IN THE SUPREME COURT OF THE STATE OF NEVADA

ROCK SPRINGS MESQUITE II OWNERS' ASSOCIATION, Appellant, vs. STEPHEN J. RARIDAN and JUDITH A. RARIDAN, Respondents.	Electronically Filed May 20 2019 03:33 p.m. Elizabeth A. Brown Clerk of Supreme Court Supreme Court No. 77085 District Court Case No. A-18-772425-C

ROCK SPRINGS MESQUITE II OWNERS' ASSOCIATION'S OPENING BRIEF

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NRAP 26.1 Disclosures

The undersigned counsel of record certifies that the following are persons and entities as required by NRAP 26.1(a): Rock Springs Mesquite II Owners' Association is a Nevada Domestic Non-Profit Corporation.

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Dated this 20th day of May, 2019.

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JURISDICTIONAL STATEMENT

The Supreme Court of Nevada has jurisdiction over this matter pursuant to NRAP 3A(b)(1) as this appeal is taken from an order granting a motion to dismiss, which was certified as a final judgment. (APP155).

The order granting Respondent Steven and Judith Raridan's motion to dismiss was filed on August 13, 2018. Notice of the district court's order granting the motion to dismiss was filed on August 27, 2018. (APP155).

ROUTING STATEMENT

This matter is presumptively retained by the Nevada Supreme Court pursuant to NRAP 17(a)(13) as it raises, as a principal issue, a question of first impression involving Nevada common law. More specifically, this matter is also presumptively retained by the Nevada Supreme Court pursuant to NRAP 17(a)(14) as it raises, as a principal issue, a question of statewide public importance and statutory interpretation.

STATEMENT OF ISSUES

1. CAN A DECLARATORY RELIEF ACTION BROUGHT UNDER NRS 30.030 BE BARRED BY THE DOCTRINE OF CLAIM PRECLUSION

2. CAN THE PRESENTATION OF A PROPOSED JURY INSTRUCTION, WHICH WAS REJECTED BY THE TRIAL COURT, SERVE AS A DETERMINATION ON THE MERITS SUFFICIENT TO SATISFY THE

REQUIREMENTS OF CLAIM PRECLUSION

3. IS A DECLARATORY RELIEF ACTION GENERALLY, WHETHER BROUGHT BEFORE OR AFTER THE ADJUDICATION OF COERCIVE CLAIMS, AN EXCEPTION TO THE DOCTRINE OF CLAIM PRECLUSION

STATEMENT OF CASE

This is an action brought by Rock Springs Mesquite II Owners Association (hereafter "HOA"), against the adjacent property owner, Stephen Raridan and Judith Raridan (hereafter "Raridans"), relating to the failure and potential collapse of a complex, multi level, retaining wall between the two properties. (APP033). On April 6, 2018 the association filed its complaint against the Raridans seeking declaratory relief **only** from the District Court. (APP035). The very narrow issue presented to the District Court for a declaratory relief determination, was whether the HOA owed a legal duty to support the adjacent homeowner's property, and ultimately, the land within the adjacent homeowners backyard. If such a duty exists, then the association could take appropriate action in redesigning and repairing the wall. However, if no such duty exists, then the association sought a declaration of the parties' relative rights, liabilities and obligations as it related to the collapsing wall, and the manner in which the repair could be effectuated. (APP035).

On May 15, 2018 the Respondents filed a motion to dismiss, or in the alternative, for summary judgment arguing, inter alia, that the complaint was barred by the doctrine of claim preclusion because the declaratory relief action should have been raised in a prior litigation between the HOA and the previous homeowners, the Olsens. (APP039).

Several years ago, on May 5, 2011, the association filed a complaint against the prior homeowners, Floyd E. and Gayle G. Olsen (hereafter "Olsens"). (APP001). The complaint's subject matter was related to the same wall, however, the complaint sounded in claims for relief in trespass, nuisance, encroachment, and negligence. (APP002-APP005). The HOA alleged in the complaint that the primary reason for the wall failure was caused by the Olsens backyard applying excessive lateral forces upon the wall. (APP002). Those issues were tried to a jury and the Olsens prevailed with the jury determining that the Olsen's landscape and pool were not the cause of the wall failure. (APP008).

In the instant matter, the District Court heard the motion to dismiss and granted said motion on the basis that claim preclusion applies because the association "could have brought" the declaratory relief in the underlying case, and further ruled that a proposed, but rejected, jury instruction during the course of the first trial specifically related to the obligations of lateral support of adjacent

homeowners and thus, the known claim should have been litigated in the first case. (APP041).

The HOA argued to the District Court that declaratory relief remedies are not precluded by the doctrine of claim preclusion generally, and specifically, the elements of claim preclusion were never satisfied because the issue of lateral support responsibility was never adjudicated or a final determination made in the first matter. (APP124). Furthermore, the HOA argued that the issues in the first case were different, and unrelated, than the relief sought in the declaratory relief action. (APP124).

STATEMENT OF FACTS

Previous landowners, the Olsens, were owners of the residence located at 558 Los Altos Circles, Mesquite, Nevada ("Property"). The HOA and the previous owners shared no legal, contractual, or voluntary relationship with each other. The Olsens sold the residence to the Respondents, the Raridans on May 27, 2016. (APP029). The HOA's real property interest is adjacent to, and west of the Respondent's property, separated by the HOA's retaining/perimeter wall, and the previous owners', installed masonry wall[1]. The Olsen/Raridan property sits above

[1]As demonstrated by the photos provided, the wall structure is very complex. The wall complex consists of several retaining and masonry walls which are located

the HOA property by several feet. This wall abuts the HOA's property and is in close proximity to the HOA's retaining perimeter wall. (APP160—APP163). In other words, the adjacent homeowners have two large, abutting walls that are collapsing into the HOA's property as the properties sit at very different elevations. (APP160—APP163). It is alleged by the HOA that the installation of the Respondent's wall and improvements, eventually caused severe damage to the HOA's wall, that left untreated would lead to the collapse of both walls, and force the HOA to perform maintenance and repairs on this hazardous wall, as well as install a metal perimeter fence to block access to it. The previous and current owners have never made any attempt to remedy their own wall, and the overall structure to this day continues to deteriorate. (APP161—APP163). The HOA simply desires to repair the wall, and is seeking a determination of the parties' relative rights and liabilities as it relates to the wall, its repair, and liability for its possible collapse. (APP033). The primary issue is whether the HOA must build a wall sufficient to provide lateral support for the Raridan's backyard and utilize its own property to do so. Or in the alternative, do the Raridans have an obligation to provide support to their own property, and thus, must shore up their property before general wall repairs can be accomplished.

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along, and on either side of the property line between the parties. (APP160—APP163).

Previously, in Case No. A-11-640682-C, the HOA brought an action against the previous owners, the Olsens, after the previous owners had constructed a failing masonry wall and improvements that were compromising the HOA's adjacent wall. The HOA sought the following kinds of monetary relief from that suit: (1) relief from trespass (2) relief from nuisance (3) relief from encroachment, and (4) relief from negligence. (APP002—APP005). The allegation was narrow and simple: was the Olsens back yard, palms tress, swimming pool, and other lateral forces the cause of the wall failure, or was the cause a construction defect to the HOA's wall itself? Ultimately, the jury found in favor of the Olsens. The jury found the cause of the wall collapse was a wall construction defect, not the Olsen's unreasonable lateral forces being exerted against it. (APP008). However, the issues of declaratory relief, and more specifically, whether the HOA now has an ongoing obligation to provide lateral support for the homeowners' wall in light of the verdict, were never adjudicated. (APP009). Does an adjacent homeowner owe a duty of lateral support in Nevada? [2] If so, then the HOA must build a wall

[2] There are numerous cases that support the proposition that an adjacent landowner does not owe a duty of lateral support to an adjacent land owner where the property is improved. The Nevada Supreme Court has held that landowners do not have a duty on the part of adjacent landowners to provide the necessary lateral support to counteract the force resulting from the property owners' activities. The plaintiff in *Carlson v Zivot* built a swimming pool within six feet and added to the height of a boundary wall shared with the defendant. 90 Nev. 361. 526 P.2d 1177 (Nev. 1974).

sufficient to support the Raridans back yard. If not, then the Raridans must support their own land, and the scope of repair to the wall is very different.

During the trial related to causation of the wall failure, the HOA proposed a jury instruction to the court related to the issue of lateral support obligations. (APP007). The Jury instruction simply stated that the HOA, or adjacent land owner, did not have a duty or obligation to support the improved land of an adjacent land owner. (APP007). The purpose of the proposed jury instruction was to insure the jury understood the issue of causation was the only issue to be determined, and that the jury further understood that the HOA was not legally obligated to repair the wall. It was a jury instruction offered for the limited purpose of outlining the general law of the case and informed the jury of all the relevant issues to avoid any confusion or a verdict based upon erroneous findings. The trial court rejected the jury instruction without explanation. The lateral

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In addition to the substantial fill that had been placed next to the wall, the plaintiff planted numerous trees adjacent to the wall. *Id* at 1178. On appeal, the court held that changing the terrain next to the defendant's wall, plus adding artificial structures thereon, altered the natural condition of the land, and therefore the defendants had no duty to provide the necessary lateral support to counteract the force resulting from the plaintiff's activities. *Id* at 1178 (citing Restatement (Second) of Torts § 817 (1979)). *See also Paola Lodge I.O.O.F.V. Bank of Knob Noster*, 238 Mo. App. 96 (holding that if the defendant does not desire to restore his walls to a sound safe condition for his own benefit, he ought not to be compelled to maintain them for the benefit of an adjacent homeowner in the absence of any express or implied contract of the neighbor's part).

support issue was never plead, briefed, or determined substantively. The jury instruction was proposed, briefly orally argued, and the court declined to give the instruction and provided no rational for so doing. (APP165).

After the verdict, the Olsens were granted a judgment in their favor against the HOA based upon an offer of judgment and were awarded attorney fees in the amount of $22,480.00. (APP015).

The HOA appealed the case generally and included several issues for review on appeal. (APP164). One of the issues was the rejection of the proposed jury instruction related to the lateral support obligations of adjacent land owners. (APP165). The appeal was eventually dismissed because the parties resolved the case and the outstanding issue of the judgment related to the award of attorney fees and costs. (APP028).

The previous homeowners, the Olsens, eventually sold the property to the Respondents. (APP029). The current litigation surrounds the same failing wall previously litigated; however, the HOA is only seeking relief from potential future damages in the form of a court order stating that the HOA has no legal obligation to provide lateral support for the defendants' wall and land, to the HOA's continuing financial detriment. (APP035). To be clear, the HOA is not seeking monetary damages by way of the present suit, but only seeks a court order

affirming its right to tear down its own wall and impose an affirmative duty on the Respondents to support their own wall and land. The removal of the HOA's wall may negatively impact the stability of the wall and the HOA continues, and will continue, to be harmed as described. Accordingly, the HOA brought forth this action seeking declaratory relief to finally settle this matter, and determine how to repair the wall. (APP033). Literally, if the wall is not repaired, someday the Raridans backyard and swimming pool may collapse into the HOA's parking lot. (APP160—APP163).

ARGUMENT

I. APPLICABLE STANDARDS FOR REVIEW

Under the Nevada Rules of Civil Procedure (NRCP), Rule 12(b)(5), a Complaint may be dismissed if it fails to state a claim upon which relief can be granted. Nev. R. Civ. P. 12(b)(5). A complaint should be dismissed for failure to state a claim "only if it appears beyond a reasonable doubt that [the plaintiff] could prove no set of facts, which if true, would entitle [the plaintiff] to relief." *Buzz Stew v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

Because of the strong presumption against dismissing an action for failure to state a claim, the issue is not whether a plaintiff will ultimately prevail, but whether he may *offer* evidence in support of his claims. Consequently, the Court

must not grant a motion to dismiss for failure to state a claim unless it appears beyond a reasonable doubt that the plaintiff could prove no set of facts in support of his claim which, if true, would entitle him to relief. *Hampe v. Foote,* 118 Nev. 405, 408, 47 P. 3d 438, 437 (2002).

II. THE DISTRICT COURT ERRED AS A MATTER OF LAW DISMISSING THE DECLATORY RELIEF ACTION ON THE BASIS OF CLAIM PRECLUSION

A. CLAIM PRECLUSION DOES NOT APPLY TO THIS DECLARATORY RELIEF ACTION

The HOA contends that there is no claim preclusion barring this action for the following three reasons: (1) NRS 30.030 states that declaratory relief is within the power of the courts and is available whether or not further relief is or could be claimed, (2) Nevada case law does not specifically, or generally, preclude declaratory relief in this case, and (3) the issue for declaratory relief did not exist until the preceding judgment was made, therefore, it could not have been brought with the other claims. For these reasons, the Respondent's argument of claim preclusion barring the declaratory relief action fail.

1) The Nevada Revised Statues clearly state that declaratory relief cannot be barred by claim preclusion.

The relevant statute could not be more clear. NRS 30.030, entitled "Scope,"

states, "[c]ourts of records within their respective jurisdiction shall have power to declare rights, status and other legal relations ***whether or not further relief is or could be claimed***. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree." NRS 30.030 (emphasis added).

Further, NRS 30.070, states "The enumeration in NRS 30.040, 30.050, and 30.060 does not limit or restrict the exercise of the general powers conferred in NRS 30.030 in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty." NRS 30.140 clarifies that the remedy of declaratory relief is, "declared to be remedial; [its] purpose is to settle and to afford ***relief from uncertainty*** and insecurity with respect to rights, status and other legal relations; and are to be **liberally** construed and administered." NRS 30.140 (emphasis added). By the wording of NRS 30.070 and 30.140, the legislature clearly intended declaratory relief to be sought freely where it could remove "uncertainty" and avoid future conflict.

The language of the statute is clear that it should be, "liberally construed and administered" NRS 30.140. Furthermore the statute specifically uses the language, "whether or not further relief is or could be claimed" NRS 30.140. The statutory

language is very clear and focused on ensuring that declaratory relief is liberally available to parties, and not to be impacted or restricted by doctrines of Res Judicata, or other potential limitations.

Declaratory relief actions are clearly treated differently than any other cause of action. The obvious reason for declaratory relief actions to proceed forward, and not be subject to arguments of claim preclusion rests with ensuring that the parties may resolve legal disputes and have rights and obligations determined. This case is a perfect example of why a bar to declaratory relief is inappropriate based upon claim preclusion. At this time, the parties cannot determine what actions to take, and what future liabilities may exist, related to this wall. In other words, the parties are at a complete stalemate without any legal recourse or ability to determine relative responsibility for possible future liabilities. For example, if the wall collapses, who ultimately is responsible to rebuild, or liable for the failure? To what degree must the new wall support the Raridan's adjacent land and utilize the land of the HOA to provide such support?

In the previous action, declaratory relief was not sought because if the HOA was successful, then the issues were rendered moot. A jury instruction was proposed to the trial court which simply stated that Nevada law does not require an adjacent homeowner to provide lateral support on improve land. (APP007). If

the HOA was successful in its legal action against the Olsens, then the issues related to repair of the wall would have been generally resolved. The purpose of the submitted jury instruction was simply to ensure that the jury understood the law as it applied to the relative right between the parties. However, declaratory relief was not requested, nor did the Court rule substantively on the jury instruction as it relates to the law. The jury instruction was simply rejected by the trial judge, and no record of the reason for its rejection is available. The District Court, in the present action ruled that the mere request for such a jury instruction, even though it was never adjudicated or accepted, is now grounds to bar any future declaratory relief action on the merits, and to support a claim that the declaratory relief should have been brought in the prior action. The District Court contended that the declaratory relief action could have been brought, and was a known possible claim at the time of the jury trial. (APP157).

2) Nevada caselaw does not preclude declaratory relief after coercive relief has been sought.

Nevada case law has never precluded declarative relief on the basis of claim preclusion. The Nevada Supreme Court's opinion in *Boca Park Martketplace Syndications Grp. V. HIGCO, Inc.*, 407 P.3d 761 (Nev. 2017) describes a unique situation discussing an exception to the claim preclusion rule, which happens to deal with declaratory relief. Nothing in the opinion precludes the bringing of a

declaratory relief action after other coercive claims have been decided upon. *Id* at 764. Rather, the Nevada Supreme Court affirmatively declared that a declaratory relief claim brought first, will not serve to bar additional coercive claims brought later, because that was the narrow issue before the court at the time. *Id* at 766. Simply put, when pure declaratory relief is sought first, it does not preclude the bringing of coercive claims later. Thus, rationally, the reverse would be true.

Specifically, the *Boca Park* opinion held that so long as the first suit only sought declaratory relief, a second suit for damages may follow. *Id*. at 765. The Court further held that, "[w]hen a plaintiff seeks solely declaratory relief; the weight of authority does not view him as seeking to enforce a claim against the defendant." *Id. citing* Restatement (Second) of Judgments §33 cmt. c.

> The Uniform Declaratory Judgments Act, which Nevada adopted in 1929 and codified in NRS 30.010 to 30.160, 1929 Nev. Stat., ch. 22, § 16 at 30, 'that declaratory actions are to supplement rather than supersede other types of litigation.' Thus, the Uniform Act, as adopted in Nevada, provides that '[f]urther relief based on a declaratory judgment or decree may be granted ***whenever necessary or proper***.' (Emphasis added).

Id. at 764 (emphasis added). Accordingly, the District Court assertion that declaratory relief is precluded where it follows a suit for coercive action is incorrect, and this action for declaratory relief may proceed. The "declaratory actions are to supplement, rather than supersede other types of litigation." *Id* at

764. This is also true, "whenever necessary and proper". *Id* at 764. The comment above, and the clear language dictates of NRS 30.030, compels a finding that declaratory relief actions, must not, and cannot, be precluded from resolving controversies between parties based upon the conflicting doctrine of claim preclusion. The broadly worded language of the statute is clearly intended to insure that claim preclusion does not limit the ability of parties to seek legal determinations.

The stated purpose in *Boca Park* for creating the exception for declaratory judgment as it relates to potential claim preclusion issues, is to ensure that all parties are provided an, "efficient way to obtain a Judicial Declaration of their rights before positions becoming trenched and irreversible damage". *Id* at 761. The court went on to write, "while a party may join claims for declaratory relief and damages in a single suit, the law does not require it." *Id* at 761.

The court in *Boca Park* found an exception to the claims preclusion bar. The court articulated there are several created exceptions which do not fundamentally support the policy considerations outlined or intended by the claim preclusion doctrine. The court in *Boca* quoted from the restatement of judgments. The Court wrote, "when a plaintiff seeks solely declaratory relief, the weight of authority does not view him as seeking to enforce a claim against the defendant. Instead he

is seen as merely requesting a judicial determination as to the existence and nature of a relation between himself and the defendant. The effect of such a declaration, under this approach, is not to merge a claim in the judgment or to bar it. Accordingly, regardless of the outcome, the plaintiff or defendant may pursue further declaratory or coercive relief in a subsequent action". *Id* at 764, Restatement second of judgment section 33 comment 1.

The *Boca Park* Court went on to explain that it found the exception outlined in the restatement of judgments to be persuasive, and thereby adopted the exception holding, "we find the Restatement's reasons for declaratory judgment exception persuasive and their far hold that claim preclusion does not apply where the original action sought only declaratory relief." *Id* at 764.

While in the instant matter, the declaratory relief action followed the claims for damages related to causation, the concept and support for allowing the declaratory judgment exception still applies. In the first case, the issue dealt specifically with the cause of the wall failure. If the cause was the adjacent homeowner above the HOA, then the issue would be resolved. However, since that matter was not determined in favor of the HOA, the repair of wall is still left to be resolved. It is for this reason, the declaratory relief actions are, and should be, an exception to claim preclusion.

A previous determination of the cause of the walls failure could render any future declaratory judgment issue moot. In *Boca Park*, depending on the outcome of the declaratory relief action, could also render any claims for damages moot as well. In other words, the restatement second of judgments contemplates the special need and issues that arise by creating the declaratory judgment exception to the general claim preclusion rules. Many different circumstances, issues, changes of condition, ongoing harm or issues can arise and the parties should be able to be free to still bring declaratory actions to ensure that appropriate rights and obligations are clearly identified and judicially determined.

3) *The issue for declaratory relief did not exist until the preceding judgment was made, therefore, it could not have been brought with the other claims.*

Contrary to the Respondents' position, the issue of whether the HOA has a legal duty to support the Defendants' wall did not exist until the jury verdict in the prior case. In the prior case, the parties disputed whether the prior owners of the Defendants' property were liable to the HOA for ***damage*** caused by their property. It was only after the jury returned a verdict stating that the Defendants' predecessors had no financial obligation to the HOA, that the issue of whether the HOA had to continue to support the wall became ripe and relevant. Once the verdict was issued, the HOA, for the first time, was faced with a new problem:

since the adjacent homeowners do not have to pay to repair the wall, does the HOA now have to continue to support the wall to their continuing detriment? What portions of the wall must the HOA repair? There are very specific and narrow legal question sought to be answered in the current suit.

B. THE DECLARATORY RELIEF ACTION IS NOT PRECLUDED, BECAUSE THE HOA IS SEEKING RELIEF THAT IS DIFFERENT FROM THE PRIOR LITIGATION

The Raridans argued that the issue has already been litigated, and therefore must be precluded as a matter of law. Claim preclusion bars re-litigation of an issue when all three of the following factors are established: "(1) the parties or their privies are the same; (2) the final judgment [in the prior case] is valid; and (3) the subsequent action is based on the same claims that were, or could have been brought in the first case." (*Five Star Capital Corp. v. Ruby*, 194 P.3d 709, 124 Nev. 1048 (Nev., 2008)).

The issue decided in prior litigation must be identical—including identical damages—to the issue presented in the current actions. *Id* at 713.

Here, the HOA seeks different relief than previously sought in the prior action. The HOA is seeking only declaratory relief; in the previous case, the HOA sought monetary damages. Because the issues are not identical, then already the issue preclusion bar is defeated. Further, declaratory relief is necessary to resolve

this matter, because a dispute exists as to the HOA's responsibility for the walls and the HOA wishes to eliminate its maintenance responsibility and its risk of liability with respect to the walls, which currently constitute a safety hazard. The HOA is seeking a declaration as to the responsibility of future support for the wall, only. (APP035). This is an entirely different issue rooted in entirely different relief.

The recent Supreme Court decision of Premier One Holdings vs. Red Rock Financial, is controlling in the instant matter

The *Premier One Holdings vs. Red Rock* case addressed the specific issue of whether claim preclusion barred a claim which were permissive in nature. (*Premier One Holdings, Inc. v. Red Rock Fin. Servs., LLC,* Case No. 73360 at *1, 429 P.3d 649(Table) (Nev. 2018)). The facts and issues addressed in *Premier One Holdings* are identical in nature to the issues presented in the instant appeal. First, the claims brought in the original suit by the homeowners association against the adjacent homeowners, were different types of claims and did not address issues of relative responsibility for the wall itself. *Id* at *4-5. Furthermore, there was good cause or reason not to bring such claims because the first suit, if successful, would have resolved the issue in perpetuity. *Id* at *4. In other words, which party was responsible to provide lateral support would be deemed moot if the HOA prevailed on its claim that the adjacent neighbor's wall and backyard were causing the wall

failure? This is very similar to the situation presented to the Nevada Supreme Court in the *Premier One Holdings* case. The court wrote:

> We further conclude that nonmutual claim preclusion should not apply here, as appellant provided a, "good reason" for not having asserted its claims against respondents in Case I. *See Weddell*, 131 Nev. at 241, 350 P.3d at 85 (explaining that nonmutual claim preclusion can apply when the plaintiff fails to provide a "good reason" for not having asserted claims against the defendant in a previous lawsuit). In particular, appellant and respondents shared a common interest in Case I in showing that respondents properly notified Bank of America of the foreclosure sale. *Cf. Boca Park Marketplace Syndications Grp., LLC v. Higco, Inc.*, 133 Nev., Adv. Op. 114, 407 P.3d 761, 763 (2017) ("Claim preclusion…is a policy-driven doctrine, designed to promote finality of judgments and judicial efficiency by requiring a party to bring all related claims against its *adversary* in a single suit, on penalty of forfeiture." (Emphasis added.)). Moreover, appellant's claims against respondents were contingent on its counterclaim against Bank of America being unsuccessful, in that if the district court had concluded Bank of America's deed of trust was extinguished by the foreclosure sale, appellant's claims against respondents would have been rendered moot. Thus, requiring

appellant to assert its claims against respondents in Case I would run counter the purpose of claim preclusion. *See Alcantara,* 130 Nev. at 257, 321 P.3d at 915 (providing that claim preclusion "is designed to preserve scarce judicial resources and to prevent vexation and undue expense to parties"). Accordingly, because appellant had a "good reason" not to assert cross-claims against respondents in Case I, we conclude that its claims are not barred by nonmutual claim preclusion. *Weddell,* 131 Nev. at 241, 350 P.3d at 85. *Id* at *4-5.

In the instant matter, claims by the HOA were contingent upon the outcome of the first suit. If the first suit for damages was successful, then the determination of lateral support is unnecessary. The ultimate issue between the parties is fixing the wall and relative liability if the wall collapses. These are very different issues being sought in the instant declaratory relief action as opposed to the cause of the wall failure. To suggest that these issues are one in the same, or are any way related is irrational.

The Respondents may argue that the presentation of the proposed jury instruction in the first case somehow indicates that such issue was adjudicated on the merits. (APP046). The record from the trial court is devoid of any detail analysis as to why the jury instruction was rejected in the first place. Second, the

jury instruction was simply presented by the HOA to the jury so as not to confuse them, and ensure that a verdict was not based upon who was responsible for support of the wall, but was simply based upon causation for the walls collapse and failure. (APP008). The proposed instruction was simply informative and to ensure that the jury did not take action, or make a decision which was not commensurate with the evidence, the law presented, and the actual dispute between the parties that the jury was asked to resolve factually. (APP007).

If the parties cannot determine their relative rights and responsibilities through declaratory relief, then the issues related to the repair and ultimate liability for the wall will never be determined despite the existence of an ongoing controversy and conflict

The subject wall is presently collapsing, and is in desperate need of repair. The repair itself may be complex and extremely costly. There are potential liability issues with the repair of the wall and harm that could occur based on its complexities. For this reason, the HOA was seeking determinations of relative responsibilities and potential liabilities. Should the wall be repaired, and some harm to the backyard of the Raridans occur in the process, who is ultimately responsible? It is the HOA's contention that the law is clear that lateral support is not owed to the Raridans and if any harm occurs to their backyard, it is not the responsibility of the HOA. However, at present, this determination cannot be

made. Furthermore, despite the fact the law appears clear on the issue of the requirements not to require lateral support for adjacent homeowners, the homeowners of the HOA themselves would still, and unfairly, bear the burden of paying for the entire wall repair, and or assuming associated liabilities, despite the fact the law clearly does not dictate such exposure is required. *Carlson,* 90 Nev. at 1178.

The facts of the instant matter clearly demonstrate why declaratory relief is an exception to claim preclusion, and in this instance, should be permitted to proceed forward for appropriate judicial determinations. The Raridans are attempting to inappropriately utilize the legal doctrine of claim preclusion to avoid responsibility under the law. You would think the Raridans would embrace a judicial determination. However, despite such a determination never being made, the Respondents are content to allow claim preclusion to force the parties to maintain the status quo, or to require the homeowners association to carry liabilities and monetary burdens for repair of the wall, that under the law, do not exist.

For example, the Raridans are taking the position that if, or when the wall is repaired, should any harm occur to their backyard, it would be the responsibility of

the association to repair.[3](APP049). However, there is no legal authority for such position, and should such harm occur, the relative responsibilities have never been judicially determined and remain unclear. Literally, the Raridans are asking the court to bar the association from protecting itself, while at the same time preserving possible claims against the association, should the wall repair not support their adjacent land. Should a subsequent suit by the Raridans for damages associated to the wall repair be deemed decided and barred by the doctrine of claim preclusion? Will they argue in the future hypothetical case that the HOA is responsible based upon the courts failure to make the ultimate determination? While the legal issues associated with lateral support requirements have never been adjudicated or presented to a court, the Raridans may attempt to utilize it as a sword in forcing liability to the association where none has ever been determined, or by law, should never exist. Rationally, we should want the parties to clarify the issues and obligations now, before potential damages or conflict/disputes arise. Judicial economy is not favored in this instance.

[3] The respondents argued in their motion to dismiss, "If Plaintiff removes its retaining walls and subsidence occurs on the Raridans' property, Plaintiff may well be liable to the Raridans for damages. Plaintiff should plan accordingly. . . . . In such a case, claim preclusion would not apply to a complaint by the Raridans against Plaintiff for the obvious reason that removal of lateral support by Plaintiff would be a new fact not present in Case #1 and would justify litigation by the Raridans against Plaintiff. (APP049).

III. CONCLUSION

Based upon the foregoing authorities and arguments, the Rock Springs II Homeowners Association respectfully requests this court allow for a determination on the merits of the declaratory relief action so as to ensure the parties rights, obligations, and possible liabilities are efficiently and appropriately adjudicated to inure to the benefit of all parties.

Dated this 20th day of May 2019.

Boyack Orme & Anthony

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14- point font size.

I FURTHER CERTIFY that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) as modified by this Court's order because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C) it is proportionally spaced, has a typeface of 14-points or more and contains 6,646 words pursuant to MS Word word-count, which is less than the 37,000 permitted under this Rule.

FINALLY, I CERTIFY that I have read this OPENING BRIEF, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 20th day of May 2019.

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CERTIFICATE OF SERVICE

I do hereby certify that on the 20th day of May 2019 a true and correct copy of the foregoing Rock Springs Mesquite II Owners' Association Opening Brief as served via the Nevada State Supreme Court Clerk electronic filing and service system.

/s/ Norma Ramirez
An Employee of Boyack Orme & Anthony