2014 WL 10537341 (Nev.) (Appellate Brief)
Supreme Court of Nevada.

BARBARA ANN HOLLIER TRUST; Barbara Ann Hollier Lawson a/k/a Barbara Anne Lawson and Barbara Anne Hollier, Individually and as a Trustee of the Barbara Ann Hollier Trust; and Acadian Realty, Inc., a Nevada Corporation, Appellants,

v.

William E. SHACK, Jr.; and Nicolle Jones Parker a/k/a Nicolle Shack Parker, Respondents.

Nos. 63308, 64047.
June 27, 2014.

Dist. Ct. Case No. A498513
On Appeal from the Nevada Eighth Judicial District Court of The State of Nevada, in and for Clark County, Rob Bare, District Judge

Appellants' Opening Brief

Andrew M. Leavitt, Esq., Nevada Bar No.: 3989, Robert F. Purdy, Esq., Nevada Bar No.: 6097, Law Offices of Andrew M. Leavitt, Esq., 633 S. Seventh Street, Las Vegas, NV 89101, Phone: (702)382-2800, Fax: (702) 382-7438, for appellants.

iii *TABLE OF CONTENTS

vi** ***TABLE OF AUTHORITIES

Cases

***x I.**

JURISDICTIONAL STATEMEMT

This is an appeal of final pre- and post-trial orders and of a final judgment resulting from a jury trial in the Eighth Judicial District Court, Department 32, before the Honorable Rob Bare,

Written Notice of Entry of Judgment on Jury Verdict was served on Appellants by mail on January 9, 2013. AA Vol. 13, P. 2510-2515. NRCP 50(b) and 59 tolling motions were filed by Appellants on January 23, 2013. AA Vol. 13, P. 2566-2624. Notice of Entry of the Orders resolving the tolling motions was served by mail on Appellants on May 23, 2013. AA Vol. 16, P. 3298-3305. A timely Notice of Appeal was filed on May 30, 2013. AA Vol. 16, P. 3319-3321.

Respondents also filed a motion for supplemental attorney fees and costs. AA Vol. 16, P. 3274-3297. Notice of Entry of the District Court Order granting the supplemental attorney fees and costs motion was served by mail on Appellants on August 30, 2013. AA Vol. 17, P. 3347-3352. A timely Notice of Appeal of the supplemental fees and costs order was filed September 16, 2013. AA Vol. 17, P. 3353-3354. The Nevada Supreme Court subsequently consolidated the two separate appeals.

***xi** NRAP 3A(b)(1) Is the basis for the Supreme Court's appellate jurisdiction of the appeal of the final judgment, NRAP 3A(b)(2) is the basis for the Supreme Court's appellate jurisdiction of the appeal of the orders refusing to grant Appellants a new trial. NRAP 3A(b)(8) is the basis for the Supreme Court's appellate jurisdiction of the appeal of the Order Granting Supplemental Attorney Fees and Costs and any other special order entered after final judgment. Orders denying Appellants' pretrial motions are may be challenged on appeal from the final judgment. See *Sicor, Inc. v. Sacks*, 127 Nev. Adv. 81, 266 P.3d 618, 620 (2011) (recognizing “the general rule that Interlocutory orders may be challenged on appeal from the final judgment”); *Consolidated Generator v. Cummins Engine*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998) (considering on appeal from final judgment a number of pretrial orders of the district court, including an order denying a pretrial motion for summary judgment).

***1 III.**

STATEMENT OF THE CASE

The parties In this case entered into a Lease Agreement and Contract of Sale on September 22, 2003. The Lease Agreement was for 3 years. The Lease Agreement was by and between Acadian Realty and William E. Shack dba Kids Care Club, LLC. A.A. Vol. 11, P. 2184-2204.

Disputes arose by and between the parties and William E. Shack and Nicolle Parker filed a lawsuit on January 24, 2005 approximately mid-way through the Lease Agreement. A.A. Vol. 1, P. 1-13. The verified complaint had 7 causes of action, Breach of Contract, Breach of the Covenant of Good Faith and Fair Dealing, Specific Performance, Declaratory Relief, Estoppel/ Preliminary Injunction, Fraud and a request for Special Damages m the form of Attorney Fees. The Complaint named the Barbara Ann Hollier Trust, Barbara Lawson, individually and Acadian Realty, Inc. as Defendants. Neither the Barbara Ann Hollier Trust nor Barbara Lawson, individually were parties to the Lease Agreement. A.A. Vol. 11, P. 2184-2204.

The Barbara Ann Hollier Trust, Barbara Lawson, individually and Acadian Realty, Inc. filed an Answer and a Counterclaim. A.A. Vol. 1, P. 16-26. The Counterclaim alleged breach of contract for failing to pay the $100,000.00 option payment that was

due and owing at the signing of the Lease Agreement. The Counterclaim contained a Cause of Action for ***2** **Exploitation** of an **Elderly** Person, a cause of action for misrepresentation in regards to a Deed of Trust on property which William Shack did not own and a Cause of Action for Abuse of Process. A.A, Vol. 1, P. 16-26.

The case tried in front of jury and the jury returned a verdict on June 27, 2008. A.A. Vol. 14, P. 2659-2661. Summary Judgment Motions were filed by and between the parties, and the only causes of action that made it through the first jury trial were William Shack and Nicolle Parker's Breach of Contract Claim, Breach of the Covenant of Good Faith and Fair Dealing Claim, and the special damages claim related to attorney fees. The first jury returned a verdict in favor of William E. Shack and Nicolle Parker for $265,600.00 for the breach of contract claim and $620,000.00 for the breach of the implied covenant of good faith and fair dealing claim. The total verdict was $885.00. A.A. Vol. 14, P. 2659. The jury returned a verdict as to the Appellants counterclaim for abuse of process in the amount of $105,000.00. The abuse of process claim for $105,000.00 was later deemed to be "not applicable" by the jury after the first District Court Judge informed the jury that this claim was dismissed pursuant to a Motion for a Directed Verdict after the jury had deliberated. A.A. Vol. 14, P. 2659-2661.

Thereafter, both parties appealed the first jury's verdict and the case was heard in the Nevada Supreme Court. This court reversed and remanded the case for a retrial because one could not tell or ascertain how the jury ***3** arrived at their damages verdict. A.A. Vol. 17, P. 3370-3371; A.A. Vol. 17, P. 3362-3369.

The case proceeded to a second jury trial in the Eighth Judicial District Court in. front of the Honorable District Court Judge Rob Baer. The second jury returned a verdict on November 19, 2012 awarding William Shack and Nicolle Parker $147,200.00 for their Breach of Contract Claim and $224,200.00 for the Breach of the Implied Covenant of Good Faith and Fair Dealing Claim. William E. Shack and Nicotic Parker did not put on any evidence regarding the Special Damages Claim relating to attorney fees and the jury did not return a verdict relating to this cause of action for attorney fees. The total jury verdict was $371,400.00. A.A. Vol. 11, P. 1982-1983. Thereafter William Shack and Nicolle Parker were awarded $400,200.00 in attorney fees by the trial court Judge. A.A. Vol. 16, P. 3315-3318. The Barbara Ann Hollier Trust, Barbara Lawson, individually and Acadian Realty, Inc. then filed an appeal, appealing the trial court's award of attorney fees, denial of pretrial motions, denial of post trial motions and appealing the jury verdict A.A. Vol. 16, P. 3319-3321; Vol. 17, P. 3353-3354.

IV.

STATEMENT OF FACTS

On September 22, 2003 a Lease Agreement and Contract of Sale (hereinafter referred to as Lease Agreement) was entered into by and ***4** between the Appellant, Acadian Realty, Inc. and Kids Care club, which was an LLC set up by the Respondent, Nicolle Parker. A.A. Vol. 7, P. 1372-1376. The Lease Agreement specifically provided on page 2, paragraph 1.1 that the parties were:

This Lease Agreement, dated, for purposed only, this 22nd day of September, 2003, is made by and between **ACADIAN REALTY, INC.**, (Hereinafter referred to as "Lessor" of "Seller") and **WILLIAM E. SHACK**, doing business under the name KIDS CARE CLUB, (hereinafter called "Lessee" or "Buyer"). A.A. Vol. 11, P. 2185

The 21 page Lease Agreement was signed by all parties and initialed on every page by all parties. William Shack and Nicolle Parker signed Personal Guarantees. A.A. Vol. 11, P. 2184; 2204. The Lease Agreement was judicially declared to be unambiguous. A.A. Vol. 13, P. 2606.

The Lease Agreement also included an option to purchase the property and was a commercial lease agreement for property located at 3101 W. Charleston Boulevard, in Las Vegas Nevada. The term of the Lease was for three years, from September 21, 2003 through September 20, 2006. A.A. Vol. 11, P. 2184-2204.

The Respondent, Nicolle Parker wanted to use the property for a child daycare center. The Respondent, William E. Shack is the father of Nicolle ***5** Parker, William E. Shack was going to **finance** the new business and neither Nicolle Parker nor William E. Shack had any prior experience operating a child daycare center. Nicolle Parker never opened any business for herself prior to this Lease Agreement. A.A. Vol. 7, P. 1312. A limited Liability Company, Kids Care Club, LLC was formed to run the daycare center and enter into the Lease Agreement. A.A. Vol. 7, P. 1372-1376.

The daycare center Kids Care Club, LLC never opened and Nicolle Parker and William Shack gave up on this project approximately halfway through the Lease and filed suit. A.A. Vol. 7, P. 13484350; Vol. 8, P. 1506-1507. The business was still in the construction phase and the earliest the construction would have been finished was approximately September of 2005. A.A. Vol. 8, P. 1521. This would have left only 1 year on the Lease. A.A. Vol. 11, P. 2184-2204.

Paragraph 1.8 of the Lease Agreement provided that there would be a $100,000.00 security deposit and a $100,000.00 option money deposit that was to be paid in consideration of Acadian Realty not selling the premises during the three year Lease Agreement. A.A. Vol. 11, P. 2026. The Lease Agreement clearly and unambiguously set forth that there would be a total of $200,000.00 due upon, the execution of the Lease. (P. 2, Paragraph 1.8 of the Lease) A.A. Vol. 11, P. 2185. Despite this very specific language, Nicolle Parker was illegally allowed to present testimony during the trial that ***6** it was Nicolle Parker's "understanding", that the security deposit was only for $50,000.00 and the option deposit was only for $50,000.00. Counsel objected to this testimony during the trial. A.A. Vol. 5, P. 1039; 1035-1039; 1044. This testimony was allowed to be entered into evidence despite being briefed in a Trial Brief, (A.A. Vol. 10, P. 1915-1917) a violation of the Parol Evidence Rule and despite the very clear and specific language of the Lease. A.A. Vol. 11, P. 2197. Nicolle Parker and William Shack essentially breached the Lease upon the signing of the Agreement, because they never paid the $200,000.00 but only paid $100,000.00. A.A. Vol. II, P. 2185. William Shack later signed a Promissory Note for the other $100,000.00 on February 12, 2004. A.A. Vol. 11, P. 2205. This $100,000.00 was never paid. A.A. Vol. 9, P. 1643;1658.

Paragraph 20 of the Lease specifically provided that the Lease contained all agreements of the parties with respect to any matter mentioned therein. The Lease provided that no prior contemporaneous agreement or understanding pertaining to any such matter shall be effective. A.A. Vol. 11, P. 2197. The Lease Agreement had an integration clause and it was reversible error for the trial court to allow Nicole Parker to testify as to what her "understanding" of the Lease Agreement was.

Nowhere in the 20 page Lease Agreement, is the Barbara Ann Hollier Trust mentioned. In the Complaint that was filed in this case, the ***7** Respondents alleged a third claim for relief, Specific Performance, wherein the Respondents wanted the Barbara Ann Hollier Trust to convey the property to them. A.A. Vol. 1, P. 1-13. This Specific Performance cause of action was dismissed pursuant to a Motion for Summary Judgment because the Respondents never paid for nor exercised the option. A.A. Vol. 2, P. 378-382.

Barbara Lawson individually and the Barbara Ann Hollier Trust were never parties to the Lease Agreement. A.A. Vol. 11, P. 2025-2045. The Trust never made any representations in this case, the Trust never caused any damages In this case and the Trust should not have been held liable pursuant to a contract that it was not a party to, never signed and never agreed to be bound by. The trust filed a Motion for Directed Verdict which was wrongfully denied. A.A.. Vol. 10, P. 1913-1942.

The Trust attempted to argue that the Trust could not be held liable and that the Trust did not cause any damage in this case. The Trust and Barbara Lawson attempted to provide separate verdict forms which was wrongfully denied by the trial court. A.A. Vol. 10, P. 17374740.

During the first trial in this case, the jury returned a verdict In favor of Nicolle Parker and William Shack in the amount of $885,600.00. The verdict Included $265,600.00 for Breach of Contract and $620,000.00 for Breach of the Covenant of Good Faith and Fair Dealing. A.A. Vol. 15, P. ***8** 3019-3020. Both parties appealed from this verdict. This case was heard in this court and the court overturned the jury's verdict and remanded the case back to District Court for the limited purpose of determining what damages Nicolle Parker and William Shack were entitled to. A.A. Vol. 17, P. 3362-3371.

All three Appellants were wrongfully precluded from arguing to the jury that the real party in interest was Kids Care Club, LLC and that Kids Care Club, LLC was entitled to damages, if any, and not Nicolle Parker or William Shack. A.A. Vol. 10, P. 1844-1846.

During the second jury trial, the jury returned a verdict in favor of Nicolle Parker and William Shack in the amount of $341,400.00. A.A Vol. 11, P. 1982-1983. The jury assessed the damages for the Appellants alleged breach of contract, in the amount of $50,000.00 for the security deposit and $97,200.00 for "other costs related to business". The jury further assessed Nicolle Parker and William Shack damages for Appellants alleged breach of the Implied Covenant of Good Faith and Pair Dealing in the amount of $50,000.00 for the security deposit, $124,200.00 for rent and $50,000.00 for construction settlement costs. A.A. Vol. 11, P. 1982-1983.

In regards, to the Respondents' Breach of Contract Claim, the jury did not find any damages for rent or construction settlement costs. In regards to the Respondents claim for breach of the Implied Covenant of Good Faith ***9** and Fair Dealing, the jury did not find any damages related to construction costs and other costs related to business. A.A. 11, P. 1982-1983.

After the trial, the trial court Judge then wrongfully awarded the Respondents $400,200.00 in attorney fees (A.A. Vol. 16, P.3315) and $18,901.04 in costs. A.A. Vol. 15, P. 2976-2979.

Prior to the trial in this case, The Appellants filed a Summary Judgment motion and a Motion in Limine arguing that neither Nicole Parker or William Shack could argue for future lost profits and future damages. The legal reasons behind these motions was because the Respondents never exercised, nor paid for, the option to purchase the property and as a result, they only had a three year lease. A.A. Vol. 2, P. 378-382. The second reason why the Respondents could not get future damages or lost profits was because they were too speculative. A.A. Vol. 2, P. 179-254; Vol. 1, P. 31-39.

Specifically, this was a "new business" that had never opened, neither Nicolle Parker or William Shack hired an expert in terms of a bookkeeper, accountant, economist or anyone else to testify regarding lost profits. This was a new business that did not have any tax returns, **financial** statements, other similar business tax returns or similar business **financial** statements or any proof whatsoever of any amount of money that this alleged business could or maybe might have made. The Appellants' Motion for Summary ***10** Judgment and Motion in Limine were both wrongfully denied by the trial Judge.

During the trial, the Respondents waited until closing arguments to concede that they could not prove future damages and/or lost profits because they were too "speculative'. A.A. Vol. 10, P. 1756. Clearly, the Appellants pre-trial Motion for Summary Judgment and Motion in Limine should have been granted. It was reversible error not to grant the motions.

As previously set forth above, the case proceeded to a jury trial on the limited issue of what damages, if any, were caused by the Appellants. To determine what damages were caused by the Appellants, it was the burden of Nicolle Parker and William Shack to prove exactly "when" any alleged breach occurred and they failed to do this. The Respondents in pre-trial motions, during the trial and in post trial motions have never stated exactly "when" any alleged breach of the Lease Agreement was committed by Acadian Realty. Perhaps in the Respondents' Reply Brief to this court, the Respondents can finally point to a specific time that Acadian Realty or any other Appellant did to breach the Lease Agreement. Without establishing "when" any alleged breach occurred, it is impossible to accurately determine damages.

***11** Therefore, any damages that were awarded in this case were based upon speculation, conjecture, were uncertain and were not based upon the evidence that was presented.

Finally, after the jury returned a verdict while counsel for both parties, the trial court Judge, and Tamara Lawson a witness from the case were speaking with the jury in the jury room, William Shack admitted that he never had any intention on paying the $100,000,00 option money. This representation was in 100% contradiction to the verified complaint that he filed in this case,

(A.A. Vol. 1, P. 1-13) his sworn testimony at his deposition, contrary to counsel's pre-trial motions and 100% contrary to his sworn testimony during the trial in this case. Counsel for the Appellants then filed post-trial motions relating to the Respondent, William Shack's perjured testimony which were summarily denied by the trial court Judge and were wrongfully denied without any hearing. A.A. Vol. 16, P. 3298-3305.

This court should also note that there was no affidavit or other evidence presented by the Respondent, William Shack to the post-trial motions indicating that he did not lie during his earlier testimony. The Appellants should have been granted a new trial on this basis and other grounds as set forth hereinafter. When ruling on this issue, the trial court Judge should have recused himself because the Judge was a witness.

***12** William Shack and Nicolle Parker were not entitled to damages in this case because they were not a party to the Lease Agreement. The Lease Agreement was entered into with Kids Care Club, LLC which was not a party to this action. (See Complaint). A.A. Vol. 1, P. 1-13.

Neither Nicolle Parker or William Shack were entitled to any attorney fees because they let the jurisdictional time limit in NRCP Rule 54(d)(2)(b) expire, (A.A. Vol. 15, P. 2856; 2979-3008) they were not the real party in interest, (A.A. Vol. 15, P. 2999) the issue of attorney fees was never presented to the jury (A.A. Vol. 15, P. 2986) and the fees that were awarded were not reasonable or equitable. A.A. Vol. 15, P. 2979-3008. Finally, the attorney time sheets were “blacked out”, (A.A. Vol. 15, P. 2882-2916; Vol. 16, P. 3290-3297) thereby rendering it impossible to accurately determine what attorney time was spent on.

The Respondents were awarded $18,901.04 in costs, when the Memorandum of Costs did not contain any itemization, no receipts, no bills, no proof of payments, and no documentation to substantiate any of the costs that were awarded. A.A. Vol. 13, P. 2539-2546.

Due to the cumulative errors that occurred in this case, and under the Doctrine of Cumulative Error, the verdict that was rendered against the Appellants must be reversed. These rulings of the lower court were erroneous and individually and cumulatively are grounds for reversal. See ***13** *Pertgen v. State*, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994); *Byford v.* State, 116 Nev. 215 (2000) (Although individual errors may be harmless, the cumulative effect of multiple errors may be grounds for reversal); *Barrett v. Baird*, 111 Nev. 1496 (1995) (granting a new trial based upon the cumulative effect of misconduct that permeated a proceeding). The post trial awards of attorney fees and costs must also be reversed.

V.

SUMMARY OF ARGUMENT

The Appellants filed pre-trial motions for Summary Judgment and a Motion in Limine regarding future damages and lost profits. The Lease in this case was a three year Lease with an Option to Purchase. It was judicially declared in the prior trial that the Respondent never paid for nor exercised their option. It was proven at the second trial that the Respondents never paid for their option. Accordingly, the only thing that the Respondents had was a three year lease and nothing more. If the Respondents only had a three year Lease then the trial court should have granted the Appellants Pre-Trial Motion for Summary Judgment and Motion in Limine Regarding Lost Profits and Future Damages. Respondents counsel finally conceded during the last day of the jury trial that lost profits and future damages were “too speculative” and requested that the jury not award the Respondents these damages. The trial court committed reversible ***14** error for failing to recognize this very simple and logical argument and failing to grant the Appellants Pre-Trial Motion for Summary Judgment and Motion in Limine Regarding Lost Profits and Future Damages.

The parties in this case had a three year Lease Agreement. The case was remanded solely to determine what damages the Respondents were entitled to. Instead of establishing when the Appellants breached the parties' Agreement, the Respondents continuously referred to this court's Order of Remand and never established when any breach occurred. Any damages that were

awarded in this case were based upon pure speculation, uncertainty and conjecture because it was never proven or shown when any breach occurred. In other words, if the Appellants breached the three year Lease Agreement on the very last day of the Lease, the Respondents obviously would not be entitled to any damages, The Respondents completely ignored, abandoned and miserably failed to establish *when* any breach occurred and as a result, one cannot ascertain how the jury arrived at their damages verdict. As a result, the jury's verdict must be reversed because it is not supported by any evidentiary basis.

The Lease in this case was entered into by Acadian Realty, Inc. and Kids Care Club, LLC. Kids Care Club, LLC was a limited liability company formed to enter into the Lease Agreement, run the day to day operations of the child daycare center and incur debts and obligations on behalf of the ***15** child daycare center. Kids Care Club, LLC was a separate entity apart and separate from Nicolle Parker and/or William Shack. Kids Care Club, LLC never filed suit In this case. Any and all damages that were awarded by the jury belonged to Kids Care club, LLC not Nicolle Parker or William Shack. The Trial Court Judge committed reversible error by failing to allow the Appellants to make these arguments, by failing to grant Appellants Motion for Directed Verdict and for failing to grant the Appellants' Motion for Judgment Notwithstanding the Verdict and/or Motion for a New Trial.

The Lease Agreement specifically contained a provision that there would be a $100,000.00 security deposit and a $100,000.00 option payment that were due and owing at the signing of the Lease. The Lease Agreement contained an Integration Clause. Nevertheless, the Trial Court judge allowed testimony to be presented as to what the Respondents' “understanding” was of the Lease and allowed them to testify that the security deposit was only $50,000.00 and the option payment was only $50,000.00 In violation of the Parol Evidence Rule and in direct contradiction to the express provisions of the lease Agreement. This was reversible error and denied the Appellants a fair trial.

After the verdict in this case, the Respondent, William Shack indicated that he never intended to pay the $100,000.00 option payment and signed a Trust Deed and promissory note to simply appease the Appellant, ***16** Barbara Lawson. This was in direct contradiction to his earlier testimony throughout the prior trial, pretrial depositions, pretrial motions and contradictory to his testimony during the trial in this case. This was brought to the trial court judge's attention. The trial court judge was a witness to this conversation and a witness to this admission of prior perjured testimony and nevertheless, refused to hold a hearing, refused to recuse himself and refused to grant a new trial. This was reversible error.

It was reversible error to award attorney fees in this case when the Respondents failed to meet the jurisdictional deadline contained in NRCP 154(d)(2)(A)(B). It was reversible error to award attorney fees in this case when the attorney fees were pled as special damages in the Complaint, (The 7th Cause of Action). the issue of attorney fees was never presented to the jury for the jury to determine.

It was reversible error to award the Respondents Attorney fees for fees that were incurred during the first trial when they were not the prevailing party and the jury verdict was reversed. It was reversible error to award attorney fees against Barbara Lawson, individually and the Barbara Ann Hollier Trust individually when they were not parties to the Lease Agreement and the only basis for the request for attorney fees was based upon the Lease Agreement. It was reversible error to award attorney fees to ***17** William Shack and Nicolle Parker when they were not parties to the Lease Agreement.

It was an abuse of discretion to award attorney fees in this case when the attorney tasks as set forth in the attorney time sheets were ail “blacked out”. In other words, it was impossible to tell what the attorney time was spent on and therefore, it was impossible to tell whether the attorney time was reasonable, necessary and /or equitable. The trial court judge never reviewed the attorney time sheets in camera and it was an abuse of discretion to fail to consider the reasonableness of the attorney fees and whether an award of attorney fees was equitable.

The trial court awarded the Respondents $18,901.04 in costs when the Memorandum of Costs that was submitted in this case failed to adequately contain any documentation whatsoever. Specifically, the Memorandum of costs did not contain any invoices, canceled checks, or any other documentation to support or substantiate that the costs were incurred and that they were paid. This was reversible error and an abuse of discretion.

Due to the individual and cumulative errors that were committed in this case by the Trial Court Judge, the Appellants were deprived of a fair trial, their due process rights and the verdict in this case must be overturned, the award of attorney fees must be reversed and if there are any damages left, this case must be remanded for a new trial.

*I *NRAP RULE 26.1* DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

1. Appellant, Barbara Ann Hollier Trust, does not have a parent corporation or a publicly-held company that owns 10% or more of its stock. The Barbara Ann Hollier Trust is presently represented by the Law Offices of Andrew M. Leavitt, Esq. and the undersigned legal counsels with that firm will be appearing before this Court. The Barbara Ann Hollier Trust was previously represented by the following law firms: Leavitt, Sully & Rivers; Jimmerson Hansen, P.C.; and Gerry G. Zobrist, LTD.

2. Appellant, Barbara Ann Hollier Lawson a/k/a Barbara Anne Lawson and Barbara Ann Hollier, does not have a parent corporation or a publicly-held company that owns 10% or more of its stock. Barbara Ann Hollier Lawson a/k/a Barbara Anne Lawson and Barbara Ann Hollier is presently represented by the Law Offices of Andrew M. Leavitt, Esq. and the undersigned legal counsels with that firm will be appearing before this Court. Barbara Ann Hollier Lawson a/k/a Barbara Anne Lawson and ***ii** Barbara Ann Hollier was previously represented by the following law firms: Leavitt, Sully & Rivers and Jimmerson Hansen, P.C.

3. Appellant, Acadian Realty, Inc., does not have a parent corporation or a publicly-held company that owns 10% or more of Its stock. Acadian Realty is presently represented by the Law Offices of Andrew M, Leavitt, Esq. and the undersigned legal counsels with that firm will be appearing before this Court. Acadian Realty was previously represented by the following law firms: Leavitt, Sully & Rivers and Jimmerson Hansen, P.C.

Dated this 3 day of June, 2014.

Law Office of

ANDREW M. LEAVITT, ESQ.

Andrew M. Leavitt, Esq.

Nevada Bar No.: 3989

Robert F. Purdy, Esq.

Nevada Bar No.: 6097

633 S. Seventh Street

Las Vegas, NV 89101

Attorneys for Appellants

***XII II.**

STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Whether the Appellants Pre-Trial Motions for Summary Judgment and Motion in Limine Regarding Lost Profits/Future Damages should have been granted.

B. Whether any alleged damages belonged to the Kids Care Club, LLC and not the Respondents.

C. Whether the trial court erred in refusing to allow the Appellants to distinguish themselves and what damages, if any, were caused by each Appellant.

D. Whether the Respondents established "when" any alleged breach occurred and if not, whether the damages awarded were based on uncertainty, speculation and conjecture,

E. Whether the trial court allowed oral testimony to be given during the trial that violated the Parol Evidence Rule.

F. Whether the trial court wrongfully denied the Appellants Motion for Pre-judgment and Post-judgment interest and incorrectly determined that Appellants did not have a Judgment in the amount of $100,000.00.

G. Whether the Appellants were entitled to a new trial based upon perjured testimony that was presented during the trial and prior proceeding pursuant to NRCP 59(a)(2)(3) and (4); and whether the Appellants were entitled to relief from the first verdict denying the Breach of Contract claim and Abuse of Process Claim.

H. Whether the trial court erred in Denying the Appellants Motion for Judgment Notwithstanding the Verdict or Alternatively a New Trial.

I. Whether the Respondents were entitled to an award of Attorney Fees.
1. Whether Respondents were time barred from requesting attorney fees pursuant to NRCP 54(d)(2)(A)(B).

***xiii** 2. Whether the Respondents were entitled to attorney fees because they failed to present the Issue to the jury. (The Respondents 7th Cause of Action in their Complaint).

3. Whether the Respondents were entitled to $158,000.00 in attorney fees allegedly incurred during the first trial, when the first trial Judgment was reversed on Appeal.

4. Whether the Respondents were entitled to attorney fees incurred prior to this court's reversal of the first trial verdict.

5. Whether the Respondents were entitled to attorney fees from Barbara Lawson individually or the Barbara Ann Hollier Trust.

6. Whether the Respondents were entitled to attorney fees or whether the attorney fees belonged to Kids Care Club, LLC.

J. Whether the attorney fees awarded were reasonable and equitable.
1. Whether the trial court abused its discretion by failing to consider a reduced amount of attorney fees.

2. Whether the Respondents were entitled to $226,415.00 in attorney fees incurred from the reversal of this matter and the re-trial.

K. Whether the trial court properly considered the *Brunzell* Factors.

L. Whether the Respondents were entitled to costs in excess of $2,662.45,.

***18 VI.**

LEGAL ARGUMENT

A.

THE APPELLANTS PRE-TRIAL MOTIONS FOR SUMMARY JUDGMENT AND MOTION IN LIMINE REGARDING LOST PROFITS/FUTURE DAMAGES SHOULD HAVE BEEN GRANTED

There were two reasons why the Appellants' Motion for Summary Judgment regarding future damages or lost profits should have been granted. The first was because the Respondents only had a 3 year lease. The Respondents failed to exercise their option. A.A. Vol. 2, P. 381. The second reason was because the Respondents had no credible or admissible evidence regarding lost profits or future damages. See Respondents Reply to Motion for Summary Judgment. A.A. Vol. 3. P. 320-340; 323. This fact was finally conceded to by the Respondents on the last day of trial during closing arguments. A.A. Vol. 10, P. 1756.

1. *THE THREE YEAR LEASE.*

As previously stated, Acadian Realty and Kids Care Club, LLC signed the lease agreement in September of 2003. The lease was a three year lease from September 21, 2003 to September 20, 2006. A.A. Vol. 11, P. 2025-2045. There was an option in the lease to purchase the property. This option was never purchased and this option was never exercised. A.A. Vol. 2, P. 378-382.

***19** Specifically, on August 21, 2007 the Honorable Sally Loeher entered a Findings of Fact, Conclusions of Law and and Order granting Appellants' Motion for Summary Judgment. The Order specifically stated that neither Nicolle Parker or William Shack paid consideration for their option to purchase the leased premises and therefore, had “no option to exercise.” A.A. Vol. 2, P. 381. Therefore, the lease term was for a period of three years, and the Respondents were not entitled to argue for any lost profits or future damages.

Despite this very clear and logical argument, the trial court denied the Appellants' Pre-trial Motion for Summary Judgment and Pre-trial Motion in Limine. A.A. Vol. 3, P. 627-631; Vol. 1, P. 174-178. This was reversible error. This was one of the individual and cumulative errors that occurred in this case. (Errors individually and cumulatively are grounds for reversal). See *Pertgen v. State*, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994); *Barrett v. Baird*, 111 Nev. 1496 (1995).

2. *THE RESPONDENTS HAD NO CREDIBLE OR ADMISSABLE EVIDENCE REGARDING LOST PROFITS OR FUTURE DAMAGES.*

To justify a money judgment the amount, as well as the fact of damage, must be proved with *reasonable certainty*. There must be substantial evidence as to the amount of damages and none of the damages ***20** can be arrived at by conjecture, speculation or uncertainty. See *Vestar Development v. General Dynamics Corp*, 249 F.3d 958 (9th Cir. 2001).

In Nevada, where the loss of anticipated profits is claimed as an element of damages, the business claimed to have been interrupted must be an *established one* and it must be shown that it has been successfully conducted for such a length of time and in such a trade established that the profits therefrom are reasonably ascertainable. Damages for lost profits or “prospective profits” of a new business venture, pursuant to Nevada law are too uncertain and speculative to form a basis for recovery. See

Hughes v. Hobson, 92 Nev. 683, 558 P2d 543 (1976); *Alper v. Stilings*, 80 Nev. 84, 389 P.2d 239 (1964); *Knier v. Azores Construction Co*., 78 Nev. 20 368 P.2d 673 (1962); *Bader v. Cerri*, 96 Nev. 352 (1980).

In this case, Nicole Parker never opened a daycare business, (any business) (Appellants' Appendix Vol. 7, P. 1311-1313) and any alleged profits were based upon pure speculation and upon Nicolle Parker's "anticipated" enrollment, "anticipated" costs, and "anticipated" expenses. A.A. Vol. 2, P. 225-246. There was no expert testimony, (economist, accountant or bookkeeper) no comparable child care centers, no comparable profit and losses, no comparable **financial** statements, no market survey, just what the Respondent "anticipated" could maybe happen. A.A. Vol. 2, P. 255-267. Nicolle Parker's "anticipated profits were merely a hope or ***21** expectation of profits supported by no proof capable of reasonable certainty". See *Kids Universe v. In2Labs*, 95 Cal. App.4th 870 (2002) (holding trial court granting of defendant's summary judgment motion on lost profits proper where Respondents could not establish profits with the requisite certainty.) See also *Tas Distributing Company v. Cummings Co.*, 491 F.3d 625 (7th Cir. 2007).

This Court, in *Knier v. Azores Construction Company*, 70 Nev. 20 (1962), held that a new business cannot recover lost profits. The reason for this holding and the other Nevada case law holdings (and probably every case in the United States dealing with this issue) is that there was no way to base the value of the profits. This was not a close case. There were no factual disputes regarding lost profits or any other "independent evidence" other than the Plaintiff's anticipated and unilateral expectations. A.A. Vol. 2, P. 320-340. This is not "evidence" of lost profits in Nevada or any other state.

In Nevada, there is no "reasonable probability that profits would have been earned". See *Knier v. Azores Construction Company*, 78 Nev. 20, 368 P.2d 673 (1962). In Nevada, the law is very clear when the loss of anticipated profits is claimed as an element of damages, the business claimed to have been interrupted must be an **"established one"** and it must be shown that it has been successfully conducted for such a length of time ***22** and has such a trade established that the profits therefrom are reasonably ascertainable.

In other jurisdictions, the limitation on awarding anticipated profits from a new business may be overcome where there is ***"concrete"*** evidence allowing a jury to establish the amount of damages with reasonable certainty. See *Cataphora, Inc. v. Parker WL 6778792*, (U.S. Dist. Ct. N.D. Cal. 2011). This "concrete evidence" to establish the lost profits that are reasonably certain, may entail expert testimony, the experience of similar businesses, whether the market is established, market settings, and the Plaintiff's experience in the field, among "other factors".

In this case, there was no expert that was designated to testify regarding the alleged lost profits; there was no profit and loss or **financial** statements from other businesses; Nicolle Parker had no experience in the childcare business; Nicolle Parker had never operated a child care business; and Nicolle Parker had never even attempted to assist anyone in opening up a child care business. A.A. Vol. 2, P. 179-201. This was not disputed! A.A. Vol. 2, P. 255-267.

Pursuant to *Wood v. Safeway, Inc.*, 121 Nev. 724, 121 P.3d. 1026 (2005), Nicolle Parker had to come forward, by affidavit or otherwise, with specific facts demonstrating the existence of a genuine factual issue. This was never done. (See Nicolle Parker and William Shack's Opposition to ***23** Motion for Summary Judgment). A.A. Vol. 2, P. 255-267. The Appellants also filed a Pre-Trial Motion in Limine arguing that the Nicolle Parker had no credible or admissible evidence of lost profits. A.A. Vol. 1, P. 31-38. These Motions were wrongfully denied. This was another individual and cumulative error that was made by the trial court in this case. See *Pertgen v. State*, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994); *Barrett v. Baird*, 111 Nev. 1496 (1995). (Individual and Cumulative errors are grounds for reversal).

B.

THE RESPONDENTS DID NOT SUFFER ANY DAMAGES AND ANY ALLEGED DAMAGES BELONGED TO KIPS CARE CLUB LLC

NRS 86.281 provides that a limited liability company organized and existing pursuant to the Nevada Revised Statutes may exercise the powers and privileges granted it by Nevada Revised Statutes and may sue and be sued, complain and defend, in its name. See NRS 86.281(1), A limited liability company may lease property. See NRS 86.281(3). A limited liability may make contracts and guarantees and incur liabilities. See NRS 86.281(6).

NRS 86371 provides that no member or manager of any limited liability company formed under the laws of this state is individually liable for the debts or liabilities of the company. If no manager or member is ***24** liable for the debts or the liabilities of the company and all of the debt and/or liabilities in this case were contracted under or incurred by Kids Care Club, LLC, and all contracts were entered into with Kids Care Club, LLC, (A.A. Vol. 7, P. 1372-1376) the debts, obligations and damages were those of Kids Care Club, LLC and not Nicolle Parker or William Shack's.

This court remanded this case to determine what damages, if any, William Shack and Nicolle Parker were entitled to. There was a jury instruction given in this case that the Appellants were only liable for damages, which they caused. A.A. Vol. 11, P. 1975. The Appellants did not cause any damages to Nicolle Parker or William Shack. Any alleged damages belonged to Kids Care Club, LLC.

During the trial in this case, Nicolle Parker testified that she formed the limited liability company, Kids Care Club, LLC, to protect herself from personal liability. A.A. Vol. 7, P. 1373. Ms. Parker testified that the gas, power, water, phone and all utilities were placed in the limited liability company's name, Kids Care Club, LLC. A.A. Vol. 7, P. 1376. Ms. Parker testified that all contracts that she entered into in this case with the general contractor, the architect, the engineer and anyone else was done under the name of Kids Care Club, LLC. A.A. Vol. 7, P. 1375. The contracts themselves listed Kids Care Club, LLC as the contracting party. A.A. Vol. 11, P. 1998 (Certificate of Insurance); P. 2007 (Application for water ***25** connection); P. 2060 (General Contractor Exterior Quote); P. 2063 (General Contractor Estimate); P. 2067-2077 (General Contractor Misc. paperwork); P.2079-82 (Phone Estimate); P.2084 (Engineer); P. 2087 (Fire Protection). The Lease was signed by William Shack and Nicolle Parker as “dba Kids Care Club”. A.A. Vol. 11, P. 2045.

NRS 86.381 provides that a member of a limited liability company is not a proper party to proceedings by or against a limited liability company. All of the debts and obligations in this case, according to the sworn testimony of Nicolle Parker, were incurred and in the name of Kids Care Club, LLC. A.A. Vol. 7, P. 1373; 13724376.

In other words, if the architect, engineer, general contractor, power company, gas company, phone company, or any other entity that entered into an agreement with Kids Care Club, LLC, attempted to sue Nicolle Parker, she would have immediately moved to dismiss herself as a party in her individual capacity pursuant to NRS 86.381 and any Court would have had to grant the Motion to Dismiss. The Motion to dismiss would be granted because the proper entity to be sued would be Kids Care Club, LLC and not Nicolle Parker individually. Likewise, the entity that incurred the damages in this case was Kids Care Club, LLC and not Nicolle Parker. This was conclusively established at the trial and was never disputed during the trial. A.A. Vol. 7, P. 1374-1376. According to Nicolle Parker, Kids Care ***26** Club, LLC was an active and ongoing business that was separate and apart from Nicolle Parker and William Shack. A.A. Vol. 7, P. 1376.

There was no testimony presented at the trial that Nicolle Parker or William Shack, in their Individual capacity were responsible for any of these debts that were incurred and to the contrary, the evidence at the trial was that all of the debts that were incurred, were Incurred by Kids Care Club, LLC. A.A. Vol. 7, P. 1374-1376. This was brought up in the Defendants' Motion for a Directed Verdict, (A.A. Vol. 10, P. 1920) in Appellants' Motion for Judgment Notwithstanding the Verdict and Motion for New Trial, (A.A. Vol. 13, P. 2582-2586; 2601) as well as closing arguments. A.A. Vol. 10, P. 1829-1830. These motions and arguments were all wrongfully rejected by the trial court which was clearly erroneous.

The general rule is that a “suit to enforce corporate rights must be brought in the name of the corporation and not of a stockholder, officer or employee”. See *Flint Cold Storage v. Department of Treasury*, 285 Mich. App. 483 776 N.W.2d 387 (2009).

A person who does business in a corporate form and reaps the benefit of a corporation cannot sue individually for damages incurred by the corporation. A shareholder has no separate or individual right of action against third persons for wrongs committed against or damages to the corporation, even where one person may be the sole shareholder. Only the ***27** corporation, not its members may sue to recover any damages it has sustained. Additionally, whether a Plaintiff has a right of action is a question of law. See generally *Skannal v. Bamburg*, 33 So.3d. 227, (La.App.2 Cir. 1/27/10).

The issue of whether an individual has had a private cause of action, can be raised at any time, even on appeal. See *Lambert v. Donald G. Lambert Construction Company*, 370 So.2d 1254 (LA. 1979); *Doland v. ACM Gaming Company*, 921 So.2d 196 (LA.App.3 Cir. 12/30/05).

This issue can be raised at any time and is jurisdictional. Kids Care Club, LLC was a limited liability company that is distinct and different from the individual managers or members. A suit to enforce rights on behalf of the LLC must be brought in the name of the LLC and not a stockholder, officer, employee, manager or managing member. This is the law in every jurisdiction.

This Court will not hesitate to disturb a verdict or decision when there is no substantial conflict in evidence on any material point and the verdict or decision is manifestly contrary to the evidence. See *Canfieid v. Gill*, 101 Nev. 170, 697 P.2d 476 (1985); *Avery v. Gilliam*, 97 Nev. 191, 625 P.2d 1166 (1981).

As a result of all of the above, and as a result of the law in every single jurisdiction in the United States, Kids Care Club, LLC was the proper ***28** party In this case that was damaged. Kids Care Club, LLC never brought suit. Assuming that the Appellants caused any damages in. this case, those damages belonged to Kids Care Club, LLC and not Nicolle Parker or William Shack. These legal principles were never disputed by the Respondents. The failure to recognize this very basic law and issue was another Individual and cumulative error made by the trial court. See *Barrett v. Baird*, 111 Nev. 1496 (1995); *Pertgen v. State*, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994).

The verdict returned in favor of Nicolle Parker and William Shack relating to damages was manifestly contrary to the evidence, and must be reversed.

C.

THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE APPELLANTS TO DISTINGUISH THEMSELVES AND WHAT DAMAGES, IF ANY, WERE CAUSED BY EACH APPELLANT

As previously stated, Barbara Lawson, individually and the Barbara Ann Hollier Trust were never parties to the Lease Agreement. A.A. Vol. 11, P. 2026. During the trial, the Barbara Ann Hollier Trust had a separate attorney. Acadian Realty, Barbara Lawson, Individually and the Barbara Ann Hollier Trust continuously through pre-trial motions, during the trial and in post-trial motions argued that the damages be calculated as to each individual or entity. A.A. Vol. 10, P. 17374738.

***29** These repeated requests were wrongfully denied by the trial court and this was reversible error. A.A. Vol. 8, P. 1551-1561; A.A. Vol. 10, P. 1737-1738. The Appellants should have been given the opportunity to argue that the Barbara Ann Hollier Trust, which was never named in the Lease Agreement nor was a party to the Lease Agreement should have been allowed to file a total separate verdict form. This was denied. A.A. Vol. 10, P. 1737-1738.

The Supreme Court Order clarifying reversal and remand indicated that the case was remanded for a new trial solely on the issue of Lessee's damages claims. A.A. Vol. 17, P. 3370.

There was nothing in this court's Order of Reversal and Remand that would indicate that the Appellants would not be able to argue that certain Appellants did not cause any damages in this case. A.A. Vol. 17, P. 3362-3371. Obviously, Nicolle Parker and/or William Shack could only recover damages that were caused by certain Appellants. If one Appellant, the Barbara Ann Hollier

Trust, did not cause any damages, the Barbara Ann Hollier Trust's Motion for Directed Verdict (A.A. Vol. 10, P. 1913-1942) should have been granted. Instead, it was wrongfully denied. A.A. Vol. 16, P. 3298-3305. Further, the Barbara Ann Hollier Trust and Barbara Lawson, individually should have been allowed to submit separate verdict forms from ***30** Acadian Realty. This request was also wrongfully denied, A.A. Vol. 10, P. 1737-1738.

The failure to recognize Acadian Realty, Barbara Lawson, individually and the Barbara Ann Hollier Trust as separate entities and allow them separate verdict forms constituted reversible error.

D.

THE RESPONDENTS NEVER ESTABLISHED "WHEN" ANY ALLEGED BREACH OCCURRED AND AS A RESULT ANY DAMAGES AWARDED WERE BASED ON UNCERTAINTY, SPECULATION AND CONJECTURE

The Court reviews questions of contract interpretation de novo. *Benchmark Insurance Company v. Sparks*, 254 P.3d 617, 620 (Nev.2011). When the language of a contract is plain, it will be enforced and construed as written. *Canfora v. Coast Hotels and Casinos, Inc.*, 121 Nev. 771, 776, 121 P.3d 599, 603 (2005). "[I]issues of contractual construction, in the absence of ambiguity or other factual complexities, present questions of law for the courts and are suitable for determination by summary judgment." *Ellison v. C.S.A.A.*, 106 Nev. 601, 6903, 797 P.2d 975, 977 (1990).

During the trial it was clearly established that Nicolle Parker had read the Lease Agreement in this case before signing it. A.A. Vol. 7, P. 1370; 1377.

***31** This Court has specifically held on many occasions that a person who signs a contract is presumed to know Its terms and consents to be bound by them. See *Ellison v. California State Automobile Assn.*, 106 Nev. 601, 603 797 P.2d 975, 977 (1990).

Even though this court remanded this case for a determination of the Respondents damages that were caused by the Appellants, there were still issues regarding exactly "when" any alleged breach occurred. For example, if Acadian Realty breached, the Lease Agreement on the last day of the 3 year Lease term, there would be no damages. A.A. Vol. 7, P. 1351-1362.

During the trial, neither Nicolle Parker or William Shack ever established **when** any Appellants allegedly breached the Lease and they never established **when** exactly their damages started to run or the exact amount of their damages.

One cannot determine from the evidence on the record how the jury calculated damages nor could, can the damages be substantiated. The jury's damages award in this case was not supported by the evidence, and the award lacks the requisite "evidentiary basis for determining a reasonable accurate amount of damages". See *Winchell v. Schiff*, 124 Nev. 938, 950, 193 P.3d 946, 954 (2008). This court should note that the case was remanded from this court because it was Impossible to tell from the first jury verdict how the jury arrived at their damage figure. A.A. Vol. 17, P. 3362- ***32** 3371. Likewise, in this case, one cannot tell or ascertain from the evidence how the jury arrived at their verdict.

The Lease Agreement, page 13 of 21, paragraph 13.3 specifically provided as follows:

> Default be Lessor. Lessor shall not be in default unless Lessor fails to perform obligations required of Lessor within a reasonable time, but not later than 30 days after written notice by Lessee to Lessor, specifying where Lessor has failed to perform its obligation.... A.A. Vol. 11, P. 2037.

This Lease specifically required a 30 day written notice, which was an express and unambiguous condition precedent, to any default. In this case, the required 30 day notice was never given thereby making it impossible to determine **when** any alleged breach occurred. Since it is impossible to determine when any alleged breach occurred in this case, it is impossible to accurately

determine what damages were proximately caused by Acadian Realty or any other party because the Respondents damages would not begin to run until after any alleged breach.

As a result, the jury's verdict was manifestly contrary to the evidence and must have been based upon conjecture, speculation or uncertainty. The verdict must therefore be reversed because it is impossible to ascertain how the jury arrived at their damages. See *Vestar Development v. General* ***33** *Dynamics Corp.*, 249 F.3rd 958 9th Cir. (2001); *Avery v. Gilliam*, 97 Nev. 181, 625 P.2d 1166 (1981).

The only thing Appellants counsel could possibly ascertain, after reviewing the entire file, sitting through the trial and listening to testimony during the trial, cross examining witnesses, as well as reviewing the briefs that were filed in the Nevada Supreme Court and reviewing the prior trial transcript, was that Barbara Lawson may have allegedly breached the agreement by not signing a Water Construction Agreement.

This Water Construction Agreement was given to Mrs. Lawson to sign, sometime after September 22, 2004. A.A. Vol. 8, P. 1400. Prior to this time there were no problems between the parties. A.A. Vol. 7, P. 1351; Vol. 9, P. 1643. Mrs. Lawson testified and it was shown through exhibits, that she would not sign the water Construction Agreement without a lien and Completion Bond as set forth in the Lease. A.A. Vol. 9, P. 1652-1653. The Water Construction Agreement provided in paragraph 14, on page 2 of 6 that the owner of the property would have:

> 14. To indemnify, defend and hold the District harmless from any and all claims, demands, liens, actions, damages, costs, expenses and attorneys' fees based upon or arising out of alleged acts or omissions of the Developer, Property Owner, or its officers, employees, agents, contractors, licensees or invitees during the construction and installation of the water facilities. As a material part of the consideration of this Agreement, the Developer ***34** and Property Owner hereby assumes all risk of injury to persons and damage to property resulting from the construction of the water facilities from any source and whomever belonging. A.A. Vol. 11, P. 2009-2014.

During the trial, William Shack's own personal attorney, Terry Lehr, testified that he would not sign the Water Construction Agreement without a bond and/or insurance. Terry Lehr, also testified that Barbara Lawson did not do anything in violation of the Lease by asking for a bond and/or Insurance. A.A. Vol. 6, P. 1149; 1159-1160; 1163. The general contractor that was called on behalf of the Respondents, Mr. Egleston, testified that he would not sign the Water Construction Agreement without insurance and/or a bond. A.A. Vol. 8, P. 1515-1516. James Leavitt, an attorney previously representing Mrs. Lawson testified that he would not have his client sign the Water Construction Agreement without insurance and/or a bond. A.A. Vol. 9, P. 1607-1609. Tamara Lawson, the daughter of Barbara Lawson and a licensed attorney, testified that she would not let her mother sign the Water Construction Agreement because it shifted all liability to Barbara Lawson. A.A. Vol. 8, P. 1579. Barbara Lawson testified that she simply wanted Nicolle Parker to follow the Lease and provide her with a lien and completion bond, prior to signing the Water Construction Agreement. A.A. Vol. 9, P. 1650-1653.

***35** Every witness except Nicolle Parker that was asked whether they would sign the Water Construction Agreement without insurance and/or a bond indicated that they would not.

The Lease Agreement which all parties signed and agreed to be bound by, specifically provided that Kids Care Club, LLC would have to post a bond, prior to any construction. Paragraph 7.3 on page 5 of 21 of the Lease Agreement provided the following:

> Lessor understands that Lessee will make alterations, improvements, additions, or utility installations or repairs, in or about the premises, and the building. Any alterations, improvements, additions or utility installations to the premises shall be performed by a contractor licensed in the State of Nevada. Lessor may require Lessee to provide Lessor, at Lessee's sole cost and expense, a lien and completion bond in an amount equal to one and one-half times the estimated costs of such improvements, to ensure Lessor against any liability for mechanic's and materialmen's liens and. to insure completion of the work. A.A. Vol. 11, P. 2188.

This is a very clear, unambiguous and specific term of the Lease which Kids Care Club, LLC chose to ignore, disregard and not follow. The Respondents filed their Complaint on January 24, 2005. A.A. Vol. 1, P.1. After the Complaint was filed the parties did not talk. A.A. Vol. 7, P. 1362.

A worthless indemnity bond was obtained on or about February 1, 2005. A.A. Vol. 11, P. 1994. The indemnity bond was for $150,000.00 and ***36** instead of being signed by William E. Shack, Jr., it was signed by Nicolle Parker, (A.A. Vol. 11, P. 1994) which, according to Terry Lehr William Shack's attorney, rendered it useless. A.A. Vol. 6, P. 1187-1188. During the trial, the Respondents never established, "when" Barbara Lawson received this indemnity bond which was a condition precedent to her signing the Water Construction Agreement.

Instead of receiving the required Bond to sign the Water Construction Agreement, Barbara Lawson was served with this Lawsuit. A.A.. Vol. 9, P. 1655.

Additionally, it was a mystery as to what Barbara Lawson did to breach the Implied Covenant of Good Faith and Fair Dealing. This Implied Covenant cannot "impose any substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement. See *Moreau v. Air France*, 356 F.3d 942, 954 (9th Cir. 2004). It was clearly established throughout the trial that Barbara Lawson never requested anything beyond what was required of the Lease Agreement. A.A. Vol. 6, P. 1163; Vol. 9, P. 1653. Further, no one testified during the trial that Barbara Lawson requested anything outside of what the Lease Agreement stated. Again, it Is a complete mystery as to exactly what Acadian Realty or any other Appellant did to breach the parties' agreement or the implied covenant of good faith and fair dealing and it Is a complete mystery as to ***37** *when* any alleged breach occurred. It should not be a mystery or a guess as to when any alleged breach occurred or exactly what was done to breach the Agreement or the covenant of good faith and fair dealing.

The amount of damages need not be met with mathematical exactitude, but there must be an evidentiary basis for determining a reasonably accurate amount of damages. A party must provide to a jury an evidentiary basis upon which it may properly determine an amount of damages. See *Mort Wallin of Lake Tahoe v. Commercial Cabinet Co. Inc.*, 105 Nev. 855, 857, 784 P.2d 954 (1989).

Without establishing when an alleged breach occurred, one cannot ascertain how the jury arrived at their verdict, which therefore, was based on speculation, conjecture and guess. There must be an evidentiary basis for determining a reasonable accurate amount of damages. See *Mort Wallin of Lake Tahoe v. Commercial Cabinet Company*, 105 Nev. 855, 857, 784 P.2d 954 (1989). Because there was no evidentiary basis for determining the damages, the verdict must be reversed.

E.

THE VIOLATION OF THE PAROL EVIDENCE RULE

Nicolle Parker was allowed to argue that the terms and conditions of the lease were different from what she understood them to be. A.A. Vol. 5, P. 1035-1039. Nicolle Parker was wrongfully allowed to argue that it was ***38** "their understanding" that the Lease Agreement provided for a $50,0O0.00 security deposit and a $50,000.00 option money deposit A.A. Vol. 5, P. 1039; 1035-1039. The Lease specifically stated there was a $100,000.00 security deposit due and a $100,000.00 deposit for the option. A.A. Vol. 11, P. 2185.

The Parol Evidence Rule excludes this type of testimony. This was brought to the trial court's attention in the Appellants' Trial Brief (A.A. Vol. 10, P. 19154917) and during trial when the Appellants objected to this testimony being presented, A.A. Vol. 5, P. 1039; 1035-1039; 1044. The trial court overruled the counsel's objections and indicated that the testimony was relevant

regarding the breach of the covenant of good faith and fair dealing. A.A. Vol. 5, P. 1037-1038. This was another individual and cumulative error committed by the trial court.

The problem with this ruling is that you cannot have a breach of the covenant of good faith and fair dealing until you have a contract. Once the contract was signed, the Parol Evidence Rule would apply. There is no "exception" to the Parol Evidence Rule to argue breach of the covenant of good faith and fair dealing.

Paragraph 20 of the Lease in this case on page 14 of 21 specifically provided that:

> ***39** This Lease contains all agreements of the parties with respect to any matter mentioned herein. No prior contemporaneous agreement or understanding pertaining to any such matter shall be effective. A.A. Vol. 11, P. 2197.

In other words, the Lease Agreement had an integration clause.

The Parol Evidence Rule forbids reception of evidence, which would vary or contradict the contract, since all prior negotiations and agreements are deemed to have merged therein. See *Daly v. Del Webb Corporation*, 96 Nev. 359, 609 P.2d 319 (1980).

Additionally, if terms in an agreement are clear, definite and unambiguous, parol evidence may not be introduced to vary those terms; however, existence of separate oral agreement as to any matter of which the *written contract is silent*, and which is not inconsistent with its terms, may be proven by parol. See *Crow-Spieker # 23 v. John E. Robinson*, 97 Nev. 302, 629 P.2d 1198 (1981). On June 26, 2008 during the first trial when the attorneys were discussing and arguing Jury Instructions pertaining to the Lease Agreement, Judge Loehrer specifically stated:
THE COURT: Right. So I have to look at the four walls of the contract, and **I don't find there is any ambiguity. None.**

(Emphasis added.)

A.A. Vol. 13, P. 2606.

***40** At trial, Nicolle Parker was allowed to argue, over several objections, (A.A. Vol. 5, P. 1039; 1035-1039; 1044) that the security deposit and the option to purchase the property totaled $100,000.00. A.A. Vol. 5, P. 1035-1039. As the court can readily see by the express terms of the Lease Agreement, this was not the case. The Lease was judicially declared to be very clear, definite and not ambiguous. A.A. Vol. 13, P. 2606.

Accordingly, any prior conversation or any extrinsic evidence whether oral or written, that alters or adds to the terms of the integrated written instrument was in-admissible and violated the Parol Evidence Rule

In other words, prior or contemporaneous collateral oral agreements relating to the same subject matter may be admissible only if it is not inconsistent with the terms of the agreement. It is well established that, "a fundamental principal of contract law that a person who signs a contract is presumed to know its terms and consents to be bound by them". See *Ellison v. California State Automobile Assn.*, 106 Nev. 601, 603, 797 P.2d 975, 977 (1990).

The agreement in this case was clear, definite and. unambiguous. Nicolle Parker should have been prevented from arguing any evidence relating to the fact that she thought that the security deposit and the lease option agreement was for a total of $100,000.00 and not $200,000.00. It was reversible error to allow this testimony to be presented to the jury.

***41** This was another individual and cumulative error made by the trial court See *Pertgen v.* State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994); *Barrett v. Baird*, 111 Nev. 1496 (1995).

F.

THE TRIAL COURT WRONGFULLY DENIED APPELLANTS MOTION FOR PREJUDGMENT AND POST JUDGMENT INTEREST AND INCORRECTLY DETERMINED THAT APPELLANTS DID NOT HAVE A JUDGMENT IN THE AMOUNT OF $100,000.00

After the trial In this case, the Appellants filed a Motion for Pre-judgment and Post-Judgment Interest. A.A. Vol. 13, P. 2627-2631. The basis for this Motion was that on December 1, 2008, after the first trial in this case, the trial court awarded the Appellants a $100,000.00 separate judgment in the form of an offset against the Respondents' larger judgment. A.A. Vol. 13, P. 2633-2635, see paragraph 5 of the Order. The Issue of the $100,000.00 that was awarded to the Appellants was thoroughly briefed on the first Appeal, argued on Appeal, and was never reversed or set aside by this court. A.A. Vol. 17, P. 3362-3371.

The trial court ruled that this court's Order to Reverse and Remand the matter for trial eliminated the $100,000.00 award to the Appellants. A.A. Vol. 16, P. 3309-3310. However, this court's Order Reversing and Remanding does not address the $100,000.00 judgment given to the ***42** Appellants at the first trial and this Judgment was never reversed. A.A. Vol. 17, P. 3362-3369. It was error for the trial court to refuse to recognize the $100,000.00 judgment in favor of the Appellants and it was error for the trial court to refuse to award the Appellants pre-judgment interest and post-judgment interest on this amount.

G.

THE APPELLANTS WERE ENTITLED TO A NEW TRIAL PURSUANT TO NRCP 59(A)(2)(3) AND(4) AMP ALSO WERE ENTITLED TO RELIEF FROM THE FIRST TRIAL VERDICT DENYING THE BREACH OF CONTRACT AND THE PRIOR JUDGMENT DISMISSING THE ABUSE OF PROCESS CAUSES OF ACTION BASED UPON PERJURED TESTIMONY THAT WAS PRESENTED DURING THE TRIAL AND PRIOR PROCEEDINGS

It is well established that use of perjured testimony in any legal proceeding is fundamentally unfair. For example, a criminal conviction based on perjured testimony violates due process and must be set aside if there is any "reasonable likelihood" that the false testimony could have affected the judgment of the jury. See generally, *Jimenez v. State*, 112 Nev. 610, 918 P.2d 687 (1996) and *Riley v. State*, 93 Nev. 461, 567 P.2d 475 (1977). Similarly, a district judge in a civil case has the discretion to grant an injured party a new trial if a verdict is based on false testimony. See *Antevski v. Vlokswagenwerk Aktiengesellschaft*, 4 F.3d 537, 541 (7th Cir. 1993); see also *Ahem v. Scholz*, 85 F.3d 774 (1st Cir. 1996) (verdict may be set aside and new trial ordered when verdict is against clear weight of evidence, ***43** or based upon evidence which is false, or will result in clear miscarriage of justice). Although in Nevada a court may not weigh the sufficiency of the evidence as grounds for a new trial, a court may grant a new trial when there is plain error in the record, or if there is a showing of manifest Injustice. *Frances v. Plaza Pac. Equities*, 109 Nev. 91, 847 P.2d 722 (1993) (citing *Price v. Sinnott*, 85 Nev. 600, 460 P.2d 837 (1969)).

Additionally, NRCP 60(b) provides:
On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:

***

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party;…

This Court has stated that the purpose of NRCP 60(b) is, "to redress any injustices which result because of excusable neglect or wrongs of an opposing party," and further provided that the rule, "should be liberally construed to effectuate that purpose". See *Nevada Indus. Dev., Inc. v. Benedetti*, 103 Nev. 360, 364, 741 P.2d 802 (1987).

William. Shack presented false evidence resulting in the Appellants suffering a manifest injustice. The falsehoods were revealed after the trial was concluded and the verdict was rendered, in this case during a voluntary ***44** post-trial discussion held in the jury deliberation room. The post-trial discussion was attended by the attorneys for ail parties, approximately one-half of the jury, the Honorable Judge Rob Bare, court staff, Respondent, William Shack, and witness, Tamara Lawson. A.A. Vol. 14, P. 2671-2672.

Tamara Lawson asked one of the male jurors a question in response to a comment made by the juror regarding whether the Respondents still owed $100,000.00 (the option money). A.A. Vol. 14, P. 2671-2672. Tamara Lawson specifically asked, "if the fact that the Plaintiffs (Mr. Shack and Ms. Parker) subsequently signed a promissory note for $100,000.00 influenced the Juror's view regarding whether the Plaintiffs still owed $100,000.00." A.A. Vol. 14, P. 2671-2672. The juror responded that he did not understand that part of the case. A.A. Vol. 14, P. 2671-2672.

Immediately following the jurors response, Mr. Shack spoke up and asked the Judge, "If I say something, can I get in trouble?" After Judge Bare informed Mr. Shack he would not get in trouble, Mr. Shack stated, "I had no intention of paying the $100,000.000. A.A. Vol. 14, P. 2671-2672. I signed the promissory note to appease Mrs. Lawson and make the deal go through." A.A. Vol. 14, P. 2671-2672.

In the jury deliberation room, William Shack revealed his true intentions regarding the signing of the promissory note and the payment of the $100,000 due under the note - that he never intended to pay the amount ***45** and only signed the document to mislead Mrs. Lawson. A.A. Vol. 14, P. 2671-2672.

Mr. Shack's admissions were 100% contrary to the prior testimony and positions put forth by him and Ms. Parker throughout the history of this case. In their Complaint, Respondents specifically acknowledged the validity of the $100,000.00 required option payment by affirmatively pleading that the parties executed an addendum to the original lease agreement, "whereby the parties agreed that a note secured by a deed of trust for real property located in California may be substituted in lieu of the **$100,000,00 option money requirement** outlined in the Agreement." A.A. Vol. 1, P. 0005. Respondents also alleged in their Complaint that, **"Plaintiffs have paid the option money for the Property** and Defendants have accepted payment of the option money for the purchase of the Property." A.A. Vol. 1, P. 0009. The Respondents swore in their earliest pleading, a verified complaint, that they both owed and paid the $100,000.00 option payment. Regardless of these claims, Mr. Shack and Ms. Parker have never paid the $100,000.00 option. A.A. Vol. 9, P. 1658.

At the first trial held in. June of 2008, William Shack disclosed for the first time that a $100,000.00 escrow account existed for payment of the option and that Mrs. Lawson was free to pick it up. Specifically, William Shack testified:

***46** Q: That $100,000.00 was to be the security for the option, where Is It?

A: It is in a trust account at First American Title, Escrow No. 1149095.

Q: Was It sitting there waiting for Barbara Lawson?

A: It's sitting there for the demand of it, yes, and is still there.

A.A. Vol. 14, P. 2675.

The Honorable Judge Sally Loeher also stated:

> … So I'm saying just exactly what Mr. Shack said. The money's in an. account; she can pick it up anytime she wants to. So I'm going to enforce what he told us In sworn testimony, so the $100,000.00 that's been

> sitting in some title company or some escrow account somewhere in California gets paid to Mr. Lawson. A.A. Vol. 14, P. 2666.

Since Mr. Shack claimed he was ready and willing to pay, the Judge awarded the Appellants a $100,000.00 offset judgment. A.A. Vol. 14, P. 2663-2668.

During the second jury trial, Mr. Shack was asked by legal counsel why he did not pay the $100,000.00 option. In response, Mr. Shack stated, "I didn't pay it (the $100,000.00 option payment) because it was in dispute. I never agreed to pay $100,000.00." A.A. Vol. 8, P. 1547.

It was readily clear that William Shack lied and changed his testimony on numerous occasions throughout this case. In addition to the misrepresentation regarding the option payment, Mr. Shack and Ms. Parker ***47** gave additional Inconsistent testimony or argument by: Mr. Shack stating in his deposition that he ***never*** read the lease agreement and then testifying at the trial that he did not read before signing, but read it before the complaint was filed (A.A. Vol. 8, P. 1541-1545); and the amount paid to the contractor - first trial testimony was "paid in full" and re-trial testimony was paid $50,000.00 and $20,000.00 still owed (A.A. Vol. 8, P. 1537-1538.) -testimony that conveniently came the day after a juror asked a question showing disapproval towards Appellants if any of the contractors or subcontractors had not been paid In full. The $50,000.00 allegedly still owing to the General Contractor was particularly egregious because the jury awarded the Respondents $50,000.00 for construction settlement costs that Mr. Shack had previously testified were paid. A.A. Vol. 11, P. 1982-1983.

The jury room admissions establish that Mr. Shack committed perjury in his prior testimony regarding the option payment and entering into the addendum and promissory note. Mr. Shack never intended to pay the option nor make good on the promissory note. He lied under oath when he said as much in two trials. The jury heard the false statements by Mr. Shack and his case was bolstered by these statements. Nicolle Parker and William Shack ultimately received a damages award based on the false testimony which has resulted in a manifest injustice against the Appellants.

***48** The Appellants filed a Motion for Judgment Notwithstanding the Verdict or Alternatively a new Trial, based upon these misrepresentations, which was wrongfully denied. A.A. Vol. 13, P. 2590. The trial court failed to hold a hearing on this issue, the trial judge failed to recuse himself because the Judge was a witness to Mr. Shack's statements and there was no affidavit submitted, by William Shack denying or contradicting any of these allegations. A.A. Vol. 14, P. 2800-2812; 2697-2716.

The Appellants were entitled to a new trial pursuant to NRCP 59(a)(2)(3) & (4), for party misconduct, surprise and newly discovered evidence.

NRCP 59(a) provides in pertinent part:
(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds materially affecting the substantial rights of an aggrieved party:

***

(2)Misconduct of the jury or prevailing party; (3) Accident or surprise which ordinary prudence could not have guarded against; (4) Newly discovered evidence material for the party making the motion which the party could not, with reasonable diligence, have discovered and produced at the trial;

The grant or denial of a new trial based upon a claim of 'surprise' lies within the sound discretion of the trial court. See ***49** *Havas v. Haupt*, 94 Nev. 591, 593, 583 P.2d 1094 (1978) (citations omitted). The determination of whether or not to grant a

new trial based on newly-discovered evidence is largely within the discretion of the trial court. See *Bramlette v. Titus*, 70 Nev. 305, 312, 267 P.2d 620 (1954).

The "surprise" contemplated by NRCP 59(a)(3) "must result from some fact, circumstance, or situation in which a party is placed unexpectedly, to his injury, without any default or negligence of his own, and which ordinary prudence could not have guarded against." *Havas*, 94 Nev. at 593, 583 P.2d at 1094. NRCP 59(a)(4) requires that the "new evidence" could not have, with reasonable diligence, been produced at trial. See *Drespel v. Drespel*, 56 Nev. 368, 373-75, 45 P.2d 792 (1935), vacated in. part on other grounds, 56 Nev. 377, 54 P.2d 226 (1936); see also *Dele v. Roggen*, 111 Nev. 1453, 907 P.2d 168 (1995).

The fact that William Shack never intended to pay the option and only signed the promissory note to appease Mrs. Lawson is evidence that could not have been guarded against nor produced at trial. William Shack lied throughout the case about his true intentions regarding the option payment and about his motives for signing the addendum and promissory note. Appellants conducted their due diligence to ascertain all disclosed facts. There was no way to establish Mr. Shack's deceit until he admitted as much. ***50** (See Robert F. Purdy, Esq. Affidavit of NRCP 59(a)(4) Compliance. A.A. Vol. 13, P. 2623-2624.)

William Shack engaged in party misconduct by making material misrepresentations to Barbara Lawson (that he would pay the $100,000.00 by a promissory note) to induce her to act to her own detriment. Barbara Lawson signed the addendum and promissory note, (A.A. Vol. 11, P. 2205) thereby deferring the due date for the option payment by several years. Under the original lease terms, the option payment was due on lease execution, thereby making the payment overdue until the addendum and promissory note was signed. William Shack's intention throughout was to "never pay" Acadian Realty for the option. These lies also gave a false appearance to the jury that Nicolle Parker and William Shack were acting truthfully and in good faith. The conduct of William Shack constituted party misconduct in that he lied and committed fraud; surprised the Appellants, in that the Appellants could not have known William Shack's true intent until he spoke up in the jury deliberation room; and the statements by the William Shack constitute new evidence.

Mr. Shack's lies regarding the $100,000.00 option payment and promissory note were misrepresentations that materially affected substantial rights of the Appellants. This type of evidence goes directly to the heart of the Appellants' case. Despite these clear undisputed misrepresentations, the ***51** trial judge denied the Appellants request for an evidentiary hearing, failed to recuse himself and summarily denied the Appellants' motion for a new trial and to reinstate their two prior causes of action. A.A. Vol. 16, P. 3298-3305. This was reversible error.

H.

THE TRIAL COURT SHOULD HAVE GRANTED DEFENDANTS' MOTION FOR JUDGEMENT NOTWITHSTANDING THE VERDICT OR ALTERNATIVELY A NEW TRIAL IN THIS CASE

After the trial had concluded, the Barbara Ann Hollier Trust, Barbara Lawson individually and Acadian Realty, Inc. filed a Motion for Judgment Notwithstanding the Verdict or Alternatively a Motion for a New Trial. A.A. Vol. 13, P. 2556-2626. The Motion for Judgment Notwithstanding the Verdict or Alternatively Motion for a New Trial essentially set forth all of the legal arguments above. After hearing all of the arguments contained in the Motion for Judgment Notwithstanding the Verdict and Motion for a New Trial, the trial court denied these Motions. This was reversible error. A.A. Vol. 16, P. 3301-3304.

I.

THE AWARD OF ATTORNEY FEES

The trial court judge awarded Nicolle Parker and William Shack $400,200.00 in attorney fees. A.A. Vol. 16, P. 3315-3318. This award included the sum of $158,387.50 in attorney fees incurred by Nicolle Parker ***52** and William Shack in litigating the *first* trial. Nicolle Parker and William Shack were also awarded a sum of $15,417.00 in attorney fees allegedly incurred

after the first trial and prior to the date of appeal that was filed by the parties after the first trial. The remaining amount of attorney fees were allegedly incurred after the appeal in pre-trial motions, trial preparations and trial work. Nicolle Parker and William Shack were awarded the sum of $226,417.50 in attorney fees incurred from the remand of this matter through the jury trial. A.A. Vol. 16, P. 3317.

For the foregoing reasons, it was reversible error for the trial court judge to award Nicolle Parker and William Shack any attorney fees. Assuming that they were entitled to some attorney fees, the attorney fees that were awarded were excessive and were unsubstantiated.

1. *THE RESPONDENTS WERE TIME BARRED FROM REQUESTING ATTORNEY FEES PURSUANT TO NRCP 54(d)(2)(A)(B).*

As set forth in *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612 (1975), the United States Supreme Court reaffirmed the "American Rule" that each party in a lawsuit ordinarily shall bear its own attorney fees unless there is express statutory authorization to the contrary. In this case there is express statutory authorization ***forbidding*** attorney fees.

NRCP Rule 54(d)(2)(A)(B), provides in pertinent part that:

***53** (A) A Claim for attorney fees must be made by motion. The district court may decide the motion despite the existence of a pending appeal from the underlying final judgment.

(B) Unless a statute provides otherwise, the motion must be filed no later than 20 days after notice of entry of judgment is served; specify the judgment and the statute, rule, or other grounds entitling the movant to the award; state the amount sought or provide a fair estimate of it; and be supported by counsel's affidavit swearing that the fees were actually and necessarily incurred and were reasonable, documentation concerning the amount of fees claimed, and points and authorities addressing appropriate factors to be considered by the court in deciding the motion. The time for **filing the motion may not be extended by the court after it has expired.**

(emphasis added)

The Notice of entry of judgment in this case was served on January 9, 2013. A.A. Vol. 13, P. 2510. The Motion for attorney fees was filed on March 4, 2013. Pursuant to NRCP 54(d)(2)(A)(B) the motion was time barred. The time for filing a motion cannot be extended by the trial court after it has expired. The Respondents failed to meet the jurisdictional deadline in NRCP 54(d)(2)(A)(B) and were jurisdictionally precluded from being awarded any attorney fees in this case. The trial court completely disregarded NRCP 54(d) and awarded attorneys fees in the amount of $400,200.00. A.A. Vol. 16, P. 3315-3318.

***54** NRCP 54(d) is the equivalent of missing the two year statute of limitations in a personal injury case. It is "black and white". You either make it or you miss it. There is no "gray" area. In this case the Respondents missed it.

Specifically, on November 13, 2012 this case went to trial pursuant to a jury trial and a verdict in favor of the Respondents in the amount $371,400.00 was returned on November 19, 2012. A.A. Vol. 13, P. 251.3-2515. The Respondents' counsel prepared, reviewed, signed, submitted for the trial Judge's signature and filed the Notice of Entry of Judgment on a Jury Verdict on January 8, 2013. A.A. Vol. 13, P. 2513-2515. The Notice of Entry of Judgment on a Jury Verdict was mailed by the Respondents to the Appellants on January 9, 2013. A.A. Vol. 13, P. 2512. The last day for the Respondents to file a Motion for Attorney Fees would have been February 4, 2013. See NRCP 54(d)(2)(A)(B). This time limit cannot be extended.

The Judgment was prepared by counsel for the Respondents, reviewed by them, signed by counsel, and sent by counsel to the trial Court Judge who signed the Judgment and it was then filed by the Respondents' counsel with the District Court clerk. The Respondents then served the Judgment on the Appellants that they prepared, and had the Judge sign. A.A. Vol. 13, P. 2512.

***55** This Judgment was filed on January 8, 2013 and this court should take specific notice that this is the only Judgment that has been submitted and filed in this case. There are no subsequent judgments or any other Judgment in this case that was prepared and filed to calculate the 20 day time limit as set forth In NRCP 54(d).

There is no dispute in this case that the jurisdictional time limit as set forth in NRCP 54(d)(2)(a)(b) was missed. Nevertheless, the trial court Judge chose to ignore NRCP 54(d) and awarded the Respondents $400,200.00 in attorney fees. A.A. Vol. 16, P. 3315-3318. This was reversible error.

2. THE RESPONDENTS WERE NOT ENTITLED TO ANY ATTORNEY FEES IN THIS CASE BECAUSE THE ISSUE WAS NEVER PRESENTED TO THE JURY

On page 11 of the Complaint on file herein, paragraph 82 under the Plaintiffs' 7th claim for relief, the Plaintiffs request as "special damages" [attorney fees that the "Plaintiffs have and will incur as foreseeable damages arising from the tortious conduct and breach of agreement set forth in the first through sixth claims for relief". A.A. Vol. 1, P. 11. In *Sandy Valley Associates v. Skyranch Estate Owners Association, et al.*, 117 Nev. 948, (2001) this Court stated that:

> A party claiming it has incurred attorney fees and foreseeable damages arising from tortious conduct or a breach of contract, such fees are considered ***56** special damages. They must be pleaded as special damages in the complaint pursuant to NRCP 9(g) and proved by competent evidence such as any other element of damages. Id. at 956.

At the first trial in this case, Nicolle Parker and William Shack presented evidence to the jury of the amount of attorney fees which they incurred and the jury awarded them $100,000.00 in attorney fees as part of their verdict. A.A. Vol. 14, P. 2665. In this trial, there was never any mention of attorney fees presented to this jury nor were any attorney fees litigated at trial.

"When attorney fees are alleged as damages, they must be specifically pleaded and proven by competent evidence at trial, just as any other element of damages." See *Sandy Valley Associates*, page 960.

Because neither Nicolle Parker or William Shack introduced evidence at trial nor proved by any competent evidence at trial that they incurred attorney fees and the amount of the attorney fees, they cannot be awarded their attorney fees. It was an abuse of discretion to award attorney fees and reversible error.

3. IT WAS REVERSIBLE ERROR TO AWARD THE RESPONDENTS $158,000.00 IN ATTORNEY FEES FOR THE FIRST TRIAL.

The Respondents were not the "prevailing party" at the first trial. The Respondents Judgment was reversed by this court. A.A. Vol. 17, P. 3362; ***57** 3370. Neither Nicolle Parker or William Shack were entitled to attorney fees as a "prevailing party" when their verdict was reversed on appeal.

The Supreme Court Order of Remand in this case does not indicate that the Respondents had a $158,000.00 award in attorney fees. A.A. Vol. 17, P. 3370-3371. If this were the case, this Court's Order of Remand would have indicated that the case was remanded to determine the Respondents' damages, "in addition to the $158,000.00 that the Respondents were awarded in attorney fees at the prior trial". This Court's Orders do not say this. A.A. Vol. 17, P. 3362; 3370.

Simply, in this case, if Nicolle Parker nor William Shack were awarded any damages by the jury, they certainly would not be entitled to any attorney fees. They would not be the "prevailing party". The Respondents were not entitled to the $158,000.00 that was previously awarded in the first trial, but reversed on appeal by this Court.

Counsel for Respondents argued and convinced the trial court Judge that the $158,000.00 in prior attorney fees was not reversed on appeal. A.A. Vol. 15, P. 2856-2870. This argument in the trial court was a complete contradiction to the legal position the Respondents had taken in earlier Motions and Oppositions.

Specifically, in the Respondents' Opposition to Appellants' Motion for Prejudgment Interest and Post-judgment Interest that was filed by the ***58** Appellants on February 7, 2013, A.A. Vol. 14, P. 2687-2696, the Respondents argued on page 6 and 7 in the heading of their Motion that:

> Other than Defendants' liability, **nothing survived** the appeal, including Plaintiffs damages and Defendants' $100,000.00 offset A.A. Vol. 14, P. 2692-2693.

On page 7 of the Respondents' Opposition, counsel for the Respondents stated that:

> As a direct result, the Supreme Court reversed the District Court's finding as to all damages, which necessarily included the Defendants' offset against Plaintiffs' damages, remanding the matter to District Court to hold a new trial on the issue of damages. A.A. Vol. 14, P.2693.

Counsel for the Respondents further argued that:

> Additionally, by remanding this matter for a new trial solely on the issue of Plaintiffs' damages, the Supreme Court made clear that the only issue that survived the appeal was Defendants' liability as to Plaintiffs' claims for relief - **all previously awarded damages and offsets were reversed and remanded.** A.A. Vol. 14, P. 2693.

It was apparently the Respondents' position that the previously awarded $158,000.00 in attorney fees, that was reversed on appeal, somehow had "survived" the appeal. This was the complete opposite of what the Respondents argued in their February 7, 2013 motion and what they orally argued in the trial court on February 26, 2012.

***59** Nevertheless, the trial court abused its discretion and wrongfully awarded attorney fees for the 1st trial which were specifically reversed by this court. A.A. Vol. 17, P. 3362; 3370. The trial court's award of $158,000.00 in attorney fees for the first trial was an abuse of discretion and must be reversed by this court.

4. THE RESPONDENTS WERE NOT ENTITLED TO ANY ATTONEY FEES INCURRED PRIOR TO THE SUPREME COURTIS ORIGINAL RULING IN THIS CASE.

In the Respondents' Motion for Attorney Fees, counsel for the Respondents alleged that they were entitled to $400,220.00 in attorney fees. This was partially comprised of $158,387.50 in fees incurred by the Respondents in litigating the first trial. The Respondents were also claiming $15,417.00 in fees incurred by the Respondents after the first trial and prior to the date the appeal was filed by the parties, A.A. Vol. 15, P. 2856-2870. As previously stated, the Respondents were not the "prevailing party" regarding the first trial and they were not entitled to attorney fees pursuant to the Lease Agreement as being the "prevailing party" for fees that were incurred during the first trial.

Additionally, the Respondents would not be entitled to the additional $15,417.00 in fees that were incurred after the first trial, but before the appeal because, again, they were not the "prevailing party" because their first judgment was reversed on appeal. A.A. Vol. 17, P. 3362; 3370.

60 5. *THE RESPONDENTS WERE NOT ENTITLED TO AN AWARD OF ATTORNEY FEES FROM BARBARA LAWSON INDIVIDUALLY OR THE BARBARA ANN HOLLIER TRUST

The Respondents in this case were seeking an award of attorney fees pursuant to paragraph 29.1 of *the Lease Agreement*. The Respondents were not seeking attorney fees based upon the Appellants being a party In the litigation (Offer of Judgment rules). A.A. Vol. 15, P. 2856-2870.

This is an important distinction that the trial court failed to recognize. The Respondents were seeking attorney fees based upon the specific terms of the Lease Agreement. Barbara Lawson individually and the Barbara Ann Hollier Trust were never parties to the Lease Agreement. Counsel for the Respondents were not alleging attorney fees, nor could they, based upon an offer of judgment. The Respondents were alleging that they were the "prevailing party" pursuant to the specific term of paragraph 29.1 of the Lease Agreement, the Respondents may have been entitled to reasonable attorney fees which were to be fixed by the court.

There is no dispute that the Lease Agreement was entered into with the Appellant Acadian Realty, Inc. and no one else. A.A. Vol. 11, P. 2185.

The Respondents' request for attorney fees was not being made pursuant to the supreme court order of remand, but was being made as an alleged "prevailing party" under the express terms of the Lease Agreement, of which neither the Trust nor Barbara Lawson individually were or are a ***61** party to. A.A. Vol. 15, P. 2864-2865. Any alleged damages that Nicolle Parker or William Shack may have been entitled to for their attorney fees would have to be awarded pursuant to the terms of the *Lease Agreement* and could only be awarded against Acadian Realty and not the other Appellants in this case. Obviously, an individual and a Trust cannot be liable for attorney fees outlined in a written agreement that they were never a party to!

The Lease Agreement in this case was previously ruled and declared to be judicially "unambiguous". A.A. Vol. 13, P. 2606. In every Nevada Supreme Court case that has dealt with the interpretation of a contract, this Court has consistently and uniformly held that "when a document is clear on its face, it will be construed from the written language and enforced as written". See *Ellison v. California State Automobile Association*, 106 Nev. 601, 603, 797 P.2d 975, 977 (1990).

Paragraph 29.1 of the Lease Agreement specifically stated that:

> If either **party** brings an action to enforce the terms hereof or declare a right hereunder, the prevailing **party** in such action, trial or appeal thereof, shall be entitled to his reasonable attorney fees to be paid by the losing **party** as fixed by the court in the same or separate suit and whether or not such action is pursued to decision or judgment. (emphasis added). A.A. Vol. 11, P. 2198.

The Barbara Arm Hollier Trust and Barbara Lawson individually were never a **"party"** to the Lease and should not have been held liable for an. ***62** award of attorney fees pursuant to NRS 18.010(4) or pursuant to the express terms of the Lease which they were not a **"party"** to.

Acadian Realty was the only **"party"** to the Lease Agreement upon which Nicolle Parker or William Shack could recover an award of attorney fees against.

There is an explicit distinction to being a party to a contract and being a party to a litigation. Neither Nicolle Parker or William Shack were entitled to attorney fees against the Trust or Barbara Lawson individually pursuant to the Lease Agreement, and. it was an abuse of discretion, as well as reversible error to award attorney fees against the Trust and Barbara Lawson, individually.

6. ***THE RESPONDENTS IN THIS CASE WERE NEVER "PARTIES" TO THE LEASE AND WERE NOT ENTITLED TO ATTORNEY FEES***

Paragraph 1.1 of the Lease Agreement specifically defined the parties as follows:

> 1.1 **Parties:** This Lease Agreement, dated, for reference purposed only, this *22*nd day of September, 2003 is made by and between **ACADIAN REALTY, INC.** (hereinafter referred to as "Lessor" of "Seller") and **William D. Shack,** doing business under the name of **"KIDS CARE CLUB"** (hereinafter called "Lessee" or "Buyer"). A.A. Vol. 11, P. 2185.

***63** The only "parties" to this Lease Agreement were Acadian Realty, Inc. and Kids Care Club. A.A. Vol. 11, P. 2185.

Paragraph 29.1 of the Lease Agreement specifically states that if either "party" brings an action, the prevailing party shall be entitled to reasonable attorney fees. Kids Care Club never brought an action in this case. Kids Care Club is the real party in interest. This argument has nothing to do with this Court's Order of Remand. The Order of Remand dealt with the litigation not the Lease Agreement. Neither William Shack nor Nicolle Jones Parker were parties to the Lease Agreement and had no standing pursuant to the express terms of the agreement to request attorney fees because they were a "stranger" to the agreement and are not "the parties".

It was never disputed in this case that Nicolle Jones Parker created Kids Care Club, LLC to run and operate the daycare center. A.A. Vol. 7, P. 1372-1376. It was never disputed that the Lease Agreement was entered into by and between Acadian Realty and Kids Care Club, LLC. A.A. Vol. 11, P. 2185. It was never disputed that all utilities, the power, the phone, the sewer, the gas were all put in the name of Kids Care Club, LLC. A.A. Vol. 7, P. 13725-1376. It was never disputed that all of the contracts that were entered into in this case with the engineer, the architect, the general contractor (Design Builders) were all entered into with Kids Care Club, LLC and not the Respondents. A.A. Vol. 7, P. 13724376. Kids Care Club was ***64** the party to this Lease Agreement. Kids Care Club never filed suit in this case. A.A. Vol. 1, P. 1.

Additionally, a party cannot sue individually for damages incurred by a limited liability company or a corporation. See *Hinchmann v. Oulore*, 445 So.2d 1313 (1984); *Cold Storage v. Dept. Of Treasury*, 776 N.W.2d 387 (2009); NRS 86.281, 86.371 and NRS 86.381. **This law and these NRS Statutes were never disputed or distinguished by the Respondents.**

It was an abuse of discretion and reversible error to award attorney fees to William Shack and Nicolle Parker.

J.

THE ATTORNEY FEES AWARDED IN THIS CASE WERE- NOT REASONABLE OR EQUITABLE.

The determination of a reasonable fee award is up to the court and attorney fees awarded pursuant to a contract is an equitable matter. This was an. impossible task because the Respondents "blacked out" almost all of what the hourly rate of time was spent on. A.A. Vol. 16, P. 3290-3297; Vol. 15, P. 2877-2916. Its common sense that you cannot tell if attorney time is "reasonable" if you don't know what the time was spent on.

The hours allowed and the amount allowed is a discretionary matter for the court to determine. The Court should compare the relief awarded on the contract claims with the parties demands on those same claims and their ***65** litigation objectives as

disclosed by the pleadings, trial briefs, opening statements and similar sources. Further, the trial court may invoke equitable considerations unrelated to litigation success, such as parties' behavior during settlement negotiations or discovery proceedings, and trial. See generally *Shuette v. Beazer Homes Holdings Corporation*, 121 Nev. 837, 124 P.3d 530 (2005); *Ideal Electronic Sec. Company v. Intern Fidelity insurance*, 129 F.3d 143, (D.C.Cir. 1997); and *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933 (1983). If neither party achieves a complete victory on all the contract claims, it is within the discretion of the trial court to determine which party prevailed on the contract or whether, on balance, neither party prevailed sufficiently to justify an award of attorney fees. *Glenbrook Homeowners Association v. Glenbrook Company*, 111 Nev. 909, 901 P.2d 132 (1995). See *Scott Co. of California v. Blount Inc.*, 20 Ca.4th 1103, 979 P.2d 974 (1999).

1. *THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO CONSIDER A REDUCED AMOUNT OF ATTORNEY FEES*

Even if the trial court was correct in awarding attorney fees, the trial court abused its discretion by failing to consider a reduced amount. The trial court awarded 100% of what was requested. A.A. Vol. 16, P. 3315-3317.

The Respondents' original complaint contained seven claims for relief. A.A. Vol. 1, P. 1-13. This case went to trial on two of the seven ***66** claims, the breach of contract claim and the breach of the implied covenant of good faith and fair dealing claim. During the trial in this case, Nicolle Parker testified that the main reason she filed a complaint in this case was to force Mrs. Lawson to act. This would be the third claim for relief contained in the Respondents' complaint for specific performance. The Respondents lost their most important claim, specific performance, as well as three other claims; declaratory relief, injunctive relief and fraud, that were all dismissed pursuant to a Motion for Summary Judgment prior to the first trial. A.A. Vol. 2, P. 378-382. Nicolle Parker and William Shack did not present evidence at the second trial and a jury verdict was not rendered on the seventh claim, for attorney fees.

Given the fact that the Respondents' first verdict was reversed on appeal, and given the fact that the Respondents lost on five of their seven original causes of action contained in the complaint, they were not “the prevailing party” for purposes of recovering attorney fees pursuant to the lease Agreement.

A reduced fee award is appropriate if the relief, however significant, is limited to the success of the litigation as a whole. See *Hensley v. Eckerhart*, 461 U.S. 440, 103 S.Ct. (1942). The United States Supreme Court in *Hensley v. Eckerhart* 461 U.S. 424 (1.983) held that the extent of a Plaintiffs success is a crucial factor in determining the proper amount of ***67** attorney fees to be awarded. Although the *Hensley*, case dealt with a violation of the civil rights act, the same principles would apply to this case.

The Court in *Hensley* reasoned that where the Plaintiff failed to prevail on a claim unrelated to the successful claims, the hours spent on the unsuccessful claims should be excluded in considering the amount of a reasonable fee. In other words, where a Plaintiff achieves only limited success, the Court should award, only that amount of fees that is reasonable in. relation to the result obtained.

This case was remanded and reversed to the District Court, The attorney fees spent on the unsuccessful claims should have been excluded when considering an amount of a reasonable fee.

The trial court did not deduct any hours that were spent on the unsuccessful prosecution of the specific performance claim, declaratory relief claim, estoppel/preliminary injunction claim and the Respondents' claim for fraud. The trial court awarded 100% of the requested relief. A.A. Vol. 13, P. 3315-3317.

The trial court had authority and power to calculate the amount of fees based upon the reasonableness of the attorney fees and pursuant to this court's equitable ability to reduce these fees. See *Shuette v. Beazer Homes Holdings Corporation*, 121 Nev. 837, 124 P.3d 530 (2005). This court still has the discretion to determine the “reasonableness of the fees”. See also ***68** *Woman's Federal Savings and Loan Association v. Nevada National Bank*, 623 F.Supp. 469, (D.Nev. 1985). (Attorney fees reduced to

account for limited success; Relief obtained was limited in comparison to scope of litigation.) The trial court did not do this because the trial court never reviewed the "blacked out" portions in camera.

In addition to the *Brunzell*, factors that will be discussed below, other factors were not considered by the trial court, which include the so called *Kerr* factors. The *Kerr* factors as set forth in *City of Riverside v. Rivera*, 461 U.S. 952, 103 S.Ct. 2427 (1983) In *Rivera*, which is another civil rights case, the court reasoned that attorney fees must be reasonably related to the results obtained. The *Kerr* factors are 1) the time and labor required; 2) the novelty and difficulty of the questions; 3) the skill requisite to perform the legal service properly; 4) the preclusion of employment by the attorney due to the acceptance of the case; 5) the customary fee; 6) whether the fee is fixed or contingent; 7) Time limitations imposed by the client or the circumstances; 8) the amount involved and the results obtained; 9) the experience, reputation, and ability of the attorneys; 10) the undesirability of the case; 11) the nature and length of the professional relationship with the client; and 12) awards in similar cases. In *Rivera*, the Court noted these guidelines derive directly from the American Bar Association Code of Professional Responsibility, Disciplinary Rule 2-106.

***69** In *Marcus and Millichap Real Estate Brokerage Company v. Weiss*, 26 F.3d 131, 1994 WL 245634 (C.A.9) the amount of attorney fees awarded to a prevailing party was reduced by $100,000.00. The Court reasoned that In determining the fee award, the district court considered 7 of the 12 factors listed by the Kerr test, which was adopted by the 9th Circuit to aid in the determination and review of the of reasonableness of fee awards.

In relation to the *Kerr* factors, as previously stated, the time and labor required in this case was impossible to ascertain because almost all of the attorney time sheets were blacked out and it was impossible to determine whether the fees were "reasonable" or not. A.A. Vol. 16, P. 3290-3297; Vol. 15, P. 2877-2916. On this basis alone, all blacked out portions of the attorney fees documentation should have been denied. One can't determine what is "reasonable" without seeing what the time was spent on. **The trial court never reviewed the time sheets in camera and as a result, failed to take into consideration any equitable set-off, or whether the award was reasonable**. This was another individual and cumulative error committed by the trial court.

This case did not involve any novel or difficult legal questions. In regards to the Kerr factors, the amount involved and the results obtained, the trial court never considered the 7 causes of action as set forth in the complaint and that only two made it to the jury. The trial court could not ***70** have considered this because all of the attorney time sheets were "blacked out". The Specific Performance, Declaratory Relief, Preliminary Injunction, and Fraud claims for relief were all dismissed pursuant to Appellants' Motions for summary judgment. A.A. Vol. 2, P. 378-382. Additionally, the Respondents asked for $600,687.34 in their closing arguments. A.A. Vol. 10, P. 1758. The Respondents were only awarded $371,400.00 by the jury. A.A. Vol. 13, P. 2513-2515. This was only $400.00 (four hundred dollars) more than the Appellants' Pretrial Offer of Judgment of $371,000.00!

The method upon which a reasonable fee is determined is subject to the discretion of the court, which is governed only by reason and fairness. There can be no"reasoning" or "fairness" when all of the time sheets are "blacked out". A.A. Vol. 16, P. 3290-3297; Vol. 15, P. 2877-1916. See *Shuette v. Beazer Homes Holdings Corporation*, 121 Nev. 837, 864 124 P.3d 530 (2005).

2. *THE RESPONDENTS WERE NOT ENTITLED TO THE ADDITIONAL SUM OF $226,415.50 IN ATTORNEY FEES INCURRED FROM THE REMAND OF THIS MATTER AND THE RE-TRIAL OF THIS CASE.*

Nicolle Parker and William Shack should not be awarded any attorney fees incurred during the trial because they did not accept the Plaintiff's pre- ***71** trial offer of Judgment for $371,000.00. As previously stated the Appellants made a pre-trial offer of judgment in this case in the amount of $371,000.00. A.A. Vol. 15, P. 2979-3007; 3004. The Respondents never even responded to this pretrial offer. The jury returned a verdict in the amount of $371,400.00.

The reasonableness in the amount of attorney fees to be awarded is at the discretion of the trial court. If either party achieves a complete victory on ail contract claims, it is then at the discretion of the trial court to determine which party prevailed on the contract or whether, on balance, neither party prevailed sufficiently to justify an award of attorney fees.

In deciding whether there is a "party prevailing on the contract" the trial court should compare the relief awarded on the contract claim or claims with the parties demands on. those same claims and their litigation objectives as disclosed by the pleadings, trial brief, opening statements and similar sources. See *Scott Company of California v. Blount, Inc.*, 979 P.2d 974 (1999). During the second trial in this case, Plaintiff's counsel requested that the Respondents be awarded the sum of $600,687.34. A.A. Vol. 10, P. 1758. The jury returned a verdict in the sum of $371,400.000. A.A. Vol. 13, P. 2513-2515.

The trial Court should have taken this into consideration in determining whether, given the amounts awarded, neither party prevailed ***72** sufficiently to justify an award of attorney fees. The trial Court failed to consider comparing the relief awarded on the contract claims with the Respondents' demands. An apportionment should have been made based upon the amount that they requested and the amount that the Respondents actually recovered. See also *Antelope Valley Health Care District v. Citadel Properties Lancaster, LLC*, (2009 WL 1028057) (C.A.9 Cal. 2009) wherein the court appropriately considered limited success by a party by reducing their legal fee by 25% "in light of the limited victory on the merits".

There was never a real issue in this case as to whether Nicolle Parker could recover lost profits for a business that never opened. For a business that had no track record, produced no other similar businesses tax returns, profit and loss statements, no **financial** statements whatsoever, no expert witness, in terms of an accountant, bookkeeper or anyone else and no documented proof of any business expenses whatsoever. Lost profits could simply not be proven.

This was readily obvious during closing arguments on the last day of trial when Nicolle Parker's counsel announced that they could not and would not be entitled to lost profits because these would be "too speculative". A.A. Vol. 10, P. 1756.

Despite the complete lack of any evidence whatsoever on future lost profits, the trial Court denied the Appellants' Motion for Summary ***73** Judgment and Motion in Limine related to lost profits. The issue regarding future lost profits that was continually alleged by Nicolle Parker in the face of absolutely no proof or any legal evidence whatsoever to support future lost profits, needlessly wasted precious resources, needlessly wasted counsel's time in pretrial litigation pretrial motions and most importantly, needlessly wasted counsel's time in preparing for trial in this case.

Nicolle Parker's counsel should have given defense counsel the courtesy, prior to the trial, of informing the Appellants that they were not going to request an award of future damages or lost profits which they knew ahead of time that they could not prove, and of which, they knew that they were not going to allege at trial. A simple courtesy phone call would have eliminated the need for counsel to spend in excess of 100 hours preparing for this issue at trial.

Nicolle Parker nor William Shack should be awarded with a. "pat on the back" and given attorney fees for wasting everyone's time in both pretrial motions and. the trial court's time in preparing for the anticipated motions for trial and testimony at trial. Certainly Nicolle Parker was not the "prevailing party" in terms of future lost profits and she should not be entitled to any attorney fees that were expended on this issue by wasting everyone's time on a significant issue she never intended to pursue at trial! A.A.Vol. 10, P. 1756.

***74** Counsel for the Respondents were are also awarded $675.00 per hour in attorney fees. This is not "reasonable" nor was it proven that this is "customary" In the Las Vegas Market. It was an abuse of discretion not to discount the attorney fees in this case.

K.

THE TRIAL COURT DID NOT PROPERLY CONSIDER THE BRUNZELL FACTORS

This Court in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969) set forth additional factors that the court can determine as to whether attorney fees and costs are reasonable and whether the court should award them. The Law Firm of Gordon & Silver is a successful law firm with excellent attorneys.

Given the fact that liability was established by this Court's previous ruling, the case was not a difficult case to prevail on.

In regards to the work actually performed and the skill and attention given to the work, the Respondents should not have been able to recover any attorney fees regarding future damages and future lost profits. The work that was actually performed regarding future damages and lost profits never had to be performed and the Respondents conceded this fact in closing arguments by indicating that future damages and future lost profits could not be proven because they were too "speculative". A.A. Vol. 10, P. 1756.

***75** In regards to the result, and whether the attorney was successful and what benefits were derived, the trial court did not consider the fact that the Respondents only recovered $400.00 in excess of the $371,000.00 formal offer of judgment which the Appellants served on the Respondents approximately 45 days prior to trial. A.A. Vol. 15, P. 3004. The trial Court also failed to consider that the Respondents were only awarded $371,400.00 when they had requested approximately $600,687.34. **This court should consider that the Respondents allegedly spent $226,417.50 in attorney fees to obtain an extra $400.00 from what the Appellants were formally offering to settle for.**

Finally, the case proceeded to trial on only 2 of the initial 7 causes of action.

It is not really possible to say who "prevailed" at trial or in this whole litigation. Each party won on some issues and lost on others. In this type of case, it would not have been an abuse of discretion in refusing to award attorney fees. See *Glenbrook Homeowners Association v. Glenbrook Company*, 111 Nev. 909, 901 P.2d 132 (1995).

I.

THE RESPONDENTS SHOULD HAVE ONLY BEEN AWARDED $2.662.45, IF ANYTHING, IN COSTS

***76** Respondents' Exhibit B, C and D, which were attached to the Memorandum of Costs were the only Invoices that were produced in support of their Memorandum of Costs. A.A. Vol. 13, P. 2539-2546. These invoices totaled $2,662.45. The Appellants opposed this motion, A.A. Vol. 13, P. 2558-2564. Despite this fact, the trial court awarded Nicolle Parker and William Shack $18,901.04 in costs. A.A. Vol. 14, P. 2976-2979. Pursuant to very specific Nevada Case Law, $2,662.45 are all the costs that Respondents should have been able to recover In this action. A party must submit actual invoices, documents, or other evidence to support the costs that were incurred and these costs must be proven with independent documentation. See *Bobby Berosini, Ltd v. PETA*, 114 Nev. 1348 (1998). A party must also demonstrate how such costs were necessary and incurred in the action. This was not done In this case. A.A. Vol. 13, P. 2519-2522.

In this case, there was insufficient documentation for any of the costs, no receipts, no bills, no proof of payments, and as a result, the Memorandum was defective. A.A. Vol. 13, P. 2519-2551 and the costs request should have been denied. See *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348 (1998).

In *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348 971 P.2d 383 (1998) this court specifically held that:
The determination of allowable costs is within the sound discretion of the trial court. However, statutes permitting the recovery of costs are to be ***77** strictly construed because they are in derogation of the common law… Pursuant to NRS 18.005, Costs must be reasonable. We have held that "reasonable costs" must be actual and reasonable, "rather than a reasonable estimate or calculation of such costs...." *Id.* at 1352.

In the *Berosini* case, this Court specifically held investigative costs although they might be reasonable, necessary and incurred in the action, were not allowed, because PETA did not attempt to demonstrate how such fees were "necessary to and incurred in the action." The Court reasoned that because it must strictly construe statutes permitting the recovery of costs, that PETA had failed to justify the costs for investigative fees. In this case, there were no facts as to how the fees and costs were incurred in this case.

In the *Berosini* case, the District Court awarded PETA $6,089.64 in costs for photocopies and $4,974.69 in costs for long distance telephone charges. This Court reasoned that both categories of costs were recoverable pursuant to NRS 18.005. However, based, upon the Supreme Court's review of the record on appeal, the court noted that PETA failed, to provide sufficient justifying documentation beyond the date of each photocopy and the total copying charge. (Id. at 1353), Moreover, PETA failed to provide any itemization with respect to its request for long distance telephone costs, Because of PETA's insufficient documentation, this Court ruled and ***78** determined that they were unable to determine the reasonableness of these costs award and did not allow them.

In this case, there was a failure to provide any documentation whatsoever, other than the date of each photocopy and the alleged total photocopying charge.

In *Berosini*, this Court also noted that the District Court had awarded PETA costs for jurors fees in the amount of $12,370.00. The Court noted that although jurors fees are recoverable pursuant to NHS 18.005, PETAs supplemental documentation of costs failed to contain any itemization or justifying documentation with respect to this cost. As a result, this Court reasoned that a District Court Judge nor the Supreme Court were able to ascertain whether such costs were accurately assessed and as a result, concluded that the District Court abused its discretion in awarding PETA $12,370.00 injury fees.

Likewise, in this case, the Appellants were unable to accurately assess whether any of the "transaction fees and costs" contained in exhibit A were accurately assessed. Appellants were equally unable to determine whether any of the costs as set forth in Exhibit E (A.A. Vol. 13, P. 2547-2550) were "accurately assessed" without the copies of actual invoices or other justifying documentation with respect to the costs and it was an absolute ***79** abuse of discretion in awarding these costs without the sufficient itemization and justifying documentation as set forth in *Berosini*.

The Memorandum of Costs in this case that was filed contains as Exhibit "A" a document entitled "Transaction Fees and Costs". This document was not supported by any foundation, any receipts, any invoices, or proof that any of these costs were paid. A.A. Vol. 13, P. 2523-2538.

The "transaction fees and costs" document sets forth numerous $10.00 fees for "messenger service" starting from November 30, 2007 through December 20, 2012 which totaled $630.00. A.A. Vol. 13, P. 2529-2530. Assuming this was for a runner fee, those costs should not have been allowed. Specifically, this Court in *Bergmann v. Boyce*, 109 Nev. 670, 681, 856 P.2d 560 (1993) held that an attorney "cannot expand the coverage of NRS 18.005" by separately billing the client for document preparation or other normal out-of pocket expenses that are part of routine office overhead claiming such expenses as taxable costs, unless extraordinary expenses are incurred only for the specific case. Surely, the Respondents' Law Firm employed "runners" or someone of similar service. This is part of attorney's routine office overhead and these costs should not have been billed separately as "taxable costs". See *Bergmann*, A trial court has discretion in determining what expenses are necessary, but the expenses must be necessarily incurred as a matter of course in litigation. The runner services ***80** for a law firm that employs a runner are *not* expenses "necessarily incurred as a matter of course in litigation". Additionally, reasonable costs means "actual costs that are also reasonable, rather than a reasonable estimate or calculation of such costs based upon administrative convenience". See *Vill Builders 96 v. US Labs*, 121 Nev. 261, 276-77, 112 P.3d 1082 (2005). An additional reason these costs should have been denied was because the "messenger service" costs were a "reasonable estimate" and as set forth in *Vill Builders 96*, it would be improper to award costs based upon a calculation that is based upon "administrative convenience".

The trial Judge completely ignored the *Berosini* case. This was an abuse of discretion and the award of costs must be reversed.

VII.

CONCLUSION

This lawsuit was a set up from the beginning. The Respondents attempted to force Mrs. Lawson to sell the property pursuant to their specific performance claim in their complaint which was denied because they breached the Agreement from the beginning by failing to pay the option money and failing to exercise the Option, A.A. Vol. 2, P. 378-382.

Instead of simply obtaining an indemnity bond pursuant to the express terms of the Lease Agreement, which would have allowed Mrs. Lawson to ***81** sign the Water Construction Agreement, the Respondents chose to file a lawsuit. A.A. Vol. 1, P. 1.; Vol. 9, P. 1652-1653.

It was clearly a set up because once the lawsuit was filed, Nicolle Parker obtained an insurance policy which she was required to do within 7 days of signing the Lease; the Friday before the lawsuit was filed. A.A. Vol. 11, P. 1998. The insurance policy was 17 months late and was only for 4 million dollars instead of the required 5 million dollars pursuant to the Lease Agreement. A.A. Vol. 11, P. 2189.

William Shack finally produced a signed a recorded Trust Deed and Promissory Note dated January 19, 2005 which was 11 months late and 4 days prior to the filing of the lawsuit. This court should note that the recorded Trust Deed was never given to Barbara Lawson prior to the filing of the lawsuit. A.A. Vol. 9, P. 1649. Nicolle Parker and William Shack finally provided the Indemnity Bond 4 months after it was requested and strangely enough, obtained after the lawsuit was filed. A.A. Vol. 11, P. 1994, The Indemnity Bond that was obtained was never given to Barbara Lawson prior to the filing of the lawsuit (A.A. Vol, 9, P. 1649) and was useless because it was never signed by William Shack. A.A. Vol, 11, P. 1994.

This lawsuit was clearly a set up because when the lawsuit was filed the construction was at least 6 months away from being completed (A.A. ***82** Vol. 8, P. 1520-1521) and even if this child care center was completed, it would have only left approximately one year of the remaining Lease for Kids Care Club, LLC to earn a profit.

There was never a valid legal basis for this lawsuit and the only thing that Barbara Lawson ever requested was for Nicolle Parker and William Shack to simply follow the terms of the Lease Agreement. A.A. Vol. 9, P. 1653, and no witness testified, otherwise.

It is readily clear that there were numerous errors that were made by the trial court Judge. The Lease Agreement in this case was made and entered into between Acadian Realty, Inc. and William Shack dba Kids Care Club, LLC. Kids Care Club, LLC was a separate entity, separate and apart from William Shack and Nicolle Parker that entered into contracts, incurred liabilities, and was formed for the specific purpose of running this business. Nevertheless, the trial court refused to allow the Appellants to argue that any damages belonged to Kids Care Club, LLC when it was readily obvious that all damages belonged to Kids Care Club, LLC.

Respondents counsel finally conceded on the last day of the jury trial during closing arguments that lost profits and future damages were too speculative and they had no proof of either. It was reversible error to deny the Appellants Pre-Trial. Motion for Summary Judgment and Motion in Limine regarding Lost Profits and Future Damages.

***83** The first jury verdict in the amount of $100,000.00 was awarded by the District Court Judge to the Appellants and should have been upheld. The $100,000.00 option payment was due and owing upon the signing of the Lease Agreement and in consideration of the $100,000.00, Barbara Lawson never listed the property nor sold the property.

The Appellants should have had the right to distinguish themselves and the jury should have been given the option of awarding damages between the Appellants. It was reversible error for the trial court judge to refuse the Appellants the right to distinguish themselves and provide separate verdict forms for each Appellant. Each Appellant had different roles in this case. Neither

Barbara Lawson individually or the Barbara Ann Hollier Trust were ever parties to the Lease Agreement and as a result, it would have been impossible for them to have breached an agreement that they were not a party to, never signed and never agreed to be bound by. This was reversible error. It was reversible error to fail to hold an evidentiary hearing relating to the perjured testimony of William Shack. It was reversible error for the trial judge to fail to recuse himself from hearing the matter because he was a witness.

The Respondents missed the deadline contained in NRCP 54(d)(2)(A)(B). Unlike the Federal Rule, NRCP Rule 54(d) specifically provides that the filing time for the motion may not be extended by the court ***84** after it has expired. It was reversible error to award attorney fees in this case when the time frame of NRCP 54(d) had expired.

It was reversible error to award attorney fees in this case when Respondents seventh claim for relief, special damages claim in their complaint was never litigated to the jury and the jury was never informed of an exact amount of attorney fees.

It was reversible error to award the Respondents $158,000.00 in attorney fees for the first trial, when this jury verdict was overturned and they were not the prevailing party.

There is no basis under the Lease for this award of attorney fees and there was no other statutory or case law authority that would allow an award of these attorney fees. There was no legal basis to award attorney fees against Barbara Lawson individually or the Barbara Ann Hollier Trust when they were not parties to the Agreement and it was reversible error to do so. It was reversible error to award attorney fees in favor of William Shack, individually and Nicolle Parker when they were not parties to the Lease Agreement.

Finally, it was an abuse of discretion in this case to award attorney fees because an award of attorney fees must be reasonable and equitable. It was impossible to determine if the attorney fees award In this case were reasonable and equitable because the attorney tasks that were listed in the ***85** time sheets provided to the trial court were blacked out and as a result, one cannot tell what the time was spent on, thereby making the time sheets that were submitted completely useless in terms of determining whether it was reasonable or equitable. It was abuse of discretion to award fees in this case for any attorney tasks that were blacked out.

It was abuse of discretion and reversible error to award the Respondents costs in the amount of $18,901.04 when the Memorandum was not supported by any invoice or any document whatsoever to independently verify or determine what the Respondents costs were.

Lastly, the individual and cumulative effect of all of the above stated errors denied the Appellants a fair trial, deprived them of their due process rights and the jury verdict in this case must be reversed or the case remanded for a new trial as set forth above.

Dated this 3 day of June, 2014.

Law Offices of

ANDREW M. LEAVITT, ESQ

Andrew M. Leavitt, Esq.

Nevada Bar No.: 3989

Robert F. Purdy, Esq.

Nevada Bar No.: 6097

633 S. Seventh Street

Las Vegas, NV 89101

Attorneys For Appellants

End of Document