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 Aug 15 2019 04:44 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 APPENDIX VOLUME I

EDWARD D. BOYACK, ESQ.
Nevada Bar No. 5229
Email: ted@boyacklaw.com
BOYACK ORME & ANTHONY
7432 W. SAHARA AVE., STE. 101
LAS VEGAS, NEVADA 89117
Telephone: (702) 562-3415
Facsimile: (702) 562-3570

Attorneys for Rock Springs Mesquite II Owners' Association.

Docket 77085 Document 2019-34447

CERTIFICATE OF SERVICE

I do hereby certify that on the 15th day of August, 2019 a true and correct copy of the foregoing Rock Springs Mesquite II Owners' Association Appendix Volume I was served via the Nevada State Supreme Court Clerk electronic filing and service system.

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

INDEX TO APPENDIX

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CLERK OF THE COURT

COMP
Edward D. Boyack
Nevada Bar No. 005229
BOYACK & BECK
401 N. Buffalo Drive #202
Las Vegas, Nevada 89145
ted@edblaw.net
702.562.3415
702.562.3570 (fax)

Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

ROCK SPRINGS MESQUITE 2 OWNERS' ASSOCIATION, a Nevada domestic non-profit corporation, Plaintiff, vs. FLOYD E. OLSEN and GAYLE G. OLSEN, husband and wife, and DOES I through X, inclusive, Defendants.	CASE NO. DEPT. A-11-640682-C XXI X

COMPLAINT

Plaintiff Rock Springs Mesquite 2 Owners' Association, by and through its attorneys, Boyack & Beck, hereby complains and alleges as follows:

GENERAL ALLEGATIONS

1. At all times relevant herein, Plaintiff is and was domestic non-profit corporation organized and existing under the laws of the State of Nevada and is and was doing business as a homeowners' association located in Mesquite, Clark County, Nevada.

2. At all times relevant herein, Defendant Floyd E. Olsen is and was a resident of Clark County, Nevada.

3. At all times relevant herein, Defendant Gayle G. Olsen is and was a resident of Clark County, Nevada.

4. That the true names or capacities, whether individual, corporate, associate or otherwise, of the Defendants named herein as DOES I through X, inclusive, are unknown to the Plaintiff, who therefore sues said Defendants by such fictitious names. Plaintiff is informed and believes and therefore alleges that each of the Defendants designated herein as DOE is legally responsible in some manner for the events and happenings herein referred to and caused damages proximately to Plaintiff as herein alleged, and Plaintiff will ask leave of the Court to amend the Complaint to insert the true names and capacities of DOES I through X, inclusive, when the same have been ascertained, and to join such Defendants in the action.

5. That in or before September, 2010, Defendants caused a wall to be erected in their rear yard.

6. Defendants' wall abuts the association property owned by Plaintiff.

7. Defendants' wall is in very close proximity to the retaining wall on Plaintiff's property.

8. Due to earth movement or other factors, Defendant's wall is moving towards and causing damage to the retaining wall on Plaintiff's property.

9. The expense to repair the damage done to Plaintiff's wall is approximately Ninety-four Thousand Dollars ($94,000.00).

10. Despite requests to remedy the situation, Defendants have not made any attempt to do so and the damage to Plaintiff's wall continues.

FIRST CLAIM FOR RELIEF

(Trespass)

11. Plaintiff repeats and realleges each and every allegation set forth above as though fully set forth herein.

12. That in or before September, 2010, Defendants caused a retaining wall to be constructed on their property located at 558 Los Altos Circle, Mesquite Nevada.

13. That the retaining wall abutted Plaintiffs' property located at Mesquite Springs Drive, Mesquite, Nevada.

14. That Plaintiffs were, at the time of the trespass, in possession of a retaining wall between Plaintiffs' and Defendants' property.

15. That Defendants made an unauthorized and unlawful entry onto Plaintiffs' land by the movement of their wall into Plaintiff's wall.

16. That Plaintiffs were damaged by the alleged invasion of their rights of possession.

17. That Defendants continue to trespass on Plaintiff's property caused by the movement of the Defendants' wall onto the Plaintiff's property, have refused to correct the trespass and continue to unlawfully trespass upon Plaintiff's property, infringing on Plaintiff's use and enjoyment of its property.

18. That as a result of the trespass, Plaintiff has been denied the quiet use and enjoyment of its property and have had to endure the existence of an encroaching and disintegrating wall on their property;

19. That as a result of the actions of Defendant, Plaintiff has been damaged in an amount in excess of $10,000;

20. That Plaintiff is entitled to have the offending wall removed from its property.

21. It has been necessary for Plaintiff to secure the services of an attorney to prosecute this action and Plaintiff is therefore entitled to an award of reasonable attorney's fees and costs of suit incurred herein.

SECOND CLAIM FOR RELIEF

(Nuisance)

22. Plaintiff repeats and realleges each and every allegation set forth above as though fully set forth herein.

23. That in or before September, 2010, Defendants caused a retaining wall to be constructed on their property located at 558 Los Altos Circle, Mesquite Nevada.

24. That the construction of the wall unlawfully crossed into the property of Plaintiff.

23. That the construction of the wall is an obnoxious use of the property and an unlawful and unauthorized use of Plaintiff's property by Defendants, and further constitutes a nuisance, for which the Court has the right to order abatement.

24. That despite being aware of the unlawful taking of Plaintiff's property and the existence of the nuisance, Defendants have refused to abate the nuisance, and Plaintiff is entitled to an order requiring Defendant to remove the wall and for an award of attorney's fees and costs

THIRD CLAIM FOR RELIEF

(Encroachment)

25. Plaintiff repeats and realleges each and every allegation set forth above as though fully set forth herein.

26. That Defendants, through the erection of a retaining wall on the real portion of their property, invaded Plaintiffs' property, thereby encroaching onto Plaintiff's land and claiming it as their own.

27. That Defendants had no right to the use of Plaintiff's land.

28. That Defendants' actions have constituted an unlawful encroachment upon Plaintiff's land, interfering with Plaintiff's quiet use and enjoyment of its property

29. That Defendants have paid no rents or other monies to Plaintiff for the use of Plaintiff's property.

30. That, as a direct and proximate result of Defendants' actions, Plaintiff has been damaged in an amount in excess of $10,000.

31. That Plaintiff is entitled to an order requiring Defendants to cease the encroachment and remove the encroaching materials, to wit, the retaining wall.

32. It has been necessary for Plaintiff to secure the services of an attorney to prosecute this action and Plaintiff is therefore entitled to an award of reasonable attorney's fees and costs of suit incurred herein.

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FOURTH CLAIM FOR RELIEF

(Negligence)

38. Plaintiff repeats and realleges each and every allegation set forth above as though fully set forth herein.

39. That at all times relevant herein, Defendants, as the owners of the real property situated next to Plaintiff's property, owed to Plaintiff a duty not to interfere with Plaintiff's quiet use and enjoyment of Plaintiffs property;

40. That at all times relevant herein, Defendants, as the owner of the real property situated next to Plaintiff, owed to Plaintiff a duty not cause damage to Plaintiff's property

41. That as a direct and proximate result of Defendants' action in having a retaining wall constructed, Defendants have breached their duty of care to Plaintiff by having the wall encroach and trespass upon the property of Plaintiff, by denying Plaintiff the ability to fully utilize and develop its land.

42. As a direct and proximate result of Defendants' conduct, Plaintiff has suffered damages in excess of $10,000;

43. It has been necessary for Plaintiff to secure the services of an attorney to prosecute this action and Plaintiff is therefore entitled to an award of reasonable attorney's fees and costs of suit incurred herein.

WHEREFORE, Plaintiffs pray as follows:

1. That this Court enter judgment against Defendant for damages in an amount in excess of $10,000, which shall be proven at trial;
2. For special damages according to proof;
3. For an order compelling Defendants to abate the nuisance and correct the encroachment upon Plaintiffs' property;
4. For an order directing Defendants to cease trespassing upon Plaintiff's property and to remove all items, including the retaining wall, which are trespassing upon Plaintiff's property;

5. For reasonable attorney's fees and costs of suit incurred; and

6. For such other and further relief as this Court may deem just and proper.

DATED this 5 day of May, 2011.

BOYACK & BECK

By: _____

EDWARD D. BOYACK
Nevada Bar No. 005229
401 N. Buffalo Drive #202
Las Vegas, Nevada 89145
Attorney for Plaintiff

INSTRUCTION NO.: _____

LATERAL SUPPORT

Plaintiff is under no duty or obligation to provide lateral support for Defendants' wall or property to counteract the force resulting from Defendants' actions.

SOURCE/AUTHORITY

Carlson v. Zivot, 90 Nev. 361, 526 P.2d 1177 (1974)

ORIGINAL

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CLERK OF THE COURT

JDJV
GINA GILBERT WINSPEAR, ESQ.
Nevada Bar No. 005552
MATTHEW A. SARNOSKI, ESQ.
Nevada Bar No. 009176
DENNETT WINSPEAR, LLP
3301 N. Buffalo Drive, Suite 195
Las Vegas, Nevada 89129
Telephone: (702) 839-1100
Facsimile: (702) 839-1113
ATTORNEYS FOR DEFENDANTS
FLOYD E. OLSEN AND GAYLE G. OLSEN

DISTRICT COURT

CLARK COUNTY, NEVADA

ROCK SPRINGS MESQUITE 2 OWNERS' ASSOCIATION, a Nevada domestic non-Profit corporation,

Plaintiff,

vs.

FLOYD E. OLSEN and GAYLE G. OLSEN, husband and wife, and DOES I through X, inclusive,

Defendants.

Case No: A-11-640682-C

Dept. No.: 1

JUDGMENT UPON JURY VERDICT

WHEREAS, the above-entitled matter having come on for trial on the 28th day of May, 2013, before the Court and a Jury, Honorable Kenneth C. Cory, Judge presiding, and having been concluded and submitted to the Jury thereafter, Edward D. Boyack, Esq. appearing as counsel for Plaintiff, and Matthew A. Sarnoski, Esq. appearing as counsel for the Defendants, and the Jury having heard and considered the testimony, evidence, proof and arguments offered by the respective parties and the cause then having submitted to the Jury for decision, the Jury being fully advised in the premises; and having duly rendered its verdict in favor of the Defendants above named, and against the Plaintiff, above named.

DENNETT WINSPEAR ATTORNEYS AT LAW

NOW, THEREFORE, the Court being fully advised in the premises,

IT IS HERBY ORDERED AND ADJUDGED that Judgment is entered in favor of the Defendants and Plaintiff recovers nothing by way of its Complaint on file herein.

IT IS FURTHER ORDERED AND ADJUDGED that Defendants may pursue recovery of reasonable fees and costs incurred in this action, pursuant to the applicable statutes and upon proper motion and hearing before the Court.

IT IS SO ORDERED.

DATED this 11 day of Sept, 2013.

DISTRICT COURT JUDGE

Submitted and approved by:

DENNETT WINSPEAR, LLP

BY _____

GINA GILBERT WINSPEAR, ESQ.
Nevada Bar No. 005552
MATTHEW A. SARNOSKI, ESQ.
Nevada Bar No. 009176
3301 N. Buffalo Drive, Suite 195
Las Vegas, Nevada 89129
Telephone: (702) 839-1100
Facsimile: (702) 839-1113
ATTORNEYS FOR DEFENDANTS, FLOYD E. OLSEN and GAYLE G. OLSEN

BOYACK BECK & TAYLOR

By _____

EDWARD D. BOYACK, ESQ.
Nevada Bar No. 005229
401 N. Buffalo Drive, Suite 202
Las Vegas, Nevada 89145
Telephone: (702) 562-3415
Facsimile: (702) 562-3570

DENNETT WINSPEAR ATTORNEYS AT LAW

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CLERK OF THE COURT

NEO
GINA GILBERT WINSPEAR, ESQ.
Nevada Bar No. 005552
MATTHEW A. SARNOSKI, ESQ.
Nevada Bar No. 009176
DENNETT WINSPEAR, LLP
3301 N. Buffalo Drive, Suite 195
Las Vegas, Nevada 89129
Telephone: (702) 839-1100
Facsimile: (702) 839-1113
ATTORNEYS FOR DEFENDANTS
FLOYD E. OLSEN AND GAYLE G. OLSEN

DISTRICT COURT

CLARK COUNTY, NEVADA

ROCK SPRINGS MESQUITE 2 OWNERS' ASSOCIATION, a Nevada domestic non-Profit corporation,

Plaintiff,

vs.

FLOYD E. OLSEN and GAYLE G. OLSEN, husband and wife, and DOES I through X, inclusive,

Defendants.

Case No: A-11-640682-C

Dept. No.: 1

DENNETT WINSPEAR
ATTORNEYS AT LAW

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that on the 27th day of March, 2014, an Order was entered granting Defendants Floyd E. Olsen and Gayle G. Olsen's Renewed Motion for Award of

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Attorneys Fees and Costs, a copy of which is attached hereto and served upon you herewith.

DATED this 2 day of April, 2014.

DENNETT WINSPEAR, LLP

By _____
GINA GILBERT WINSPEAR, ESQ.
Nevada Bar No. 005552
MATTHEW A. SARNOSKI, ESQ.
Nevada Bar No. 009176
3301 N. Buffalo Drive, Suite 195
Las Vegas, Nevada 89129
Telephone: (702) 839-1100
Facsimile: (702) 839-1113
ATTORNEYS FOR DEFENDANTS
FLOYD E. OLSEN AND GAYLE G. OLSEN

DENNETT WINSPEAR ATTORNEYS AT LAW

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and EDCR 7.26, I certify that on this date, I served the foregoing NOTICE OF ENTRY OF ORDER on all parties to this action by:

✓ Facsimile

✓ Mail

Edward D. Boyack
Boyack & Beck
401 N. Buffalo Drive, Suite 202
Las Vegas, NV 89145

FAX: **(702) 562-3570**
ted@edblaw.net
Attorney for Plaintiff

DATED this 2nd day of April, 2014.

An Employee of DENNETT WINSPEAR, LLP

DENNETT WINSPEAR ATTORNEYS AT LAW

Mar. 18. 2014 9:48AM

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ORIGINAL

DISTRICT COURT

CLARK COUNTY, NEVADA

CLERK OF THE COURT

ROCK SPRINGS MESQUITE 2 OWNERS' ASSOCIATION, a Nevada domestic non-Profit corporation,

Plaintiff,

vs.

FLOYD E. OLSEN and GAYLE G. OLSEN, husband and wife, and DOES I through X, inclusive,

Defendants.

Case No: A-11-640682-C

Dept. No.: 1

Date: January 13, 2014

Time: In Chambers

ORDER GRANTING DEFENDANTS' MOTION FOR ATTORNEY'S FEES AND COSTS

THIS MATTER, having come before the Court on Defendants' Motion for Attorney Fees and Costs, the Court having reviewed the Motions, Oppositions, all other relevant pleadings, papers, and exhibits on file, being fully advised, having reviewed and applied the factors outlined in *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268, and in *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 455 P.2d 31, and good cause appearing

DEFENDANTS' MOTION FOR ATTORNEYS FEES IS GRANTED. The Court awards to Defendants FLOYD OLSEN and GAYLE OLSEN recovery from Plaintiff of their reasonable attorney fees in this action, which reasonable fees the Court determines to be $22,480.00. Further,

DEFENDANTS' MOTION FOR COSTS IS GRANTED. The Court Awards to Defendants FLOYD OLSEN and GAYLE OLSEN recovery from Plaintiff of their taxable costs in this action, which taxable costs the Court determines to be $9,757.34.

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DENNETT WINSPEAR ATTORNEYS AT LAW

WHEREFORE, based on the foregoing, Defendants herein are awarded attorney's fees in the amount of $22,480.00, and costs in the amount of $9,757.34, for a total award in favor of Defendants and against Plaintiff of $32,237.34.

Dated and done this 26 day of March, 2014.

DISTRICT COURT JUDGE

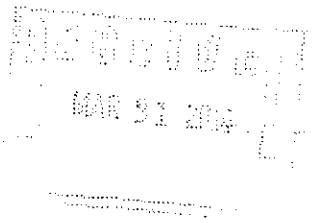
Prepared by:
DENNETT WINSPEAR, LLP

By
GINA GILBERT WINSPEAR, ESQ.
Nevada Bar No. 005552
MATTHEW A. SARNOSKI, ESQ.
Nevada Bar No. 009176
3301 N. Buffalo Drive, Suite 195
Las Vegas, Nevada 89129
Telephone: (702) 839-1100
Facsimile: (702) 839-1113
ATTORNEYS FOR DEFENDANTS
FLOYD E. OLSEN AND GAYLE G. OLSEN

Approved as to form and Content:
BOYACK, BECK & TAYLOR

By:
TED BOYACK, ESQ.
COLBY BECK, ESQ.
ATTORNEYS FOR PLAINTIFF

DENNETT WINSPEAR ATTORNEYS AT LAW



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CLERK OF THE COURT

NEOJ
GINA GILBERT WINSPEAR, ESQ.
Nevada Bar No. 005552
MATTHEW A. SARNOSKI, ESQ.
Nevada Bar No. 009176
DENNETT WINSPEAR, LLP
3301 N. Buffalo Drive, Suite 195
Las Vegas, Nevada 89129
Telephone: (702) 839-1100
Facsimile: (702) 839-1113
ATTORNEYS FOR DEFENDANTS
FLOYD E. OLSEN AND GAYLE G. OLSEN

DISTRICT COURT

CLARK COUNTY, NEVADA

ROCK SPRINGS MESQUITE 2 OWNERS' ASSOCIATION, a Nevada domestic non-Profit corporation,

Plaintiff,

vs.

FLOYD E. OLSEN and GAYLE G. OLSEN, husband and wife, and DOES I through X, inclusive,

Defendants.

Case No: A-11-640682-C

Dept. No.: 1

NOTICE OF ENTRY OF JUDGMENT

PLEASE TAKE NOTICE that on the 25th day of September, 2014, Judgment was entered in favor of Defendants Floyd E. Olsen and Gayle G. Olsen and against Plaintiff, in the above-captioned matter, a copy of which is attached hereto and served upon you herewith.

DATED: this 29th day of September, 2014.

DENNETT WINSPEAR, LLP

By /s/ Matthew A. Sarnoski, Esq.
GINA GILBERT WINSPEAR, ESQ.
Nevada Bar No. 005552
MATTHEW A. SARNOSKI, ESQ.
Nevada Bar No. 009176
3301 N. Buffalo Drive, Suite 195
Las Vegas, Nevada 89129
ATTORNEYS FOR DEFENDANTS
FLOYD E. OLSEN AND GAYLE G. OLSEN

DENNETT WINSPEAR ATTORNEYS AT LAW

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), EDCR 7.26 and N.E.F.C.R. 9, I certify that on this date, I served the foregoing **NOTICE OF ENTRY OF JUDGMENT**on all parties to this action by this Court's electronic service website, Wiznet, to the following parties to this action by:

_____X___ Facsimile

_____X___ Mail

_____ Electronic Service

Edward D. Boyack
Boyack & Beck
401 N. Buffalo Drive, Suite 202
Las Vegas, NV 89145

FAX: **(702) 562-3570**
ted@edblaw.net
Attorney for Plaintiff

DATED this 29th day of September, 2014.

An Employee of DENNETT WINSPEAR, LLP

DENNETT WINSPEAR ATTORNEYS AT LAW

ORIGINAL

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CLERK OF THE COURT

JDG
GINA GILBERT WINSPEAR, ESQ.
Nevada Bar No. 005552
MATTHEW A. SARNOSKI, ESQ.
Nevada Bar No. 009176
DENNETT WINSPEAR, LLP
3301 N. Buffalo Drive, Suite 195
Las Vegas, Nevada 89129
Telephone: (702) 839-1100
Facsimile: (702) 839-1113
ATTORNEYS FOR DEFENDANTS
FLOYD E. OLSEN AND GAYLE G. OLSEN

DISTRICT COURT

CLARK COUNTY, NEVADA

ROCK SPRINGS MESQUITE 2 OWNERS' ASSOCIATION, a Nevada domestic non-Profit corporation,

Plaintiff,

vs.

FLOYD E. OLSEN and GAYLE G. OLSEN, husband and wife, and DOES I through X, inclusive,

Defendants.

Case No: A-11-640582-C

Dept. No.: 1

JUDGMENT

WHEREAS, the above-entitled matter having come on for hearing on the 13th day of January, 2014, before the Court, the Honorable Kenneth Cory, Judge presiding, IN CHAMBERS, TED BOYACK, ESQ. of the law firm of BOYACK, BECK & TAYLOR, counsel for Plaintiff, and MATTHEW ALLEN SARNOSKI, ESQ. of the law firm of DENNETT WINSPEAR, LLP, counsel for the Defendants, and the Court having heard and considered the testimony, evidence, and proof and arguments offered by the respective parties with respect to Defendants' Renewed Motion for Award of Attorney's Fees and Costs for decision, the Court having issued its Order Granting Defendants' Renewed Motion for Award of Attorney's Fees and Costs on January 13, 2014 against the Plaintiff, above named.

DENNETT WINSPEAR ATTORNEYS AT LAW

NOW THEREFORE, the Court being fully advised in the premises

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of Defendants FLOYD E. OLSEN and GAYLE G. OLSEN and against Plaintiff, in the amount of thirty two thousand, two hundred thirty seven dollars and thirty four cents ($32,237.34).

ENTERED: this 23 day of Sept, 2014

DISTRICT COURT JUDGE

Submitted and approved by:

DENNETT WINSPEAR, LLP

By
GINA GILBERT WINSPEAR, ESQ.
Nevada Bar No. 005552
MATTHEW ALLEN SARNOSKI, ESQ.
Nevada Bar No. 009176
3301 N. Buffalo Drive, Suite 195
Las Vegas, Nevada 89129
Telephone: (702) 839-1100
Facsimile: (702) 839-1113
ATTORNEYS FOR DEFENDANTS
FLOYD E. OLSEN AND GAYLE G. OLSEN

Reviewed and Approved as to Form and Content by:

BOYACK, BECK & TAYLOR

By: *Refused to Sign*
TED BOYACK, ESQ.
Nevada Bar No.
COLBY BECK, ESQ.
Nevada Bar No.
401 N. Buffalo Drive #202
Las Vegas, NV 89145
ATTORNEYS FOR PLAINTIFF, ROCK SPRINGS MESQUITE 2 OWNERS ASSOCIATION

DENNETT WINSPEAR LLP ATTORNEYS AT LAW

* * * Communication Result Report (Sep. 29. 2014 10:24AM) * * *

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Reason for error
E. 1) Hang up or line fail
E. 2) Busy
E. 3) No answer
E. 4) No facsimile connection
E. 5) Exceeded max. E-mail size

NEOJ
GINA GILBERT WINSPEAR, ESQ.
Nevada Bar No. 005552
MATTHEW A. SARNOSKI, ESQ.
Nevada Bar No. 009176
DENNETT WINSPEAR, LLP
3301 N. Buffalo Drive, Suite 195
Las Vegas, Nevada 89129
Telephone: (702) 839-1100
Facsimile: (702) 839-1113
ATTORNEYS FOR DEFENDANTS
FLOYD E. OLSEN AND GAYLE G. OLSEN

DISTRICT COURT

CLARK COUNTY, NEVADA

ROCK SPRINGS MESQUITE 2 OWNERS' ASSOCIATION, a Nevada domestic non-Profit corporation.

Plaintiff,

vs.

FLOYD E. OLSEN and GAYLE G. OLSEN, husband and wife, and DOES I through X, inclusive,

Defendants.

Case No: A-11-640682-C

Dept. No.: 1

NOTICE OF ENTRY OF JUDGMENT

DENNETT WINSPEAR ATTORNEYS AT LAW

PLEASE TAKE NOTICE that on the 25th day of September, 2014, Judgment was entered in favor of Defendants Floyd E. Olsen and Gayle G. Olsen and against Plaintiff, in the above-captioned matter, a copy of which is attached hereto and served upon you herewith.

DATED: this 29th day of September, 2014.

DENNETT WINSPEAR, LLP

By /s/ Matthew A. Sarnoski, Esq.
GINA GILBERT WINSPEAR, ESQ.
Nevada Bar No. 005552
MATTHEW A. SARNOSKI, ESQ.
Nevada Bar No. 009176
3301 N. Buffalo Drive, Suite 195
Las Vegas, Nevada 89129
ATTORNEYS FOR DEFENDANTS
FLOYD E. OLSEN AND GAYLE G. OLSEN

OCT 14 2013
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DATE
CLERK OF THE COURT

NOT
Edward D. Boyack
Nevada Bar No. 005229
BOYACK BECK & TAYLOR
401 N. Buffalo Drive #202
Las Vegas, Nevada 89145
ted@edblaw.net
702.562.3415
702.562.3570 (fax)
Attorney for Plaintiff

Electronically Filed
10/14/2013 03:58:13 PM
CLERK OF THE COURT

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

ROCK SPRINGS MESQUITE 2 OWNERS' ASSOCIATION, a Nevada domestic non-profit corporation, Plaintiff, vs. FLOYD E. OLSEN and GAYLE G. OLSEN, husband and wife, and DOES I through X, inclusive, Defendants.	CASE NO. A-11-640682-C DEPT. I

NOTICE OF APPEAL

Notice is hereby given that ROCK SPRINGS MESQUITE 2 OWNERS' ASSOCIATION, a Nevada domestic non-profit corporation, plaintiff above named, hereby appeals to the Supreme Court of Nevada from the final judgment entered in this action on the 13th Day of September, 2013; the order of the court restricting Plaintiff's voir dire of potential jurors; and the order of the court refusing to give Plaintiff's requested jury instruction on the duty of lateral support.

Dated this 10 day of October, 2013.

BOYACK BECK & TAYLOR

Edward D. Boyack
Nevada Bar No. 5229
401 N. Buffalo Drive #202
Las Vegas, Nevada 89145
Attorneys for Plaintiff

RECEIVED
OCT 14 2013
CLERK OF THE COURT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of October, 2013, I caused service of the foregoing **NOTICE OF APPEAL**, that was E-Filed on October 11, 2013, Via Facsimile, to the person and at the facsimile number shown below:

Matthew A. Sarnoski
DENNETT WINSPEAR, LLP
3301 N. Buffalo Drive #195
Las Vegas, Nevada 89129
Facsimile No. 839.1113

Mardell Collins
An Employee of Boyack Beck & Taylor

Edward D. Boyack
Nevada Bar No. 005229
BOYACK BECK & TAYLOR
401 N. Buffalo Drive #202
Las Vegas, Nevada 89145
ted@boyacklaw.com
702.562.3415
702.562.3570 (fax)

Attorney for Appellant

Electronically Filed
Dec 04 2014 01:57 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROCK SPRINGS MESQUITE 2 OWNERS' ASSOCIATION, a Nevada non-profit Corporation, Appellant, vs. FLOYD E. OLSEN and GAYLE G. OLSEN, Husband and Wife, Respondents.	CASE NO. 64227 District Court Case No. A640682

NOTICE OF WITHDRAWAL OF APPEAL

Rock Springs Mesquite 2 Owners' Association, appellant named above, hereby moves to voluntarily withdraw the appeal mentioned above.

I, Edward D. Boyack, as counsel for the appellant, explained and informed Rock Springs Mesquite 2 Owners' Association of the legal effects and consequences of this voluntary withdrawal of this appeal, including that Rock Springs Mesquite 2 Owners' Association cannot hereafter seek to reinstate this appeal and that any issues that were or could have been brought in this appeal are forever waived. Having been so informed, Rock Springs Mesquite 2 Owners' Association hereby consents to a voluntary dismissal of the above-mentioned appeal.

VERIFICATION

I recognize that pursuant to N.R.A.P. 3C I am responsible for filing a notice of withdrawal of appeal and that the Supreme Court of Nevada may sanction an attorney for failing

Docket 64227 Document 2014-39510

to file such a notice. I therefore certify that the information provided in this notice of withdrawal of appeal is true and complete to the best of my knowledge, information and belief.

DATED this _____ day of December, 2014.

BOYACK BECK & TAYLOR

EDWARD D. BOYACK, ESQ.
Nevada Bar Number 5229
401 N. Buffalo Drive Suite 202
Las Vegas, Nevada 89145
(702) 562-3415
Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that on the 4th day of December, 2014, I served a copy of the foregoing **NOTICE OF WITHDRAWAL OF APPEAL** upon all counsel of record:

via electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk;

Gina Winspear
DENNETT WINSPEAR, LLP
3301 N. Buffalo Drive #195
Las Vegas, Nevada 89129

by mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

Matthew A. Sarnoski
DENNETT WINSPEAR, LLP
3301 N. Buffalo Drive #195
Las Vegas, Nevada 89129

DATED this 4th day of December, 2014.

Marcia Wright
Signature

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROCK SPRINGS MESQUITE 2 OWNERS' ASSOCIATION, A NEVADA DOMESTIC NON-PROFIT CORPORATION,
Appellant,
vs.
FLOYD E. OLSEN; AND GAYLE G. OLSEN, HUSBAND AND WIFE,
Respondents.

No. 64227

FILED

DEC 1 1 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DISMISSING APPEAL

Cause appearing, appellant's motion for a voluntary dismissal of this appeal is granted. This appeal is dismissed. NRAP 42(b).

It is so ORDERED.

CLERK OF THE SUPREME COURT
TRACIE K. LINDEMAN
BY: Matt Pinkerton

cc: Hon. Kenneth C. Cory, District Judge
Boyack & Taylor
Dennett Winspear, LLP
Eighth District Court Clerk

Inst #: 20160527-0003792
Fees: $19.00 N/C Fee: $0.00
RPTT: $1632.00 Ex: #
05/27/2016 03:33:06 PM
Receipt #: 2777646
Requestor:
NATIONAL TITLE COMPANY
Recorded By: RYUD Pgs: 4
DEBBIE CONWAY
CLARK COUNTY RECORDER

APN: 001-09-512-003
Escrow No: 20162135-004-SB1
R.P.T.T: $1,632.00

Recording Requested By: National Title Co.
Mail Tax Statements To: *Same as below*
When Recorded Mail To:
STEPHEN J RARIDAN AND JUDITH A RARIDAN
558 LOS ALTOS CIR
MESQUITE, NV 89027

GRANT, BARGAIN, SALE DEED

ASSESSOR'S COPY

THIS INDENTURE WITHESSETH: That for valuable consideration, the receipt of which is hereby acknowledged, Floyd E Olsen and Gayle G Olsen, husband and wife as joint tenants does hereby Grant, Bargain, Sell and Convey to Stephen J Raridan and Judith A Raridan, husband and wife as joint tenants

all that real property situated in the County of Clark, State of Nevada, described as follows:

For Legal Description, See Attached Exhibit "A", attached hereto and made a part hereof.

SUBJECT TO:
1. Taxes for fiscal year;
2. Reservations, restrictions, conditions, rights, rights of way and easements, if any of record on said premises.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and any reversions, remainders, rents, issues or profits thereof.

See page 2 for signature of Grantor(s) and Notary Acknowledgment

Escrow No. 20162135-004-SB1
Grant, Bargain, Sale Deed...Continued

Floyd E Olsen

Floyd E Olsen

Gayle G. Olsen

Gayle G Olsen

NOTARY ACKNOWLEDGEMENT(S) TO GRANT, BARGAIN, SALE DEED

State of Nevada }ss
County of Clark

This instrument was acknowledged before me on this 5th day of April, 2016

by Floyd E. Olsen and Gayle G. Olsen

(Seal)

Raschelle Muirbrook
Signature of Notarial Officer

My commission expires: 11.5.17

RASCHELLE MUIRBROOK
Notary Public State of Nevada
No. 09-11664-1
My Appt. Exp. Nov. 5, 2017

ASSESSOR'S COPY

Escrow No. 20162135-004-SB1

EXHIBIT "A"
Legal Description

Lot Fifty (50) of SANTA FE VISTAS SUBDIVISION PHASE II, as shown by map thereof on file in Book 58 of Plats, Page 25, and by that Certificate of Amendment recorded September 22, 1994 in Book 940922 as Document No. 01003 in the Office of the County Recorder of Clark County, Nevada.

ASSESSOR'S COPY

STATE OF NEVADA
DECLARATION OF VALUE FORM

1. **Assessor Parcel Number(s)**
   a) 001-09-512-003
   b) _____
   c) _____
   d) _____

2. **Type of Property:**
   a) ☐ Vacant Land b) ✓ Single Fam. Res.
   c) ☐ Condo/Twnhse d) ☐ 2-4 Plex
   e) ☐ Apt. Bldg f) ☐ Comm'l/Ind'l
   g) ☐ Agricultural h) ☐ Mobile Home
   i) ☐ Other _____

FOR RECORDERS OPTIONAL USE ONLY
Book _____ Page _____
Date of Recording: _____
Notes:

3. **Total Value/Sales Price of Property:** $320,000.00
   Deed in Lieu of Foreclosure Only (value of property) $_____
   Transfer Tax Value $320,000.00
   Real Property Transfer Tax Due: $ 1632.00

4. **If Exemption Claimed**
   a. Transfer Tax Exemption, per NRS 375.090, Section _____
   b. Explain Reason for Exemption: _____

5. Partial Interest: Percentage being transferred: _____%

The undersigned declares and acknowledges, under penalty of perjury, pursuant to NRS 375.060 and NRS 375.110, that the information provided is correct to the best of their information and belief, and can be supported by documentation if called upon to substantiate the information provided herein. Furthermore, the parties agree that disallowance of any claimed exemption, or other determination of additional tax due, may result in a penalty of 10% of the tax due plus interest at 1% per month. Pursuant to NRS 375.030, the Buyer and Seller shall be jointly and severally liable for any additional amount owed.

Signature Floyd E Olsen Capacity: Grantor

Signature _____ Capacity: Grantee

(GRANTOR) INFORMATION (REQUIRED)	(GRANTEE) INFORMATION (REQUIRED)
Print Name: Floyd E Olsen, Gayle G Olsen	Print Name: Stephen J Raridan, Judith A Raridan
Address: 558 Los altos Mesquite NV 89027	Address: 558 Los altos Cr Mesquite NV 89027

COMPANY/PERSON REQUESTING RECORDING (Required if not the Seller or Buyer)

Print Name: National Title Co./Stacey Bixler Escrow #.: 20162135-SB1
Address: 840 Pinnacle Court, Bldg. 7, Suite B, Mesquite, NV 89027
City, State, ZIP Code

AS A PUBLIC RECORD THIS FORM MAY BE RECORDED/MICROFILMED

SFRM0071 (DSI Rev. 05/14/14)

ASSESSOR'S COPY

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4/6/2018 10:15 AM
Steven D. Grierson
CLERK OF THE COURT

COMP
Edward D. Boyack, Esq.
Nevada Bar No. 5229
Christopher B. Anthony, Esq.
Nevada Bar No. 9748
BOYACK ORME & ANTHONY
7432 W. Sahara Ave.
Las Vegas, Nevada 89117
ted@boyacklaw.com
canthony@boyacklaw.com
702.562.3415
702.562.3570 (fax)

Attorneys for Plaintiff

EIGHT JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

ROCK SPRINGS MESQUITE 2 OWNERS' ASSOCIATION, a Nevada domestic non-profit corporation, Plaintiff, vs. STEPHEN J. RARIDAN and JUDITH A. RARIDAN, husband and wife, and DOES I through X, inclusive, Defendants.	CASE NO. A-18-772425-C DEPT. Department 16 **COMPLAINT** **Exempt from Arbitration:** Seeking Declaratory Relief

COMPLAINT

Plaintiff Rock Springs Mesquite 2 Owners' Association, by and through its attorneys, Boyack Orme & Anthony, hereby complains and alleges as follows:

GENERAL ALLEGATIONS

1. At all times relevant herein, Plaintiff is and was domestic non-profit corporation organized and existing under the laws of the State of Nevada and is and was doing business as a homeowners' association located in Mesquite, Clark County, Nevada.

2. At all times relevant herein, Defendant Stephen J. Raridan is and was a resident of Clark County, Nevada.

. . . .

Case Number: A-18-772425-C

3. At all times relevant herein, Defendant Judith A. Raridan is and was a resident of Clark County, Nevada.

4. That the true names or capacities, whether individual, corporate, associate or otherwise, of the Defendants named herein as DOES I through X, inclusive, are unknown to the Plaintiff, who therefore sues said Defendants by such fictitious names. Plaintiff is informed and believes and therefore alleges that each of the Defendants designated herein as DOE is legally responsible in some manner for the events and happenings herein referred to and caused damages proximately to Plaintiff as herein alleged, and Plaintiff will ask leave of the Court to amend the Complaint to insert the true names and capacities of DOES I through X, inclusive, when the same have been ascertained, and to join such Defendants in the action.

5. On May 5, 1997, Floyd E. Olsen and Gayle G. Olsen purchased the real property located at 558 Los Altos Circle, Mesquite. Nevada (hereinafter the "Property").

6. In or before September, 2010, Floyd E. Olsen and Gayle G. Olsen caused a wall to be erected in the rear yard of their property located at the Property (hereinafter the "Wall").

7. The Wall abuts the association property owned by Plaintiff.

8. The Wall is in very close proximity to the retaining wall on Plaintiff's property.

10. Due to earth movement or other factors, the Wall is moving towards and causing damage to the retaining wall on Plaintiff's property.

11. On May 5, 2011, Plaintiff filed a Complaint against Floyd E. Olsen and Gayle G. Olsen in the Eighth Judicial District Court of Clark County, Nevada, Case No. A-11-640682-C, seeking damages arising out of the above-referenced Wall movement.

12. On September 13, 2013, the Eighth Judicial District Court granted judgment in favor of Floyd E. Olsen and Gayle G. Olsen with respect to Case No. A-11-640682-C.

12. On or about May 27, 2016, Defendants purchased the Property, inclusive of the above-referenced Wall, from Floyd E. Olsen and Gayle G. Olsen.

11. Defendants' Wall continues to encroach upon Plaintiff's perimeter wall, causing Plaintiff to incur costs to maintain the structure of the wall and mitigate the both potential and existing safety hazards.

12. Plaintiff has no duty to maintain the integrity of Defendants' Wall.

13. If Plaintiff removes its perimeter wall, it is possible that Defendants' Wall will collapse.

14. Plaintiff seeks a declaration from this Court stating that Plaintiff has no duty to maintain Defendants' Wall, and that Plaintiff may remove the portion of Plaintiff's wall which may be preventing Defendants' Wall from collapsing.

FIRST CAUSE OF ACTION

(Declaratory Relief)

15. Plaintiff repeats and re-alleges the preceding paragraphs as though fully set forth herein and incorporates same by reference.

16. Pursuant to NRS 30.010 *et seq*., this Court has the power and authority to declare Plaintiff's rights with respect to its ability to remove its own wall.

17. Upon information and belief, Defendants refuse to repair, maintain or otherwise remedy the current condition of their Wall such that it will not impact Plaintiff's perimeter wall or continue to pose a safety hazard. Further upon information and belief, Defendants maintain that Plaintiff has an obligation to continue to support Defendants' Wall.

18. Plaintiff asserts that it has no obligation to support Defendants' Wall.

19. In light of the allegations herein, a justiciable controversy exists between Plaintiff and Defendants.

20. Further in light of the allegations herein, Plaintiff and Defendants have adverse interests in the maintenance of Defendants' Wall.

21. Further, because Plaintiff seeks a declaration of its rights as it pertains to its own wall, wholly owned by Plaintiff, Plaintiff has a legally protectible interest in the fate of its perimeter wall.

22. Because Plaintiff is currently maintaining its perimeter wall and, by proximity, the Defendants' Wall, Plaintiff is currently undergoing harm in the form of unnecessary wall maintenance. Further, because Defendants' Wall poses a safety concern, Plaintiff is in imminent danger of facing liability for any accident which may occur as a result of Defendants' unstable

Wall. Accordingly, this matter is ripe for declaratory relief.

PRAYER FOR RELIEF

Plaintiff requests the Court grant the following relief:

(a) A declaration establishing that Plaintiff has the right to tear down its own perimeter wall, notwithstanding the fact that may impact the structural integrity of Defendants' Wall.

(b) For such other and further relief the Court deems proper.

DATED this 5th day of April, 2018.

BOYACK ORME & ANTHONY

By: */s/ Christopher B. Anthony*
EDWARD D. BOYACK, ESQ.
Nevada Bar No. 5229
CHRISTOPHER B. ANTHONY, ESQ.
Nevada Bar No. 9748
7432 W. Sahara Ave.
Las Vegas, Nevada 89117
Attorneys for Plaintiff

IAFD
Edward D. Boyack, Esq.
Nevada Bar No. 5229
Christopher B. Anthony, Esq.
Nevada Bar No. 9748
BOYACK ORME & ANTHONY
7432 W. Sahara Ave.
Las Vegas, Nevada 89117
ted@boyacklaw.com
canthony@boyacklaw.com
702.562.3415
702.562.3570 (fax)

Attorneys for Plaintiff

EIGHT JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

ROCK SPRINGS MESQUITE 2 OWNERS' ASSOCIATION, a Nevada domestic non-profit corporation, Plaintiff, vs. STEPHEN J. RARIDAN and JUDITH A. RARIDAN, husband and wife, and DOES I through X, inclusive, Defendants.	CASE NO. DEPT. NO. **INITIAL APPEARANCE FEE DISCLOSURE**

Pursuant to NRS Chapter 19, as amended by Senate Bill 106, filing fees are submitted for the parties joining in the above-entitled action as indicated below:

. . .

. . .

. . .

. . .

Rock Springs Mesquite 2 Owners' Association..... ..... $270.00

TOTAL REMITTED…….....……..... $270.00

DATED this 5th day of April, 2018.

BOYACK ORME & ANTHONY

By: _/s/ Christopher B. Anthony____
EDWARD D. BOYACK, ESQ.
Nevada Bar No. 5229
CHRISTOPHER B. ANTHONY, ESQ.
Nevada Bar No. 9748
7432 W. Sahara Ave.
Las Vegas, Nevada 89117
Attorneys for Plaintiff

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Steven D. Grierson
CLERK OF THE COURT

MTD

BINGHAM SNOW & CALDWELL
Clifford Gravett, Nevada Bar No. 12586
Jedediah Bo Bingham, Nevada Bar No. 9511
840 Pinnacle Court, Suite 202
Mesquite, Nevada 89027
(702) 346-7300 phone
(702) 346-7313 fax
mesquite@binghamsnow.com
Attorneys for the Raridans

DISTRICT COURT

CLARK COUNTY

ROCK SPRINGS MESQUITE 2 OWNERS' ASSOCIATION, a Nevada domestic non-profit corporation, Plaintiff, v. STEPHEN J. RARIDAN and JUDITH A. RARIDAN, husband and wife, and DOES I through X, inclusive, Defendants.	**MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT** Case No. A-18-772425-C Dept. No. XVI

COME NOW Defendants, Stephen J. Raridan and Judith A. Raridan, by and through counsel, and move this Court to dismiss the Complaint filed in the above-captioned matter with prejudice, or in the alternative, issue summary judgment in the Raridans' favor. This Motion is supported by the memorandum of points and authorities filed concurrently herewith as well as any oral arguments the Court may permit on this matter.

Respectfully submitted this 15TH day of May, 2018,

BINGHAM SNOW & CALDWELL

Clifford Gravett, Nevada Bar No. 12586
Jedediah Bo Bingham, Nevada Bar No. 9511
840 Pinnacle Court, Suite 202
Mesquite, Nevada 89027

Case Number: A-18-772425-C

NOTICE OF MOTION

YOU AND EACH OF YOU will please take notice that the undersigned will bring the above-captioned MOTION TO DISMISS, OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT on for hearing before Dept. XVI of the Eighth Judicial District Court at the hour of **June 28, 2018 at 9:00 am**

___ :___ ___ ___.M. or as soon thereafter as counsel may be heard.

Dated this 15th day of May, 2018,

BINGHAM SNOW & CALDWELL

Clifford Gravett, Nevada Bar No. 12586
Jedediah Bo Bingham, Nevada Bar No. 9511
840 Pinnacle Court, Suite 202
Mesquite, Nevada 89027

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This case is the quintessential attempt for a second bite at the apple by Plaintiff Rock Springs II ("Plaintiff"). Plaintiff already sued the previous owners of Stephen and Judith Raridans' (the "Raridans") home claiming that the previous owners (the "Olsens")—by virtue of a privacy wall the Olsens built on their own property—were responsible for the failure of Plaintiff's retaining walls. Plaintiff lost in a jury trial and had to pay all of the Olsens' attorney's fees. Nonetheless, rather than doing what it should have done all along, fix its failing retaining walls, Plaintiff has come back for another try, suing the Raridans (who now own the home). Plaintiff claims essentially that, even though a jury has declared that the wall built by the Olsens (now owned by the Raridans) is not the cause of Plaintiff's wall failures, it actually is. Further (according to Plaintiff), because the jury got it wrong in the previous case, Plaintiff owes no duty of support to the Raridans and should be allowed to tear down its retaining walls without any fear of possible harm to the Raridans.

If ever a case called for claim preclusion, this is it. The very issue placed before the Court in this case, the failure of Plaintiff's retaining wall, has been litigated all the way to a jury trial. If Plaintiff wanted a declaration of rights regarding it and the Raridans' property, it was required to request it in the prior case. Even if the case is not entirely precluded, Plaintiff's claims that the Raridans' privacy wall is encroaching on Plaintiff's property, is trespassing, is a nuisance and is causing damage to Plaintiffs retaining wall were fully and fairly litigated in the prior case and Plaintiff should be precluded from raising them here.

If the Court determines that preclusion does not bar this case, it should still either dismiss or issue summary judgment in the Raridans' favor because the relief Plaintiff requests—that it

owes no duty of lateral support[1] to the Raridans is contradicted by black letter law and over a century of caselaw holding that adjacent property owners owe each other a duty of lateral support. Finally, even if Plaintiff does not have a duty to provide lateral support at common law, it has a statutory duty to do so imposed by the City of Mesquite, which has already indicated that Plaintiff must apply for and receive permits for all work it intends to undertake in connection with its failing retaining walls.

FACTUAL BACKGROUND

The present litigation is the second case Plaintiff has filed in connection with its failing retaining walls, which walls are below and immediately adjacent to the Raridans' residence. Specifically, Plaintiffs' retaining walls provide lateral support to the Raridans' back yard from Plaintiff's property, which lies significantly below grade from the Raridans' property.[2] In Case No. A-11-640682-C ("Case #1"), Plaintiff sued the Olsens (the previous owners of the Raridans' residence and thus the Raridans' predecessors in interest) alleging that a privacy wall the Olsens constructed when they owned the residence was trespassing onto Plaintiffs' property, was an unauthorized use of Plaintiff's property, encroached onto Plaintiff's property, and was negligently constructed.[3]

In its Opposition to the Olsen's summary judgment motion, Plaintiff explained that its case was based on Plaintiff's belief that the Olsen's privacy wall, various landscaping changes made by the Olsens to their property, and palm trees planted by the Olsens on their property had

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[1] Later support being support from the side of land as contrasted with subjacent support, which is support from below, and which is not at issue in this case. *Black's Law Dictionary*, 1453 (7th Ed. 1999).

[2] *See* Exhibit A, Case #2 Complaint at ¶13 (conceding that removal of Plaintiff's retaining walls could cause damage to the Raridans' property); *see also* Exhibit C, sketches from Plaintiff's Expert Report in Case #2 depicting Plaintiff's retaining walls.

[3] Exhibit B, Case #1 Complaint.

increased the lateral pressure on Plaintiff's retaining walls to the point where the walls failed.[4] Plaintiff lost the case in its entirety; Judge Cory dismissed the trespass claim in summary judgment proceedings[5] and the remaining causes of action were tried to a jury, which returned a verdict in favor of the previous owners of the Olsens.[6]

Reading Plaintiffs' new complaint against the Raridans ("Case #2), who purchased the property after the conclusion of Case #1, one would hardly guess that Plaintiff lost Case #1. Notwithstanding a jury verdict against Plaintiff on claims for encroachment, nuisance, and negligence as well as summary judgment on the trespassing claim, Plaintiff nonetheless claims that the privacy wall is encroaching on Plaintiffs' property and causing damage to Plaintiff's wall.[7] Additionally, whereas Plaintiff characterized its retaining wall as what it is, a "retaining wall" in Case #1, in Case #2 Plaintiff now, for the first time, claims its wall as merely a "perimeter" wall.[8]

In addition to its decision to disregard the jury verdict against it in Case #1, Plaintiff alleges that it plans to tear down its retaining walls without any regard to the effect of such an action on the Raridans.[9] However, the City of Mesquite (where Rock Springs II is located) has already issued a letter stating its position that no steps may be taken regarding Plaintiff's failing retaining wall without an engineered plan, presented by a licensed contractor, being approved by the City of Mesquite. Plaintiff is silent in its complaint regarding its efforts to present plans for repairs of its retaining walls to the City of Mesquite; the Raridans suspect they have not so much

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[4] Exhibit D, Plaintiff's Opposition to Summary Judgment Motion at p. 7.
[5] Exhibit E, Minute Order re Summary judgment.
[6] Exhibit F, Jury Verdict.
[7] Exhibit A, Case #2 Complaint ¶¶10, 11 (second paragraph numbered 11).
[8] *Compare* Exhibit A, Case #2 Complaint, ¶¶11, 13 *with* Exhibit B, Case #1 ¶¶7-8.
[9] Exhibit A, Case #2 Complaint, ¶¶12-14.

as inquired with the City of Mesquite as to what requirements will be imposed on Plaintiff for repair of the walls.

LEGAL ARGUMENT

Plaintiff lost a jury trial seeking to hold the Olsens liable for the deterioration and failure of Plaintiff's retaining walls. Undeterred by its loss, Plaintiff now seeks a judicial declaration from the Court that it can tear down the same retaining walls and owe no duty whatsoever to the Raridans to continue providing lateral support to the Raridans' property. This case should be dismissed under NRCP 12(b)(5) because: 1) the doctrines of issue and claim preclusion bar Plaintiff's suit; 2) Plaintiff owes a common law duty—either as a matter of strict liability or of due care—to continue providing lateral support to the Raridans' property; and 3) Plaintiff also has a statutory obligation to provide lateral support to the Raridans' property. While the Court can take judicial notice of Plaintiff's prior complaint against the Olsens (which dealt with the exact same retaining wall) and dismiss this case under 12(b)(5), it may also issue summary judgment in favor of the Raridans in this matter should it deem summary judgment more appropriate.

1. Legal Standard for Motions to Dismiss

Motions to dismiss for failure to state a claim are governed by NRCP 12(b)(5), which allows a court to dismiss a complaint with prejudice upon a finding that the complaint fails to set forth a legally recognized cause of action.[10] In reviewing such motions, the Court must accept factual allegations set forth in the complaint as true and make every inference in favor of the non-moving party.[11] If, after applying this standard to the complaint, the non-moving party cannot

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[10] NRCP 12(b)(5) (West 2017).

[11] *Buzz Stew v. City of Las Vegas,* 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

show any set of facts which would entitle it to relief, the complaint can be dismissed with prejudice.[12]

Generally, motions to dismiss should be confined to the pleadings themselves. In limited instances, the Court can look beyond the pleadings, including those matters of which judicial notice may be taken, the veracity of which may be determined readily and without dispute.[13] Where there is a close relationship between two cases (including the same parties litigating), the Court make take judicial notice of prior cases in the context of a motion to dismiss without converting it to a motion for summary judgment.[14] In cases where a motion to dismiss does reference outside sources for which judicial notice may not be taken, the Court may still render a decision on the merits of the case, but must treat the motion as one for summary judgment and apply the standards of proof found at NRCP 56.[15]

In this case, because there is no question that Plaintiff's complaint fails to set forth any entitlement to the requested relief either because of the preclusive effect of prior litigation or the duties owed by Plaintiff as a matter of law, the Court should dismiss the complaint with prejudice.[16] Alternatively, because the relevant evidence demonstrates that Plaintiff is not entitled to the requested relief, the Court should issue summary judgment in the Raridans' favor.

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[12] *Buzz Stew*, 124 Nev. at 224.
[13] NRS 41.430 (West 2017); *United States v. Ritchie*, 342 F.3d 903, 909 (9th Cir. 2003); *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 2003)
[14] *Occhiuto v. Occhiuto*, 97 Nev. 143, 145, 625 P.2d 568, 569 (1981).
[15] NRCP 12(b)(5) (West 2017).
[16] *See Buzz Stew*, 124 Nev. at 224.

2. The prior proceeding between Plaintiff and the Olsens bars the present action as a matter of both claim and issue preclusion.

The Nevada Supreme Court has been clear that although claim preclusion and issue preclusion are related legal doctrines, they have different purposes, prerequisites, and effects on a case. In this case, both claim and issue preclusion apply to Plaintiff's complaint and bar either the entire complaint or, alternatively, all factual allegations regarding encroachment and that the Raridans' privacy wall is the cause of the failure of Plaintiff's retaining walls.

a. The prior litigation between Plaintiff and the Olsens completely bars Plaintiff's complaint in this case.

Claim preclusion is, "...a policy driven doctrine, designed to promote the 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."[17] In other words, claim preclusion allows only one case between the same parties regarding the same facts.[18] The elements of claim preclusion are threefold: "...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 or any part of them that were *or could have been brought* in the first case."[19] Because the prior litigation in Case #1 satisfies all three of these requirements, this case must be dismissed.[20]

i. <u>The parties or their privies are the same as Case #1 and the judgment from Case #1 is valid</u>.

The first element for claim preclusion, the parties being the same or privies in both cases is satisfied in this case.[21] The Nevada Supreme Court has explained that the "privities" language in the claim preclusion test means that "...a person is in privity with another if the person had

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[17] *Boca Park Marketplace v. Higco*, --- Nev. ---, 407 P.3d 761, 763 (2017).
[18] *Five Star Capital v. Ruby*, 124 Nev. 1048, 1052, 194 P.3d 709, 711 (2008).
[19] *Five Star Capital*, 124 Nev. at 1055 (emphasis added).
[20] *Id.*
[21] *Id.*

'acquired an interest in the subject matter affected by the judgment through … one of the parties, as by inheritance, succession, or purchase.'"[22] In this case, Plaintiff admits that the Raridans purchased their property from the Olsens and that the purchased property was the subject of Plaintiff's lawsuit against the Olsens in Case #1.[23] Accordingly, the first element for claim preclusion is satisfied because the Raridans purchased the property which was the "subject matter affected by the judgment…" for which claim preclusion is sought.[24] The second element in the claim preclusion test (the finality and validity of a judgment in the first case) is also satisfied: the jury verdict against Plaintiff in Case #1 is final and has not been modified or set aside in any subsequent proceeding.[25] Additionally, Plaintiff admits in its complaint in Case #2 that a judgment was entered against it.[26]

ii. The claim for declaratory relief in this current case could have been raised in the first case.

As the Supreme Court explained in *Ticor*, "The modern view is that claim preclusion embraces all forms of recovery that were asserted in a suit, *as well as those that could have been asserted…*"[27] For purposes of determining whether a claim could have been asserted in a prior proceeding, courts examine the facts asserted in both cases; if the facts are the same, then any

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[22] *Weddell v. Sharp*, 131 Nev. Adv. Op. 28, 350 P.3d 80, 82-83 (2015) (*quoting Bower v. Harrah's Laughlin*, 125 Nev. 470, 481, 215 P.3d 709, 718 (2009)).
[23] Exhibit A, Case #2 Complaint at ¶¶5-12.
[24] *Weddell*, 350 P.3d at 82-83.
[25] Exhibit F, Jury Verdict.
[26] Exhibit F, Jury Verdict; Exhibit A, Case #2 Complaint at ¶12 (first paragraph 12).
[27] *Ticor*, 114 Nev. at 834 (emphasis added) (*quoting University of Nevada v. Tarkanian*, 110 Nev. 581, 600, 879 P.2d 1180, 1191 (1994) ("Therefore, a 'claim' under Nevada law encompasses all claims that arise out of a single set of facts.")).

new claims *could* have been brought in the prior litigation and are thus barred by claim preclusion.[28]

The fact that a party's subsequent case couches its "new" claims in a claim for declaratory relief does not avoid the dismissal mandated by claim preclusion; a new legal theory based on the same set of facts is exactly what claim preclusion is designed to prevent.[29] The recent decision from the Nevada Supreme Court in *Boca Park* is inapposite for one critical reason: *Boca Park* allows a second case based on the same facts where the first case sought *only* declaratory relief and nothing else and second case seeks to enforce the rights declared in the previous case.[30] Specifically the Court stated: "For the declaratory judgment exception to apply, *the original action must have only sought declaratory relief*...Thus, if a plaintiff stated a claim for coercive relief in addition to declaratory relief in the original action, the exception does not apply."[31] In announcing this rule, the Court explained that, " 'A declaratory action is intended to provide a remedy that is simpler and less harsh than coercive relief...' It conserves judicial resources by providing a mechanism for courts to clarify the legal relationships of parties before they have been disturbed thereby tending toward an avoidance of full-blown litigation."[32]

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[28] *Round Hill v. B-Neva*, 96 Nev. 181, 183, 606 P.2d 176, 178 (1980); *see also Holcombe v. Hosmer*, 477 F.3d 1094, 1098 (9th Cir. 2007) (construing and applying Nevada law).

[29] *Spittler v. Washoe County*, 2014 WL 6449306 at *2 (Nev. 2014) (unpublished) ("As for appellant's declaratory relief claim, which was based on the same conduct as the 2011 complaint, the district court properly granted respondent's motion to dismiss."); *Zaidi v. United States Sentencing Commission*, 115 F. Supp.3d 80, 86 (D.D.C. 2015) "Given these rules [governing claim preclusion], it is clear that the claims Zaidi already litigated...and the declaratory relief he seeks here constitute the same 'claims or cause of action.'"); *see also Valley View Angus Ranch v. Duke Energy*, 497 F.3d 1096, 1102 (10th Cir. 2007) (declaratory relief action as to validity of prior action an "obvious assault" on finality of judgments); *see also Mycogen v. Monsanto*, 123 Cal. Rptr.2d 432, 441 (Cal. 2002) (only subsequent cases where the *first* case sought "pure" declaratory relief are exempt from the rules of claim preclusion).

[30] *Boca Park*, 407 P.3d at 765.

[31] *Id* (emphasis added).

[32] *Id.*

Plaintiff, of course, went about things in the opposite fashion from the exception allowed by *Boca Park*: Plaintiff filed a complaint seeking coercive relief and engaged in full-blown litigation first and then, only after losing at trial, went back to the Court for a declaration of rights.[33] By attempting to enforce first and asking for a declaration of rights second, Plaintiff placed Case #2 outside of the exception to claim preclusion set forth in *Boca Park*.[34] Accordingly, this Court should hold that *Boca Park's* exception to the rule of claim preclusion for declaratory relief does not apply, that this case is precluded by the prior litigation regarding the parties' respective walls, and dismiss this case with prejudice.

Plaintiff may claim that, but for an order declaring the rights of the parties, it will not be able to proceed with their desired removal/repair of their retaining walls; this is not the case. Following dismissal in this case, Plaintiff will be in the same position as any other property owner deciding how to do an excavation/retaining wall removal which may (and in this case likely will) affect the lateral support to the neighboring property owner. If Plaintiff removes its retaining walls and subsidence occurs on the Raridans' property, Plaintiff may well be liable to the Raridans for damages.[35] Plaintiff should plan accordingly. In any event, Plaintiff could have sought a determination of its rights in Case #1 but did not and is barred from doing so now.

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[33] *Compare* Exhibit A, Case #1 Complaint *with* Exhibit B, Case #2 Complaint; Exhibit F, Jury Verdict.

[34] *Boca Park*, 407 P.3d at 765.

[35] 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.

b. Issue preclusion bars the bulk of the factual and legal issues raised in Case #2.

Issue preclusion is similar to, but distinct from claim preclusion in that, while claim preclusion bars cases, issue preclusion bars all issues (legal or factual) previously litigated between parties in all future litigation, even if subsequent litigation is completely different from the previous litigation.[36] The test for application of the issue preclusion doctrine in Nevada is as follows: 1) the issue decided in the prior litigation must be identical to the issue presented in the current action; 2) the initial ruling must have been on the merits and have become final; 3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation; and 4) the issue was actually and necessarily litigated.[37] The "actually and necessarily litigated" requirement means that the issue must be decided after the participation of both parties and findings or legal conclusions issued in some form of judgment.[38]

A comparison of the allegations in the complaints for Case #1 and Case #2 demonstrates that the bulk of the factual and legal issues are identical, satisfying the first factor for issue preclusion, that the issues between the two cases be identical. The complaint for Case #1 alleged in paragraphs seven and eight that, "Defendants' wall is in very close proximity to the retaining wall on Plaintiffs' property. Due to earth movements and other factors, Defendant's wall is moving towards and causing damage to the retaining wall on Plaintiff's property."[39] The corresponding allegations in the complaint for Case #2, found at paragraphs eight and ten (there

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[36] *Five Star Capital*, 124 Nev. at 1055. To be clear, the Raridans are extremely confident that the doctrine of claim preclusion applies to bar the present case in its entirety; however, in the unlikely even claim preclusion would still apply to several of the allegations raised by Plaintiff in the present case.

[37] *Id.*

[38] *Frei v. Goodsell*, 129 Nev. 403, 407, 305 P.3d 70, 72 (2013) (*citing In re Sandoval*, 126 Nev. 136, 232 P.3d 422, 424 (2010).

[39] Exhibit B, Case #1 Complaint, ¶¶7-8.

is no paragraph nine) are almost verbatim of those in the Case #1 complaint.[40] The second paragraph eleven (there are two numbered paragraphs eleven and twelve), in the Case #2 complaint alleges that "Defendants' Wall continues to encroach upon Plaintiff's perimeter wall, causing Plaintiff to incur costs to maintain the structure of the wall and mitigate the (*sic.*) both potential and existing safety hazards."[41] The complaint in Case #1 contained an entire cause of action for encroachment, claiming in relevant part that, "...Defendants through the erection of a retaining wall on the rear portion of their property, invaded Plaintiffs' (*sic.*) property, thereby encroaching onto Plaintiff's land..." which encroachment claim was ultimately decided against Plaintiff.[42] Each of these issues are identical and are precluded in the present case.

Satisfaction of factors two through four for issue preclusion is also apparent in this case; the jury verdict in the First Case is final, the parties in this case are the same or are privies with the parties in the First Case (see the section above regarding privities), and insofar as each of Plaintiff's claims in the First Case were decided either at summary judgment or in a jury verdict, all legal and factual issues raised in the First Case were actually and necessarily litigated with the full participation of Plaintiff.[43] Accordingly, the issues of: 1) whether the Raridans' wall is causing damage to Plaintiff's retaining wall; and 2) whether the Raridans' wall is encroaching on the Plaintiff's wall have already been decided against Plaintiff and Plaintiff is precluded from raising those issues against the Raridans in either this or any future litigation.[44]

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[40] Exhibit A, Case #2 Complaint, ¶¶8-10.
[41] Exhibit A, Case #2 Complaint, ¶11.
[42] Exhibit B, Case #1 Complaint, ¶26; Exhibit F, Jury Verdict, Case #1.
[43] *See Frei*, 129 Nev. at 407.
[44] *Five Star Capital*, 124 Nev. at 1055. These precluded issues are only those that appear on the face of the respective complaints. It is possible and even likely that should the matter proceed, a review of additional pleadings, papers, and trial transcripts would demonstrate additional issues from Case #1 which Plaintiff is precluded from raising in Case #2 or any other matter against the Raridans.

3. Plaintiff has a duty at common law to provide lateral support to adjoining property owners, including the Raridans.

Plaintiff requests a declaration from the Court that it has no obligation to provide support for the Raridans' wall. The requested relief is directly contrary to the long standing common law rules regarding the obligations of property owners to adjacent properties; thus the Court should either dismiss the case in its entirety (since Plaintiff is not entitled to the requested relief) or issue summary judgment in favor of the Raridans declaring that a duty is owed. While there is potentially a question of whether Plaintiff's duty to the Raridans is absolute or one of due care, it is certain that there is a duty of some kind owed to the Raridans, which is the sole issue Plaintiff raises.

a. Plaintiff's obligation to the Raridans is absolute as to lateral support of soils in their natural condition and as to structures which do not increase lateral pressure beyond that of soils in their natural condition.

Courts have long held that property owners have an absolute obligation to support the soils of adjoining property owners in their natural condition.[45] The Restatement sets forth the obligation as follows:

> One who withdraws the naturally necessary lateral support of land in another's possession or support that has been substituted for the naturally necessary support, is subject to liability for a subsidence of the land of the other that was naturally dependent upon the support withdrawn.[46]

The California Court of Appeals has formulated the duty in the following manner,

> There can be no doubt that if one removes a part of his land so as to take away necessary lateral support for his neighbor's land, and it caves in, he cannot justify

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[45] *Blake Const. v. United States*, 585 F.2d 998, 1006 (Ct. Cl. 1978) ("It is well settled that the owner of adjacent property is entitled to support for his property in its natural state and if through excavation his neighbor removes this support the neighbor is absolutely liable for the resulting damages to the natural state of the land."); *Colorado Fuel & Iron v. Salardino*, 245 P.2d 461, 464-65 (Col. 1952) (*en banc*, collecting cases); Restatement of Torts, 2d ed. §817 (1979).

[46] Restatement of Torts, 2d ed. §817 (1979), enclosed as Exhibit G.

his act by proof that he had no reason to expect that occurrence, and hence was not guilty of negligence.[47]

Of particular importance in the instant matter is the fact that, if artificial support (via a bulkhead or retaining wall or similar supporting device) is substituted for natural support, removal or deterioration of the artificial support is subject to the same strict liability as removal of natural support.[48] Retaining walls or bulkheads must both be adequate to provide lateral support and be maintained in a condition sufficient to provide lateral support in the future.[49]

The placement of artificial structures onto land does not change the absolute right to lateral support so long as the structures do not change the amount of lateral support as was required by the land in its natural state prior to the structures being built.[50] Thus, if lateral support is withdrawn and subsidence (e.g. land movement) occurs on land with structures on it, if the structures had not increased the lateral pressure prior to the subsidence (and thus the amount of support required) then liability for harm to the structures will be strict to the same extent as to soil in its natural condition.[51]

While the Nevada Supreme Court has never opined as to the absolute obligation of property owners to provide lateral support to neighbors (it has opined as to the obligation to use

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[47] *Elliot v. Rodeo Land*, 297 P.2d 129, 135 (Cal. Ct. App. 1956).

[48] *Urosevic v. Hayes*, 590 S.W.2d 77, 741-42 (Ark. Ct. App. 1979) (collecting cases); Restatement of Torts, 2d ed. §817 (1979), cmt. k ("Substituted or remote support. The actor may avoid liability by furnishing artificial support, such as a retaining wall, sufficient to replace the natural lateral support withdrawn. The later withdrawal of the artificial support subjects the person who withdraws it to the liability stated in [§817].")

[49] *Klebs v. Kim*, 772 P.2d 523, 526 (Wa. Ct. App. 1989); *Noone v. Price*, 298 S.E.2d 218, 222 (W. Va. 1982); *Salmon v. Peterson*, 311 N.W.2d 205 (S.D. 1981); *see also Sager v. O'Connell*, 153 P.2d 569, 571 (Cal. Ct. App. 1944) (holding that there must be negligence in allowing the deterioration of a bulkhead for liability to lie).

[50] Restatement of Torts, 2d Ed. §817, cmt. f.

[51] *Gladin v. Von Engeln*, 575 P.2d 418, 421 (Col. 1978) (*en banc*); Exhibit G, Restatement of Torts, 2d Ed. §817, cmt. f.

due care in regards to artificial structures, discussed below), there is no reason for the Court to assume that it would not follow the near-universal weight of opinions from neighboring jurisdictions and the Restatement. This Court should therefore either dismiss this case with prejudice beyond the sole relief requested by Plaintiff is a declaration that no duty is owed, or issue summary judgment holding that the obligation of lateral support owed by Plaintiff to the Raridans' land in its natural condition (and to the extent that structures have not increased lateral pressure beyond that which would be present if the land were in its natural state, to structures as well) is absolute.[52]

b. Plaintiff owes the Raridans a duty of due care in connection with lateral support for artificial structures.

As set forth above, the strict liability imposed with the providing of lateral support applies only to land in its natural condition and to those structures which do not increase the lateral pressure above that which would have been exerted by land in its natural condition. In cases where land is modified with artificial structures, the owner of neighboring property still has an obligation to use due care in excavating or otherwise modifying lateral support to ensure that structures or artificial features are not damaged by a withdrawal of lateral support.[53] As with the absolute obligation discussed above, where a retaining wall or bulkhead is substituted for naturally occurring lateral support, the obligation of due care runs to the retaining wall to the same extent as it would run to the soils (or other naturally occurring lateral support) the wall is substituted for.[54]

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[52] *See Klebs*, 772 P.2d at 526; *see also Urosevic*, 590 S.W.2d at 741-42; *see also* Exhibit G, Restatement of Torts, 2d ed. §817 (1979), cmt. k.

[53] *Lyon v. Walker Boudwin Const.*, 88 Nev. 646, 649, 503 P.2d 1219, 1220-21 (1972) (duty of excavators to exercise due care); *Lee v. Takao Bldg. Dev. Co.*, 175 Cal. App. 3d 565, 568–69, 220 Cal. Rptr. 782, 783 (Ct. App. 1985); Restatement of Torts, 2d ed. §819 (1979).

[54] *Noone*, 298 S.E.2d at 222; *Sager*, P.2d at 571.

In this case, Plaintiff is requesting an order from the Court that it owes no duty whatsoever to the Raridans and that Plaintiff can remove its retaining walls (and thus the lateral support provided to the Raridans' property thereby) without any risk of a negligence claim from the Raridans should the Raridans' privacy wall, backyard, or even their home be impacted by the removal of the lateral support. Even if the absolute obligation to provide support articulated above does not bar Plaintiff's requested relief, the obligation to exercise due care in the removal and replacement of Plaintiff's retaining wall in regards to artificial structures on the Raridans' property certainly does.[55]

In opposing this Motion, Plaintiff will almost certainly cite the Court to the case of *Carlson v. Zivot*;[56] however, the facts of *Zivot* are completely distinct from this case and the holding inapposite to the present matter. In *Zivot* two neighbors made an agreement for the construction of a "party" wall (not a retaining wall) and both contributed towards the construction of the wall. After the wall was constructed, one of the neighbors graded its property, placed fill dirt and trees against the wall, and constructed a swimming pool, all of which caused the wall to collapse.[57] In the context of those facts, it is no surprise the Nevada Supreme Court held that the other party (the one who hadn't placed soil and landscaping against the wall) had no obligation to provide support for all of the additional lateral pressure placed against the wall and which ultimately caused its collapse.[58] This holding, although based on the unique circumstance where a party treated a party wall like a retaining wall, is consistent which the Restatement (indeed the

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[55] *Lyon v. Walker Boudwin Const.*, 88 Nev. 646, 649, 503 P.2d 1219, 1220-21.
[56] *Carlson v. Zivot*, 90 Nev. 361, 362, 526 P.2d 1177 (1974).
[57] *Id.*
[58] *Id.*, at 363.

restatement was cited by the *Zivot* court) because the appellant had *increased* the lateral pressure on the subject wall until the wall collapsed.[59]

This case is completely different from *Zivot*. Despite Plaintiff's averments to the contrary in Case #2, the walls Plaintiff wants to remove are retaining walls (not perimeter or boundary walls) which have long provided lateral support to the Raridans' property. The complaint in Case #1 is explicitly clear on this point.[60] Additionally, in *Zivot* the plaintiff was found to have been the cause of the failure of the perimeter wall by placing fill dirt, trees, and a swimming pool against the wall and in its yard. In this matter, a jury has already decided (in Case #1) that the Olsens' (the previous owners) activities and landscaping did *not* cause the failure of Plaintiff's retaining walls.[61] Finally, the issue the Plaintiff is seeking declaratory relief on is its plan to remove support to the Raridans, not the repair of the walls (which was decided against Plaintiffs in Case #1). *Zivot* is completely inapplicable to this case and should be disregarded by the Court.

4. Plaintiff owes a statutory duty to the Raridans to maintain lateral support and, in any event should be ordered to exhaust administrative remedies with the City of Mesquite.

In addition to the common law duties articulated above, Plaintiff owes the Raridans a statutory duty, imposed by the City of Mesquite, to maintain lateral support to the Raridans. Further, unless Plaintiff submits acceptable, conforming plans to the City of Mesquite, Plaintiff will not receive the permits necessary for repair or replacement of its failing retaining walls. The fact that Plaintiff's plans regarding its wall—whatever they might be—are ultimately subject to approval or denial by the City of Mesquite's planning department, imposes a duty on Plaintiff to

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[59] *Id.*
[60] *Zivot*, 90 Nev. at 363.
[61] Exhibit B, Case #1 Complaint; Exhibit F, Jury Verdict.

exhaust its administrative remedies with the City of Mesquite prior to seeking relief from this Court.[62]

The City of Mesquite has adopted the 2006 International Building Code ("IBC") as the statutory scheme governing residential construction in Mesquite, where Plaintiff's property is located. Pursuant to the IBC, retaining walls must be designed and constructed "against lateral sliding and overturning."[63] Additionally, because of the size of Plaintiff's wall, Plaintiff must receive permits and approvals from the City of Mesquite prior to any repairs being performed on Plaintiff's walls.[64] Representatives from the City of Mesquite have already opined that any and all repair, replacement, or other activity undertaken in connection with Plaintiff's retaining wall must be prepared by an engineer and approved by the City of Mesquite.[65] This statutory obligation negates any relief the Court might give Plaintiff regarding its common law duties to provide lateral support to the Raridans.

The fact that the City of Mesquite has already issued a letter declaring that it must approve Plaintiff's plans for its retaining wall indicates another problem with Plaintiff's complaint, namely that Plaintiff has failed to seek building permits from the City of Mesquite and exhaust its administrative remedies therein.[66] NRS 278.0235 *et seq.* allows appeals to the courts from any adverse land use decisions, sets forth the required administrative appeals of land use decisions, and sets forth the timelines for exhausting administrative appeals. As the Supreme Court has held,

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[62] *Public Service Com'n. v. District Court*, 107 Nev. 680, 684-85, 818 P.2d 396, 400 (1991).
[63] Exhibit H, IBC, §1806.
[64] Exhibit I, Uniform Administrative Code, §301.1 301.2.1(5) (requiring permits for construction, repair, or demolition of retaining wills over four feet tall) (the Uniform Administrative Code has been adopted by the City of Mesquite).
[65] Exhibit J, Correspondence from City of Mesquite Senior Plan Reviewer.
[66] *Mesagate Homeowners Ass'n v. City of Fernley*, 124 Nev. 1092, 1093, 194 P.3d 1248, 1984 (2008); *see also Public Utilities Com'n.*, 107 Nev. at 684-85.

a party seeking to contest a ruling regarding land use in court (including permitting) must first exhaust the administrative remedies with the permit issuing entity.[67]

In this case, Plaintiff has not so much as submitted plans to the City of Mesquite for how it intends to deal with its failing retaining walls. Thus, even if the Court were to rule completely in Plaintiff's favor and issue the requested declaratory relief, the City will nonetheless likely require lateral support as a condition for issuance of any necessary permits for removal or repair of Plaintiff's retaining wall.[68] Such an occurrence would render the decision Plaintiff requests from the Court completely moot, which is why Plaintiff should be instructed to exhaust administrative remedies with the City of Mesquite. For these reasons, the Complaint should be dismissed pending an administrative decision by the City of Mesquite on the permits necessary for Plaintiff's planned repairs or demolition of its retaining walls.

CONCLUSION

For the reasons set forth herein, the Court should dismiss the complaint or, in the alternative, issue summary judgment in the Raridans' favor.

Respectfully submitted this 15th day of May, 2018,

BINGHAM SNOW & CALDWELL

Clifford Gravett, Nevada Bar No. 12586
Jedediah Bo Bingham, Nevada Bar No. 9511
Attorneys for the Raridans

[67] *Mesagate*, 124 Nev. at 1093.
[68] *See* Exhibit J, Letter from City of Mesquite; Exhibit H, IBC, §1806.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) I certify that I am an employee of Bingham Snow & Caldwell, and that on this day; I caused a true and correct copy of the foregoing document to be served, to the following:

ATTORNEYS OF RECORD	PARTIES REPRESENTED	METHOD OF SERVICE
Edward D. Boyack Christopher Anthony 7432 W. Sahara Ave. Las Vegas, NV 89117	Rock Springs II HOA	☐ Personal Service ☒ Email / E-File ☐ Facsimile ☐ Mail

DATED this 15th of May, 2018.

An employee of Bingham Snow & Caldwell

EXHIBIT A

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4/6/2018 10:15 AM
Steven D. Grierson
CLERK OF THE COURT

COMP
Edward D. Boyack, Esq.
Nevada Bar No. 5229
Christopher B. Anthony, Esq.
Nevada Bar No. 9748
BOYACK ORME & ANTHONY
7432 W. Sahara Ave.
Las Vegas, Nevada 89117
ted@boyacklaw.com
canthony@boyacklaw.com
702.562.3415
702.562.3570 (fax)

Attorneys for Plaintiff

EIGHT JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

ROCK SPRINGS MESQUITE 2 OWNERS' ASSOCIATION, a Nevada domestic non-profit corporation, Plaintiff, vs. STEPHEN J. RARIDAN and JUDITH A. RARIDAN, husband and wife, and DOES I through X, inclusive, Defendants.	CASE NO. A-18-772425-C DEPT. Department 16 **COMPLAINT** **Exempt from Arbitration:** Seeking Declaratory Relief

COMPLAINT

Plaintiff Rock Springs Mesquite 2 Owners' Association, by and through its attorneys, Boyack Orme & Anthony, hereby complains and alleges as follows:

GENERAL ALLEGATIONS

1. At all times relevant herein, Plaintiff is and was domestic non-profit corporation organized and existing under the laws of the State of Nevada and is and was doing business as a homeowners' association located in Mesquite, Clark County, Nevada.

2. At all times relevant herein, Defendant Stephen J. Raridan is and was a resident of Clark County, Nevada.

. . . .

Case Number: A-18-772425-C

3. At all times relevant herein, Defendant Judith A. Raridan is and was a resident of Clark County, Nevada.

4. That the true names or capacities, whether individual, corporate, associate or otherwise, of the Defendants named herein as DOES I through X, inclusive, are unknown to the Plaintiff, who therefore sues said Defendants by such fictitious names. Plaintiff is informed and believes and therefore alleges that each of the Defendants designated herein as DOE is legally responsible in some manner for the events and happenings herein referred to and caused damages proximately to Plaintiff as herein alleged, and Plaintiff will ask leave of the Court to amend the Complaint to insert the true names and capacities of DOES I through X, inclusive, when the same have been ascertained, and to join such Defendants in the action.

5. On May 5, 1997, Floyd E. Olsen and Gayle G. Olsen purchased the real property located at 558 Los Altos Circle, Mesquite. Nevada (hereinafter the "Property").

6. In or before September, 2010, Floyd E. Olsen and Gayle G. Olsen caused a wall to be erected in the rear yard of their property located at the Property (hereinafter the "Wall").

7. The Wall abuts the association property owned by Plaintiff.

8. The Wall is in very close proximity to the retaining wall on Plaintiff's property.

10. Due to earth movement or other factors, the Wall is moving towards and causing damage to the retaining wall on Plaintiff's property.

11. On May 5, 2011, Plaintiff filed a Complaint against Floyd E. Olsen and Gayle G. Olsen in the Eighth Judicial District Court of Clark County, Nevada, Case No. A-11-640682-C, seeking damages arising out of the above-referenced Wall movement.

12. On September 13, 2013, the Eighth Judicial District Court granted judgment in favor of Floyd E. Olsen and Gayle G. Olsen with respect to Case No. A-11-640682-C.

12. On or about May 27, 2016, Defendants purchased the Property, inclusive of the above-referenced Wall, from Floyd E. Olsen and Gayle G. Olsen.

11. Defendants' Wall continues to encroach upon Plaintiff's perimeter wall, causing Plaintiff to incur costs to maintain the structure of the wall and mitigate the both potential and existing safety hazards.

12. Plaintiff has no duty to maintain the integrity of Defendants' Wall.

13. If Plaintiff removes its perimeter wall, it is possible that Defendants' Wall will collapse.

14. Plaintiff seeks a declaration from this Court stating that Plaintiff has no duty to maintain Defendants' Wall, and that Plaintiff may remove the portion of Plaintiff's wall which may be preventing Defendants' Wall from collapsing.

FIRST CAUSE OF ACTION

(Declaratory Relief)

15. Plaintiff repeats and re-alleges the preceding paragraphs as though fully set forth herein and incorporates same by reference.

16. Pursuant to NRS 30.010 *et seq.*, this Court has the power and authority to declare Plaintiff's rights with respect to its ability to remove its own wall.

17. Upon information and belief, Defendants refuse to repair, maintain or otherwise remedy the current condition of their Wall such that it will not impact Plaintiff's perimeter wall or continue to pose a safety hazard. Further upon information and belief, Defendants maintain that Plaintiff has an obligation to continue to support Defendants' Wall.

18. Plaintiff asserts that it has no obligation to support Defendants' Wall.

19. In light of the allegations herein, a justiciable controversy exists between Plaintiff and Defendants.

20. Further in light of the allegations herein, Plaintiff and Defendants have adverse interests in the maintenance of Defendants' Wall.

21. Further, because Plaintiff seeks a declaration of its rights as it pertains to its own wall, wholly owned by Plaintiff, Plaintiff has a legally protectible interest in the fate of its perimeter wall.

22. Because Plaintiff is currently maintaining its perimeter wall and, by proximity, the Defendants' Wall, Plaintiff is currently undergoing harm in the form of unnecessary wall maintenance. Further, because Defendants' Wall poses a safety concern, Plaintiff is in imminent danger of facing liability for any accident which may occur as a result of Defendants' unstable

Wall. Accordingly, this matter is ripe for declaratory relief.

PRAYER FOR RELIEF

Plaintiff requests the Court grant the following relief:

(a) A declaration establishing that Plaintiff has the right to tear down its own perimeter wall, notwithstanding the fact that may impact the structural integrity of Defendants' Wall.

(b) For such other and further relief the Court deems proper.

DATED this 5th day of April, 2018.

BOYACK ORME & ANTHONY

By: */s/ Christopher B. Anthony*
EDWARD D. BOYACK, ESQ.
Nevada Bar No. 5229
CHRISTOPHER B. ANTHONY, ESQ.
Nevada Bar No. 9748
7432 W. Sahara Ave.
Las Vegas, Nevada 89117
Attorneys for Plaintiff

EXHIBIT B

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CLERK OF THE COURT

COMP
Edward D. Boyack
Nevada Bar No. 005229
BOYACK & BECK
401 N. Buffalo Drive #202
Las Vegas, Nevada 89145
ted@edblaw.net
702.562.3415
702.562.3570 (fax)

Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

ROCK SPRINGS MESQUITE 2 OWNERS' ASSOCIATION, a Nevada domestic non-profit corporation, Plaintiff, vs. FLOYD E. OLSEN and GAYLE G. OLSEN, husband and wife, and DOES I through X, inclusive, Defendants.	CASE NO. DEPT. A-11-640682-C XXI X

COMPLAINT

Plaintiff Rock Springs Mesquite 2 Owners' Association, by and through its attorneys, Boyack & Beck, hereby complains and alleges as follows:

GENERAL ALLEGATIONS

1. At all times relevant herein, Plaintiff is and was domestic non-profit corporation organized and existing under the laws of the State of Nevada and is and was doing business as a homeowners' association located in Mesquite, Clark County, Nevada.

2. At all times relevant herein, Defendant Floyd E. Olsen is and was a resident of Clark County, Nevada.

3. At all times relevant herein, Defendant Gayle G. Olsen is and was a resident of Clark County, Nevada.

4. That the true names or capacities, whether individual, corporate, associate or otherwise, of the Defendants named herein as DOES I through X, inclusive, are unknown to the Plaintiff, who therefore sues said Defendants by such fictitious names. Plaintiff is informed and believes and therefore alleges that each of the Defendants designated herein as DOE is legally responsible in some manner for the events and happenings herein referred to and caused damages proximately to Plaintiff as herein alleged, and Plaintiff will ask leave of the Court to amend the Complaint to insert the true names and capacities of DOES I through X, inclusive, when the same have been ascertained, and to join such Defendants in the action.

5. That in or before September, 2010, Defendants caused a wall to be erected in their rear yard.

6. Defendants' wall abuts the association property owned by Plaintiff.

7. Defendants' wall is in very close proximity to the retaining wall on Plaintiff's property.

8. Due to earth movement or other factors, Defendant's wall is moving towards and causing damage to the retaining wall on Plaintiff's property.

9. The expense to repair the damage done to Plaintiff's wall is approximately Ninety-four Thousand Dollars ($94,000.00).

10. Despite requests to remedy the situation, Defendants have not made any attempt to do so and the damage to Plaintiff's wall continues.

FIRST CLAIM FOR RELIEF

(Trespass)

11. Plaintiff repeats and realleges each and every allegation set forth above as though fully set forth herein.

12. That in or before September, 2010, Defendants caused a retaining wall to be constructed on their property located at 558 Los Altos Circle, Mesquite Nevada.

13. That the retaining wall abutted Plaintiffs' property located at Mesquite Springs Drive, Mesquite, Nevada.

14. That Plaintiffs were, at the time of the trespass, in possession of a retaining wall between Plaintiffs' and Defendants' property.

15. That Defendants made an unauthorized and unlawful entry onto Plaintiffs' land by the movement of their wall into Plaintiff's wall.

16. That Plaintiffs were damaged by the alleged invasion of their rights of possession.

17. That Defendants continue to trespass on Plaintiff's property caused by the movement of the Defendants' wall onto the Plaintiff's property, have refused to correct the trespass and continue to unlawfully trespass upon Plaintiff's property, infringing on Plaintiff's use and enjoyment of its property.

18. That as a result of the trespass, Plaintiff has been denied the quiet use and enjoyment of its property and have had to endure the existence of an encroaching and disintegrating wall on their property;

19. That as a result of the actions of Defendant, Plaintiff has been damaged in an amount in excess of $10,000;

20. That Plaintiff is entitled to have the offending wall removed from its property.

21. It has been necessary for Plaintiff to secure the services of an attorney to prosecute this action and Plaintiff is therefore entitled to an award of reasonable attorney's fees and costs of suit incurred herein.

SECOND CLAIM FOR RELIEF

(Nuisance)

22. Plaintiff repeats and realleges each and every allegation set forth above as though fully set forth herein.

23. That in or before September, 2010, Defendants caused a retaining wall to be constructed on their property located at 558 Los Altos Circle, Mesquite Nevada.

24. That the construction of the wall unlawfully crossed into the property of Plaintiff.

23. That the construction of the wall is an obnoxious use of the property and an unlawful and unauthorized use of Plaintiff's property by Defendants, and further constitutes a nuisance, for which the Court has the right to order abatement.

24. That despite being aware of the unlawful taking of Plaintiff's property and the existence of the nuisance, Defendants have refused to abate the nuisance, and Plaintiff is entitled to an order requiring Defendant to remove the wall and for an award of attorney's fees and costs

THIRD CLAIM FOR RELIEF

(Encroachment)

25. Plaintiff repeats and realleges each and every allegation set forth above as though fully set forth herein.

26. That Defendants, through the erection of a retaining wall on the real portion of their property, invaded Plaintiffs' property, thereby encroaching onto Plaintiff's land and claiming it as their own.

27. That Defendants had no right to the use of Plaintiff's land.

28. That Defendants' actions have constituted an unlawful encroachment upon Plaintiff's land, interfering with Plaintiff's quiet use and enjoyment of its property

29. That Defendants have paid no rents or other monies to Plaintiff for the use of Plaintiff's property.

30. That, as a direct and proximate result of Defendants' actions, Plaintiff has been damaged in an amount in excess of $10,000.

31. That Plaintiff is entitled to an order requiring Defendants to cease the encroachment and remove the encroaching materials, to wit, the retaining wall.

32. It has been necessary for Plaintiff to secure the services of an attorney to prosecute this action and Plaintiff is therefore entitled to an award of reasonable attorney's fees and costs of suit incurred herein.

. . . .

. . . .

. . . .

FOURTH CLAIM FOR RELIEF

(Negligence)

38. Plaintiff repeats and realleges each and every allegation set forth above as though fully set forth herein.

39. That at all times relevant herein, Defendants, as the owners of the real property situated next to Plaintiff's property, owed to Plaintiff a duty not to interfere with Plaintiff's quiet use and enjoyment of Plaintiffs property;

40. That at all times relevant herein, Defendants, as the owner of the real property situated next to Plaintiff, owed to Plaintiff a duty not cause damage to Plaintiff's property

41. That as a direct and proximate result of Defendants' action in having a retaining wall constructed, Defendants have breached their duty of care to Plaintiff by having the wall encroach and trespass upon the property of Plaintiff, by denying Plaintiff the ability to fully utilize and develop its land.

42. As a direct and proximate result of Defendants' conduct, Plaintiff has suffered damages in excess of $10,000;

43. It has been necessary for Plaintiff to secure the services of an attorney to prosecute this action and Plaintiff is therefore entitled to an award of reasonable attorney's fees and costs of suit incurred herein.

WHEREFORE, Plaintiffs pray as follows:

1. That this Court enter judgment against Defendant for damages in an amount in excess of $10,000, which shall be proven at trial;
2. For special damages according to proof;
3. For an order compelling Defendants to abate the nuisance and correct the encroachment upon Plaintiffs' property;
4. For an order directing Defendants to cease trespassing upon Plaintiff's property and to remove all items, including the retaining wall, which are trespassing upon Plaintiff's property;

5. For reasonable attorney's fees and costs of suit incurred; and

6. For such other and further relief as this Court may deem just and proper.

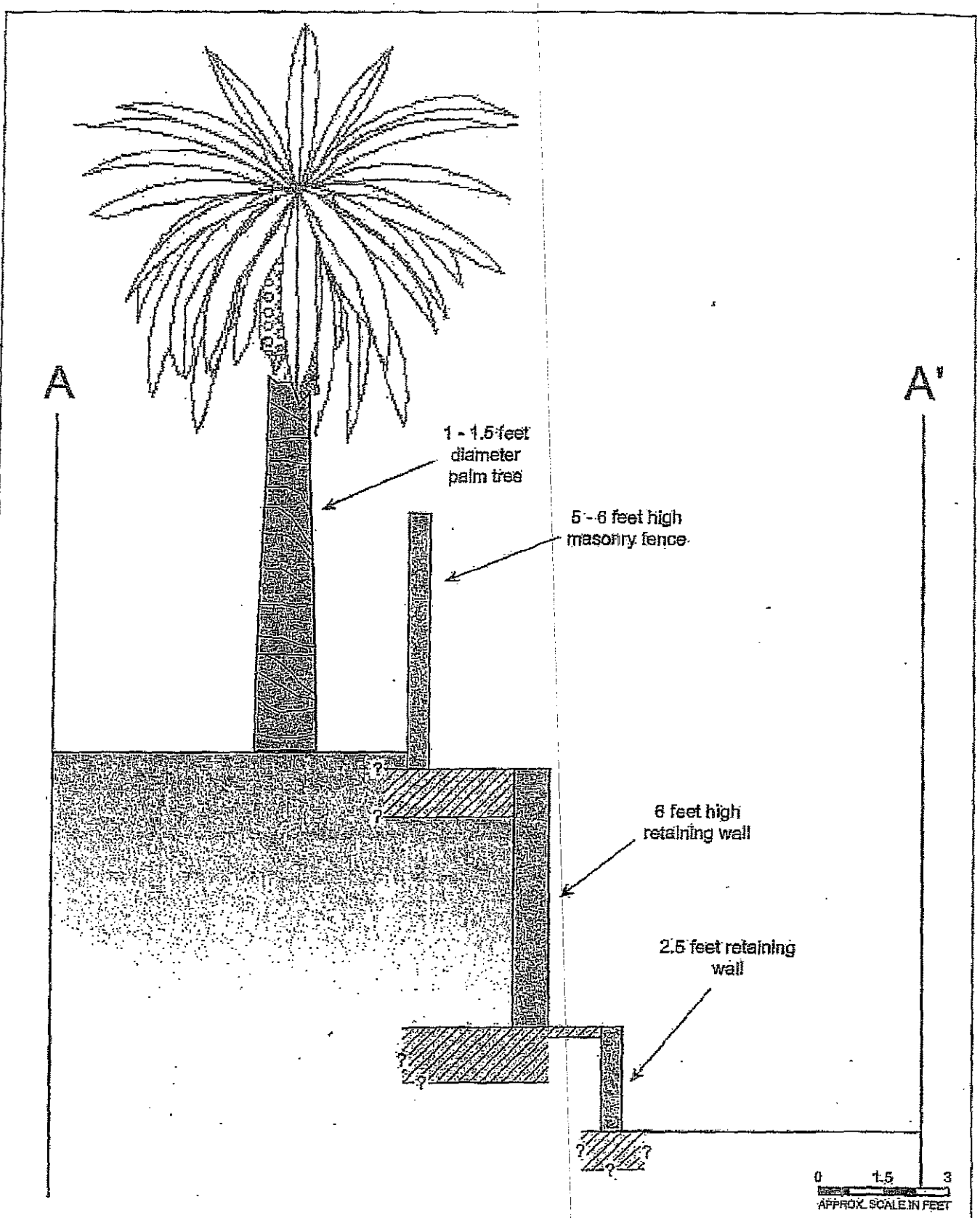
DATED this 6 day of May, 2011.

BOYACK & BECK

By: _____

EDWARD D. BOYACK
Nevada Bar No. 005229
401 N. Buffalo Drive #202
Las Vegas, Nevada 89145
Attorney for Plaintiff

EXHIBIT C



TerraPacific CONSULTANTS INC. 12348 World Trade Drive Suite G San Diego CA 92128 858-521-1160	*Section A-A'*	Rock Springs II File No. 12013 June 2012	Figure 3

EXHIBIT D

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CLERK OF THE COURT

OPP
Edward D. Boyack
Nevada Bar No. 5229
BOYACK BECK & TAYLOR
401 N. Buffalo Drive, Suite 202
Las Vegas, Nevada 89145
ted@edblaw.net
702.562.3415
702.562.3570 (fax)
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

ROCK SPRINGS MESQUITE 2 OWNERS' ASSOCIATION, a Nevada domestic non-profit corporation, Plaintiff, vs. FLOYD E. OLSEN and GAYLE G. OLSEN, husband and wife, and DOES I through X, inclusive, Defendants.	CASE NO. A-11-640682-C DEPT. I

OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

COMES NOW, Plaintiff, ROCK SPRINGS MESQUITE 2 OWNERS' ASSOCIATION (hereinafter "ROCK SPRINGS"), by and through its attorney of record, EDWARD D. BOYACK, ESQ., of the law firm of BOYACK BECK & TAYLOR, and hereby submits its Opposition to Defendants' Motion for Summary Judgment as follows:

FACTS

ROCK SPRINGS' complaint is the result of Defendants' failure to properly install and/or maintain portions of their property. It is undisputed that a masonry fence that is six feet high sits on Defendants' property. It is also undisputed that this fence is failing. This failure is causing that fence to rotate and twist onto the property of ROCK SPRINGS and is causing the retaining wall located on ROCK SPRINGS' property to deteriorate and fail. In other words, the wall on Defendants' property is encroaching upon the property of ROCK SPRINGS and causing damage

to the property of ROCK SPRINGS in addition to creating a life safety hazard. The Complaint's causes of action were for trespass, nuisance, and encroachment, including, among other things, for damages relating to earth movement and other factors upon Defendants' property. **See Attached Exhibit 1, ROCK SPRINGS' Complaint.** The damages sought by ROCK SPRINGS are the direct result of the Defendants' fence leaning into the property of ROCK SPRINGS causing the deterioration of the retaining wall which has presently created a life safety hazard. **See Attached Exhibit 2, Expert Report of Scott A. Thoeny, P.E., G.E.** In fact, at this time, the entire area surrounding the wall is fenced off and the public excluded. **See Attached Exhibit 3, Photographs.**

Contrary to the apparent representations of Defendants, this case does not involve a single wall, but in fact multiple walls. The first is a six foot high wall which Mr. Thoeny has identified as a "masonry property line fence." **See Exhibit 2 at p. 1.** This fence is free standing wall "located above the main retaining wall." ***Id.*** Below this free standing masonry fence is a low retaining wall. ***Id.*** The undisputed evidence is that the free standing fence is on the property of Defendants (running along the property line) and the low retaining wall is directly below it on the property of ROCK SPRINGS. The evidence is also undisputed that, at the time the walls were constructed, there did not exist on Defendants' property any additional fill or improvements or palm trees. ***Id.* at p. 2.** In other words, at the time the walls were constructed, they were sufficient to retain the earth and weight present. ***Id.* at p. 4.** It is undisputed that the condition must be corrected. **See *Id.* at p. 5; see also Attached Exhibit 4, Expert Report of Daniel A. Bartlett, P.E. at p. 4.**

This is not a case of a single wall failing. Within the last several years, the damage to the lower retaining wall has been accelerating dramatically and is significantly worse than previously thought. It was not until 2010 that the full extent of the accelerating damage was apparent and ROCK SPRINGS then took quick action to have the situation investigated. **See Attached Exhibit 5, Answers to Interrogatories.** ROCK SPRINGS hired experts to investigate and it was only then, in January 2011, that the full scope of the problem became apparent. **See Attached Exhibit 6, Report from Rimkus Consulting.**

Evidence gathered demonstrated that issues within Defendants' property, including, but not limited to, the planting of numerous palm and other trees very close to the masonry fence, is the cause of the wall failure. **See Attached Exhibit 7, Additional Photographs.** Once this was discovered, ROCK SPRINGS took immediate action to bring the present litigation.

It was only when the expert report was prepared, that the association learned that the cause of the failure was related to the Defendants' backyard. Furthermore, prior to the Rimkus report, no information was known as to the specific cause of the wall failure, and/or the needed repairs. Prior to the Rimkus report, the lower retaining wall showed some minor cracking, but the damage became progressively worse over the last several years. **See Exhibit 5.** The repair estimate to the subject wall is $94,550. **See Attached Exhibit 8, Repair Estimate from Cordova Construction.** Defendants' repair cost is even higher. **See Exhibit 4 at fig. 5.** It is undisputed that the problems with the lower retaining wall were not significant enough to warrant anything other than minor repairs prior to 2011. Prior to that, the repairs consisting of repairing minor cracking in the stucco.

Defendants' Undisputed Facts Are Inaccurate, Misleading, and Simply False

Defendants' "undisputed facts" are anything but undisputed. With the exception of Defendants undisputed facts numbered three and eight, ROCK SPRINGS disputes all of the facts identified by Defendants as follows:

1. ROCK SPRINGS' complaints are not of one wall, but rather, multiple walls that are located on both the property of ROCK SPRINGS and Defendants;
2. The actual construction date is unknown but is presumed to be in 1995. **See Exhibit 2 at p. 2.**
3. ROCK SPRINGS has never made claims for constructional defect and stipulated to this at the hearing on the prior motion to dismiss;
4. The evidence demonstrates that the load placed on the upper masonry fence, which is on Defendants' property, is causing the rotation of that wall into the property of ROCK SPRINGS and causing the failure of the lower retaining wall. **See Exhibit 2.**

5. This is simply false. There are multiple photographs of the upper masonry fence rotating and pressing into ROCK SPRINGS' property. This is further supported by the findings of experts. **See Exhibit 2.**

6. This is a mischaracterization of evidence. ROCK SPRINGS performed minor repairs of stucco over the years. Stucco cracking is common and not unexpected in Clark County.

7. This is a mischaracterization of evidence. ROCK SPRINGS performed minor repairs of stucco over the years. Stucco cracking is common and not unexpected in Clark County.

8. True.

9. This is an inaccurate recitation of the expert's opinion. ROCK SPRINGS' expert clearly calls for a repair and analyzes the necessity of the proffered repair. In addition, Defendants' lone expert's repair is basically the same and the costs are actually higher than the estimate received by ROCK SPRINGS;

10. ROCK SPRINGS fails to see the relevance.

ARGUMENT

A. Defendants Have Already Had A Hearing On their Unsupportable Statute of Limitations Claims Which This Court Denied

This court, on February 28, 2012, signed an Order that, contrary to the assertions of Defendants, did not grant dismissal of any causes of action contained in ROCK SPRINGS' Complaint. Further, the Order did not, as Defendants state, deal at all with the "ownership" of any wall. ROCK SPRINGS has consistently maintained that its claims do not rest on the construction of the walls but rather the actions and inactions of Defendants in their ownership of their property, including the upper masonry fence. Whether that specific wall was constructed defectively is really irrelevant for ROCK SPRINGS' purposes. The fact remains that the masonry fence is rotating causing damage to ROCK SPRINGS. ROCK SPRINGS' expert has opined that the failure is due to the pressures placed on the walls by Defendants' property and the trees placed very close to the masonry fence. **See Exhibit 2.** These pressures have caused

the walls to rotate causing damage to ROCK SPRINGS. In other words, there is too much dirt in their backyard, too many trees near the property line, and/or the soils are moving, causing harm to the wall. This, of course, is a continuing "nuisance." ROCK SPRINGS' claims are related to the nuisance caused by the trees, earth, soils, and other factors from the Defendants' back yard. **See Exhibit 2.**

1. Defendants Misconstrue and Mischaracterize Evidence Relating to the Walls

Defendants state that there is no evidence that they have invaded ROCK SPRINGS' property. However, this is simply not true. Photographs (**See Exhibits 3, 7, and 9**) and expert opinions (**See Exhibit 2**) demonstrate that the stresses of the loads placed on the walls by Defendants' property have rotated the walls causing the damages alleged. Further, the upper masonry fence, which was originally on Defendants' property, has rotated and is pushing against the lower retaining walls on ROCK SPRINGS' property. In other words, the wall on Defendants' property is sliding down the hill and encroaching upon ROCK SPRINGS' property. It is inconceivable to see how this is anything but a physical intrusion upon the property of another.

Defendants attempt to lump the case into one wall (presumably the lower retaining wall). However, the evidence is undisputed that there are multiple walls at the location and that the wall that is sliding down the hill is the wall belonging to Defendants. **See Exhibit 2.** ROCK SPRINGS has never admitted ownership of the upper masonry fence and, in fact, the evidence demonstrates that this fence was originally on Defendants' property. However, even if the upper masonry fence was not on Defendants' property, there is evidence supporting ROCK SPRINGS' contention that force on Defendants' property, mainly earthen buildups and tress, have caused the walls' failures. **See Exhibit 2.** That Defendants may disagree with this opinion simply raises a question of fact that is properly a question only the jury.

Defendants misstate the law of nuisance. NRS 40.140(1)(a) is the proper definition of a nuisance, not the Restatement (Second) of Torts. As the Nevada Supreme Court recently reaffirmed in *Sowers v. Forest Hills Subdivision*, 129 Nev. Adv. Op. 9 (Feb. 14, 2013), a nuisance is "[a]nything which is injurious to health, or indecent and offensive to the senses, or

an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." *Id.* at p. 5, quoting NRS 40.140(1)(a). There are generally two types of nuisances, a nuisance at law or a nuisance in fact. *Id.* As is relevant here, a nuisance in fact is "one which becomes a nuisance by reasons of circumstances and surroundings." *Id.*, quoting 66 C.J.S. Nuisances para. 4 (2013). In order to maintain a private nuisance claim, there must be a "substantial and unreasonable" interference with the use and enjoyment of land. *Id.* at p. 7. Substantial interference is when "normal persons living in the community would regard the [alleged nuisance] as definitively offensive, seriously annoying or intolerable." *Id.* (internal citations omitted). Unreasonable interference is defined as when "the gravity of the harm outweighs the social value of the activity alleged to cause the harm. *Id.* (internal citations omitted).

Defendants' conduct in planting palm and multiple other trees very near the property line as well as the additional earth and soils in the backyard placed additional stresses and weight upon the upper masonry fence which caused the rotation of that fence and the failure of that fence and the lower retaining wall. **See Exhibit 2.** This is the crux of ROCK SPRINGS' argument. This condition is one that has been present for several years but it was not until those stresses and pressures had been building for years did the full extent of the problem manifest itself. The condition is continuing and Defendants have failed to take steps to alleviate the problem requiring the present litigation. This is not a singular event. The damages continue, the conduct continues, and the nuisance, trespass upon ROCK SPRINGS' property, and encroachment continue. Normal persons would certainly regard the situation at Rock Springs with earth and walls falling from the property of Defendants onto ROCK SPRINGS' property as offensive, seriously annoying and certainly intolerable. Additionally, there is no social value to permitting the Defendants to maintain a condition on their property which is casing the harm to ROCK SPRINGS. As such, the interference is both substantial and unreasonable under Nevada law.

However, even though ROCK SPRINGS has presented evidence in support of its position, the court need only recognize the simply fact that claims such as trespass,

encroachment, and particularly nuisance are **questions of fact**. *See Sowers, 129 Nev. Adv. Op. 9* at p. 7. Thus, summary judgment is not appropriate and the matter must be submitted to the jury to make a factual determination.

Defendants' contentions regarding the necessity of some intentional or reckless conduct is misplaced. First, Defendants were placed on notice of the problem when ROCK SPRINGS learned of the cause of the failure. They failed to take any corrective action thus making the intrusion intentional. They made the conscious decision to not correct the condition on their property which is damaging the property of ROCK SPRINGS. This conduct is, by definition, intentional and reckless. However, in Nevada, there is not a requirement of intentional or reckless conduct to support a nuisance claim. The focus is on the result, not the conduct itself. The conduct itself may in fact be lawful. However, the implications of that conduct is what is important. Thus, it is the result of Defendants' conduct in placing the earth and trees on their property which is the nuisance. They planted the trees and placed the extra earth. They knew or should have known that such activities would create stresses on their property, and the property of others, that they had to take into account. Their failure to do so caused damage. To say that Defendants are not responsible for the damage caused because of their affirmative actions flies in the face of all commonly accepted principles of law. The requirement is similar for trespass. The Nevada Supreme Court has held that trespass is the "wrongful interference with the right of exclusive possession of real property." *Palm Springs Transfer & Storage Corp. V. City of Reno*, 281 P.3d 1208 (2009). Further, the plaintiff need only prove that the defendant invaded the property and that the invasion was direct and tangible. *Id.* Defendants' interpretation of the trespass requirements as stated in their motion is simply an incorrect statement of Nevada law. In the present case, there is a direct and tangible invasion as the upper masonry fence has twisted and invaded into the lower wall and the property of ROCK SPRINGS. **See Exhibit 2.**

Contrary to Defendants' assertions in their motion, the upper masonry fence has been shown to belong to Defendants. This fact has never been disputed by Defendants. However, even if the fence did not belong to Defendants, the evidence demonstrates that the cause of the

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failure is the actions of Defendants and the extra weight, earth, trees, and strain placed on the walls. These factors are undisputably Defendants' and located upon Defendants' property.

2. ROCK SPRINGS' Allegations That Give Rise To The Nuisance And Trespass Causes Of Action Are Continuing, And Thus, The Statute of Limitations Is Not Applicable.

Defendants again raise the issue of statutes of limitations. This is true even though this court has already considered and rejected these statutes of limitations arguments. By their very nature, ROCK SPRINGS' allegations are continuing. In fact, the damages continues to this day. It remains just as inconceivable now, as it was at the time Defendants first tried this argument, that the statute of limitations would run on a nuisance and trespass claim that is continuing. Nothing has changed since that first motion. ROCK SPRINGS continues to maintain that the nuisance, trespass, and encroachment are continuing because Defendants have failed and refused to abate the cause of the damage. ROCK SPRINGS is in the position that, even if they corrected the problem now, it would simply reoccur because of the stresses imposed by Defendants' property. The reason that nuisance and encroachment causes of action do not contain specific statutes of limitations is because if the nuisance and the encroachment are continuing, then the matter can be brought to court for a remedy. Furthermore, to assume that the four year limitation rule applies is completely unsupportable, and without any foundation in law, and/or logic.

It is well established law that continuing nuisances **do not** have an applicable statute of limitations so long as the nuisance is continuing. In the California case of *Spar v. Pacific Bell*, 1 CalRptr 2d 480 (1992), the law regarding continuing nuisance, and its applicable statute of limitations, was well addressed. **A Copy of the Spar decision is attached hereto as Exhibit 10 for the Court's convenience.** The *Spar* case states:

> The two primary characteristics of a continuing nuisance or trespass are: (1) the nuisance/trespass is abatable and/or (2) the damages from the nuisance/trespass may vary over time. *Id* at 482.

The Court went on to state:

> In these instances, persons harmed by the continuing nuisance may bring successive actions for damages until the damages or the nuisance is abated. *Id* at 483.

The California Supreme Court has stated that the crucial distinction in determining a

continuing nuisance is "whether the nuisance may be discontinued or abated at any time". *Id* at 483.

Other cases around the country state the same principal. A nuisance which can be corrected by the expenditure of labor or money is a continuing nuisance. *Caldwell v. Knox Concrete Products, Inc.* (1964) 54 Tenn.App. 383, 391 SW 2d 5. Where the nuisance is continuing, damages to property effected by the nuisance are recurrent and may be recovered from time to time until the nuisance is abated. *Stevinson v. Deffenbaugh Industries* (1993, Mo.App.) 870 SW 2d 851. Where a nuisance is "temporary, continuing or abatable,", an injured party can bring a subsequent action for injuries sustained by the continuation of a temporary nuisance. *Spain v. Cape Girardeau* (1972, Mo.App.) 44 SW 2d 498.

Common sense dictates that an ongoing trespass and nuisance allows the aggrieved party to seek a legal remedy without applicable statutes of limitations. The actions that give rise to the cause of action continue to occur. Clearly, this matter, the excessive earth, vegetation and other lateral pressures on the wall can, be abated at any time. Additionally, the nature of the injuries that are ongoing vary in nature. This particular case is a perfect example. The injuries vary over time. Additionally, if the Defendants' backyard issues are not properly addressed, then even a repair/new construction of a wall will not solve the problem. If the Defendants' land is subsiding, and/or their vegetation is continuing to cause harm, then a new wall cannot even be constructed safely.

As such, it is important for the Court to note the distinction in this case. The matter is not related to construction issues, but simply the ongoing nuisance/trespass being created by the Defendants' backyard, soils, water or vegetation.

3. ROCK SPRINGS Only Discovered the Severity of the Situation in Late 2010 and Early 2011

Defendants repeat their arguments concerning ROCK SPRINGS' actions since 2000. This Court has already considered and rejected these arguments. The evidence is that ROCK SPRINGS was aware of some minor cracking and issues but that it was not until the problem accelerated (presumably due to the years of excessive and inappropriate stresses placed on the

walls by Defendants' conduct), that ROCK SPRINGS was on notice of the severity of the issue and the failure of the walls. Under Defendants' misguided and unsupported theory, a single crack in a stucco system would place an unreasonable burden on the owner of the property to conduct a full scale and expensive investigation. As the court is well aware, stucco cracking and slight separation is common in the Las Vegas area and does not necessarily herald a catastrophic failure or problem. The reasonableness of ROCK SPRINGS' actions, and the fact that Defendants dispute this, are perfect examples of a question of fact that is left to the determination of the jury. *See Winn v. Sunrise Hospital & Medical Center*, 277 P.3d 458, 128 Nev. Adv. Op. 23 (2012). In *Winn*, the Nevada Supreme Court stated quite clearly with approval, the well settled rule in Nevada that "the appropriate accrual date for the statute of limitations is a question of law only if the facts are uncontroverted." *Id.* at 277 P.3d at 463, *quoting Day v. Zubel*, 112 Nev. 972, 977, 922 P.2d 536, 539 (1996). In other words, when there is a dispute as to the date, the question of a statute of limitations must, by definition, be a question of fact for the jury. Thus, summary judgment, as requested by Defendants is wholly inappropriate.

ROCK SPRINGS does not dispute that it conducted minor repairs on the lower retaining wall prior to 2010. However, this does not give rise to notice of such a substantial problem. That problem did not manifest itself until, at the earliest, 2010. Further, the walls are actually multiple walls, not a single unit. It has only been in the last several years that it could be discovered that the entire wall system is failing.

While earlier inspections and repairs revealed some minor cracking, there was no evidence of a systemic failure until the problem worsened and ROCK SPRINGS brought in an expert in late 2010 to investigate. Given that the condition is ongoing and continuing, the timing is not as important as the damage. When the adjoining neighbors' backyard, due to its heavy earth, irrigation, trees, or some other factor, is causing damage, the Plaintiff has a right to bring a legal action to abate the problem and recover its damages as a result of the Defendants' conduct.

B. Defendants' Equitable Arguments Lack Any Factual Support

Apparently recognizing that their legal arguments have already been rejected by this court

once, Defendants attempt to argue that the doctrine of laches works to defeat ROCK SPRINGS' complaint. While Defendants correctly point out some of the requirements to support a laches defense, they conveniently fail to point out to this court two important caveats to the laches doctrine. First, when the statutes of limitations has not expired, a mere substantial disadvantage to the party seeking to invoke the defense is not sufficient. Our Supreme Court has stated that, in such circumstances, "[e]xtremely strong circumstances must exist to sustain the defense of laches when the statute of limitations has not run." *Home Sav. Assn. v. Bigelow*, 105 Nev. 494, 495, 779 P.2d 85, 86 (1989). The second caveat is that the Supreme Court will not give a defendant a windfall by applying the equitable doctrine of laches. *Id.*, 779 P.2d at 86-87.

In the present case, the statute of limitations has not expired and Defendants have not shown any "extremely strong" circumstances that would justify the application of a laches defense. Secondly, permitting Defendants to escape liability based on their arguments concerning an inability to sue the builder would permit an impermissible windfall and would allow Defendants to escape with a windfall. They would be able to continue to destroy ROCK SPRINGS' property over and over again without responsibility. Further, Defendants again misinterpret the actual complaint. ROCK SPRINGS makes no contention concerning the construction of the wall on Defendants' property. The allegations are not connected to the wall per se but to the actions Defendants undertook on their property. The damages would be present whether the upper masonry fence was present or not.

As discussed above, even if laches was theoretically available to Defendants, there has been no great delay by ROCK SPRINGS. ROCK SPRINGS discovered the problem in 2010 and, after a short investigation, filed the present litigation. Contrary to Defendants' unsupported assertions, there was no delay of years. Defendants' argument is simply illogical. There is no advantage to ROCK SPRINGS sitting for years after discovering a large problem. To believe that ROCK SPRINGS knew or should have known of a catastrophic failure and simply did nothing defies common sense. It was not until the situation progressed and the failure became visible in 2010 that ROCK SPRINGS could have taken action. That is exactly what it did. As soon as the problem was identifiable, it was identified and investigated and appropriate measures

were begun to have Defendants, as the offending party, correct the problem. When that was unsuccessful, ROCK SPRINGS resorted to the present suit. Contrary to Defendants' statements, this was not an immediate situation. It was not until the extra earth, trees, and weight had beared on the walls for many years was the condition noticeable. It was then that ROCK SPRINGS took action.

C. ROCK SPRINGS Has Presented Evidence of Damages

Defendants, without any legal justification or support, contend that ROCK SPRINGS cannot present any admissible evidence of damages. Defendants seem to prop up this spurious argument on the idea that ROCK SPRINGS is required to present expert testimony on the amount that it would cost to remedy the situation. However, Defendants present no legal support for this assertion. The reason for this omission is simple; they have no legal support for such an argument. All of the cases cited by Defendants permit the introduction of expert testimony but do not **require** it. Defendants recognize this fact when, in their motion, they say "a party seeking damages may utilize an expert to assist in the calculation of the total damages sustained." **See Defendants' Motion at p. 14 ll.4-5.** The ability to utilize experts does not translate into a **requirement** to use an expert. Defendants have presented no evidence or law to support a theory that one must present expert testimony on the issue of the damages. *See Krause v. Little*, 34 P.3d 566, 117 Nev. 929 (2001)(holding that expert testimony was not necessary before a jury could award damages for future pain and suffering). In other words, a jury may award damages without expert testimony. In the present case, the damage caused is explained through expert testimony. ROCK SPRINGS has provided an estimate for a straightforward and objective fix to the problem. This remedial measure is agreed to by Defendants. The only real difference is that Defendants' cost is actually higher than ROCK SPRINGS. If Defendants would instead rely upon their estimate, ROCK SPRINGS would agree to such a figure. However, ROCK SPRINGS simply seeks to introduce testimony from a licensed contractor as to the amount he would charge to undertake the repair. This is competent evidence that need not be provided by a retained expert. The witness has observed the condition and provided an estimate as to the cost. It is no different than providing an estimate to repair a car from a body shop. Such testimony need not

be from an expert. The amount of the estimate may be subject to criticism as too high but all the estimate is doing is taking a recommended repair (removing and replacing the walls) and putting a price on it. This is not an area where an expert is required. Any arguments would go to the weight given by the jury to the estimate, not whether the testimony is admissible. ROCK SPRINGS is free to provide the estimate through either the person who gave the estimate or through ROCK SPRINGS itself who received the estimate. If Defendants want to challenge the amount, they are free to do so. However, their witness has stated that the same repair would actually cost more. In addition to its estimate, ROCK SPRINGS is also free to utilize the estimate provided by Defendants. See **Exhibit 4 fig. 5.** Defendant shave provided no legal authority that would prevent ROCK SPRINGS from utilizing that figure as its measure of damages at trial and during its case in chief.

D. The Damages Caused by Defendants' Actions Were Foreseeable and, in any Event, the Issue of Foreseeability is a Factual Question Left to the Jury

Defendants incorrectly rely upon a line of Nevada cases that deal with a specific type of negligence; Innkeeper Negligence, as opposed to general negligence principles. The cases relied upon by Defendants deal with an innkeeper's liability to a guest, not a general negligence situation. Such negligence is specifically governed by a special statute relating to innkeeper liability, NRS 651.015, and, as such, are inapplicable to the present case. When one examines the applicable law on negligence, it is clear that ROCK SPRINGS has satisfied its obligations to present a prima facie case and that the ultimate determination is a jury question precluding summary judgment.

It is well settled that the Nevada Supreme Court is very hesitant to uphold the grant of summary judgment in a negligence action. *See Butler v. Bayer*, 168 P.3d 1055, 1063, 123 Nev. 450 (2007)(holding that "[w]e are reluctant to affirm summary judgment in negligence cases because, generally, the question of whether a defendant was negligent in a particular situation is a question of fact for the jury to resolve.").

In the present case, ROCK SPRINGS has alleged, and the evidence demonstrates that the actions of Defendants in planting trees near the property line and causing additional earth to be

placed resulted in the failure of the walls and the encroachment and trespass upon ROCK SPRINGS' property and caused damage. It is undisputed that Defendants owed a duty to neighboring landowners not to create a situation whereby the neighbor's land is damaged. By engaging in conduct that caused such damage, Defendants breached that duty. The testimony of ROCK SPRINGS' expert demonstrates that the cause of the damages sustained by ROCK SPRINGS were the actions of Defendants. Finally, ROCK SPRINGS has alleged that it suffered damages as a result of those actions. Given this, there is no doubt that ROCK SPRINGS has demonstrated sufficient evidence, through the testimony and report of its expert, to have a jury decide the case.

Defendants seemingly argue that any damage caused by the planting of trees on an up slope that was supported by retaining walls was unforeseeable to Defendants and thus, they have no liability. Such an argument, while disingenuous at best, fails to properly apply Nevada law. Turning first to the argument itself, it seems unbelievable that a landowner is not responsible for his actions if he does something with his property that then causes damage to neighbors. However, even beyond that, the Nevada Supreme Court has made it very clear that the issue of foreseeability in a normal negligence case is a factual question and must be left to the jury. *See DeBoer v. Senior Bridges of Sparks Family Hosp., Inc.*, 282 P.3d 727, 732, 128 Nev. Adv. Op. 38 (2012); *see also Butler*, 168 P.3d at 1065. The Court in *DeBoer* reversed a summary judgment finding in favor of the defendant after finding that it was error for the district court to find, as a matter of law, that the defendant did not breach a duty of reasonable care to prevent foreseeable harm because such issues are factual questions that must be addressed by the jury. *DeBoer*, 282 P.3d at 732. In other words, it is for the jury, not the court, to determine the issues of duty, breach, causation, and damages. It is not appropriate for the court to make a determination if some damage was foreseeable. Defendants' reliance on cases involving innkeepers and specific Nevada statutes limiting the liability of innkeepers in negligence situations is clearly inappropriate, inapplicable, and should be disregarded by the court. This matter must be placed before a jury to make those factual decisions.

CONCLUSION

WHEREFORE, based on the foregoing, Plaintiff ROCK SPRINGS MESQUITE 2 OWNERS' ASSOCIATION respectfully requests that the court DENY Defendants' Motion for Summary Judgment.

DATED this 18 of April, 2013.

BOYACK BECK & TAYLOR

By: _____
EDWARD D. BOYACK
Nevada Bar No. 005229
401 N. Buffalo Drive #202
Las Vegas, Nevada 89145
Attorney for Plaintiff

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 18th day of April, 2013, service of the **OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** was made this date by depositing a copy thereof for mailing at Las Vegas, Nevada, postage prepaid, addressed to:

Matthew A. Sarnoski
DENNETT WINSPEAR, LLP
3301 N. Buffalo Drive, Suite 195
Las Vegas, Nevada 89129
Attorneys for Defendants

4-18-11
An Employee of Boyack & Beck

APP08

EXHIBIT E

DISTRICT COURT
CLARK COUNTY, NEVADA

Negligence - Other | COURT MINUTES | May 14, 2013

A-11-640682-C Rock Springs Mesquite 2 Owners Association, Plaintiff(s)
vs.
Floyd Olsen, Defendant(s)

May 14, 2013 **9:00 AM** **All Pending Motions**

HEARD BY: Cory, Kenneth **COURTROOM:** RJC Courtroom 16A

COURT CLERK: Michele Tucker

RECORDER: Beverly Sigurnik

PARTIES PRESENT: Boyack, Edward D — Attorney for Plaintiff
Sarnoski, Matthew A. — Attorney for Defendant

JOURNAL ENTRIES

- ALL PENDING - Defendants Floyd E. Olsen and Gayle G. Olsen's Motion for Summary Judgment...Defendants Floyd E. Olsen and Gayle G. Olsen's First Motion in Limine, to Exclude Arguments Regarding Defendants Potential Strict Liability....Defendants Floyd E. Olsen and Gayle G. Olsen's Second Motion in Limine, to Exclude Defendants' Liability for Damages Arising from Defective Design or Construction of Improvements to Real Property

Defendants Floyd E. Olsen and Gayle G. Olsen's Motion for Summary Judgment -

Mr. Sarnoski restated the facts of the Motion for Summary Judgment. Mr. Sarnoski stated this should be a construction defect action, but the Court ruled all construction defect claims out. Mr. Sarnoski argued Plaintiffs have been aware of the trees pushing on the fence line since 2000. It now requires $90,000.00 in repairs. Plaintiffs sat on their rights for over a decade. Statements by the Court. Mr. Boyack argued this is a matter for the Court to decide as to what the statute of limitations is. Mr. Boyack further argued the nuisance and trespass claims are on going, and the negligence claim is still continuing. This matter has been in litigation for a year and half. We have experts saying these are remedial harms which are on going. These harms are occurring and continue to occur. The statute of limitations is not running, as it is continuing and on going. Mr. Sarnoski argued there are no bases for on going harm. The encroachment and trespass claims require physical invasion. There is no physical nuisance; there is nothing protruding on the property. Defendants do not feel there is a claim for trespass or encroachment. Mr. Sarnoski further argued as to the statute of limitations, equality precludes this claim. This all could have been remedied when the Plaintiffs first knew about

it. It was the Plaintiffs obligation to pursue their rights timely. Court inquired if the wall was going to fall. Mr. Sarnoski advised it would. Court inquired as to Injunctive Relief. Mr. Boyack argued the Plaintiffs can not repair their wall without the Defendants wall collapsing. If the Defendants are not found liable, it still does not fix the problem. The wall needs to be jointly repaired. Mr. Sarnoski stated there is no request for Injunctive Relief. The low barring wall is the property of the Plaintiff. Further arguments. COURT ORDERED, Motion for Summary Judgment DENIED. Mr. Sarnoski made an oral motion to dismiss the trespass, nuisance, and encroachment claim. Mr. Boyack argued there is actual intrusion; the wall is falling into the Plaintiffs property line. Mr. Sarnoski argued there is no such evidence. Further arguments. COURT ORDERED, Trespass claim DISMISSED. Mr. Sarnoski argued as to encroachment and negligence. COURT ORDERED, DENIED.

Defendants Floyd E. Olsen and Gayle G. Olsen's First Motion in Limine, to Exclude Arguments Regarding Defendants Potential Strict Liability -

Mr. Boyack advised he did not intend on using the term "strict liability", negligence and nuisance is what the jury instruction would say. COURT ORDERED, Motion GRANTED.

Defendants Floyd E. Olsen and Gayle G. Olsen's Second Motion in Limine, to Exclude Defendants' Liability for Damages Arising from Defective Design or Construction of Improvements to Real Property -

Colloquy as to design and construction of wall. COURT ORDERED, Motion DENIED.

EXHIBIT F

ORIGINAL

DISTRICT COURT

CLARK COUNTY, NEVADA

ROCK SPRINGS MESQUITE 2 OWNERS' ASSOCIATION, a Nevada domestic non-profit corporation,

Plaintiff,

vs.

FLOYD E. OLSEN and GAYLE G. OLSEN, husband and wife, and DOES I through X, inclusive,

Defendants.

CASE NO: A-11-640682-C

DEPT. I

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

JUN 03 2013 3:06pm

BY: Michele Tucker
MICHELE TUCKER, DEPUTY

VERDICT FORM NUMBER 3

We, the jury, find in favor of the Defendants and against the Plaintiff.

DATED this 3rd day of June, 2013.

Laurie Abbo
FOREMAN

EXHIBIT G

2 of 187 DOCUMENTS

Restatement of the Law, Second, Torts
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Case Citations

Rules and Principles

Division 10 - Invasions of Interests in Land Other Than by Trespass

Chapter 39 - Interests in the Support of Land

Topic 1 - Withdrawing Lateral Support

Restat 2d of Torts, § 817

§ 817 Withdrawing Naturally Necessary Lateral Support

(1) One who withdraws the naturally necessary lateral support of land in another's possession or support that has been substituted for the naturally necessary support, is subject to liability for a subsidence of the land of the other that was naturally dependent upon the support withdrawn.
(2) One who is liable under the rule stated in Subsection (1) is also liable for harm to artificial additions resulting from the subsidence.

COMMENTS & ILLUSTRATIONS: Comment on Subsection (1):

a. Lateral support is defined in the Introductory Note to the Chapter.

b. Strict liability. The liability stated in this Subsection is strict liability in the sense that it exists although no subsidence is intended or foreseeable, and although in removing the lateral support the utmost care and skill are used to prevent a subsidence. This strict liability extends only to naturally necessary lateral support as defined in Comments *c* to *g*. In this respect it is to be contrasted with the liability in respect to lateral support that is not naturally necessary, such as support for structures on land, which depends upon rules of the law of negligence. On liability for negligent withdrawal of lateral support in general, see § 819.

Illustrations:

1. A and B are severally in possession of adjoining lands. A's land is in its natural condition. B makes an excavation on his land, using all possible care. A's land falls into this excavation. B is subject to liability to A.

2. A and B are severally in possession of adjoining lands. A building on A's land extends to the boundary between them. The underpinning wall on the boundary is 10 feet deep, and is supported by B's land. B excavates for a house on his land to a depth of 6 feet, using reasonable care. A's underpinning wall falls, and A's house collapses. B is not liable under the rule stated in this Subsection.

c. Naturally necessary lateral support. Naturally necessary lateral support is that support which the supported land itself requires and which, in its natural condition and in the natural condition of the surrounding land, it would require. It does not include the support needed because of the presence of artificial additions to or other artificial alterations in the supported land or the surrounding land. The measure of this right of the other and of this duty of the actor is the natural dependence of land upon land, and the right and duty are not enlarged by alterations of the natural condition. Lateral support made necessary by these alterations is not naturally necessary support. This distinction is more particularly stated and illustrated in Comments *e* to *h*.

d. The rule stated in this Subsection applies only to lateral support of the land itself. It does not apply to lateral support required by artificial additions on the supported land. This is true although the weight of the addition does not exceed the weight of the soil removed in erecting it. When artificial additions are present, this rule applies to that lateral support, and only that support, which the land itself requires, but not exceeding what it would require in the absence of these additions.

Illustration:

3. A and B are severally in possession of lands. There is a heavy building on A's land. B makes an excavation in his land for the purpose of building a house on it. A's land falls into this excavation. If A's land would not have fallen if there had been no building on it, B is not liable under the rule stated in this Subsection. If A's land would have fallen if there had been no building on it, B is liable under the rule stated in this Subsection.

e. The rule stated in this Subsection does not apply to additional lateral support required because alterations in the supported land have impaired its cohesiveness and stability. When these artificial conditions exist, this rule applies to only that lateral support which the land itself would require if it were in its natural condition.

Illustration:

4. A and B are severally in possession of adjoining lands. A takes coal from under his land. B excavates in his land for the purpose of building a house on it. A's land falls into the excavation. If A's land would have fallen even if it had been in its natural condition, B is subject to liability under the rule stated in this Subsection. If A's land would not have fallen if it had not been undermined, B is not liable under the rule stated in this Subsection.

f. The rule stated in this Subsection applies to the lateral support required by the supported land because of the natural pressure of surrounding land, but it does not apply to the additional lateral support required by the supported land because of the presence of artificial additions that weight the surrounding lands and increase the dependence of the supported land upon the land in which the act is done. When these artificial additions exist, this rule applies to only the lateral support that the land itself would require if the surrounding land were in its natural condition.

Illustration:

5. B is in possession of a narrow strip of land lying between land in the possession of A and land in the possession of C. There is a downward slope from A's land to C's land. A great quantity of bricks is piled upon A's land. B's land is in its natural condition. C makes an excavation for a house in his land. B's land falls into the excavation. If B's land would have fallen if A's land had not been weighted, C is subject to liability under the rule stated in this Subsection. If B's land would not have fallen if A's land had not been weighted, C is not liable under the rule stated in this Subsection.

g. The rule stated in this Subsection applies to the withdrawal of the support of any land naturally necessary to maintain another's land in its natural condition. The area of land necessary to support the other's land depends upon the character of the other's land and the supporting land. These lands may be so solid and stable that a narrow strip of land will provide the requisite support, or they may be so friable and unstable that a wide strip is necessary. It may be impossible to determine, except after the event, how much land was in fact necessary. It is immaterial that the necessary strip is divided into different tracts severally possessed. If, in their natural condition, the lands of two or more

possessors are necessary to maintain another's land in its natural condition, each of them subjects himself to the liablity stated in this Subsection if he withdraws the support furnished by his land.

Illustration:

6. B is in possession of a narrow strip of land lying between land possessed by A and land possessed by C. The lands of A and B are in their natural condition. C makes an excavation in his land. The lands of A and B subside. C is subject to liability to A and B.

On the other hand, a possessor of land outside this area of natural support is not liable under the rule stated in this Subsection. Thus, although an undermining of one possessor's land within the area of natural support may create a dependence for support upon the land of a second possessor outside the area, this rule does not apply to the withdrawal by the latter of the support thus artificially necessitated and furnished by his land. When there are artificial conditions in the nearer possession, it is a question of fact whether the withdrawal of the support of a more remote possession is a withdrawal of naturally necessary support. If it is found that the other's land would not have subsided if the possession nearer to it had been in its natural condition, the rule stated in this Subsection does not apply to the withdrawal of the support of the more remote possession. But if, and to the extent that, the other's land would have subsided if the possession nearer to it had been in its natural condition, the rule stated in this Subsection applies.

Illustration:

7. B is in possession of a narrow strip of land lying between land possessed by A and land possessed by C. A's land is in its natural condition. B undermines his land. C makes an excavation for a house on his land. The lands of A and B subside. If A's land would not have fallen if B's land had been in its natural condition, B is, and C is not, subject to liability to A under the rule stated in this Subsection. If A's land would have fallen, but to a lesser extent, if B's land had been in its natural condition, B and C are each subject to liability to A under the rule stated in this Subsection. If A's land would have fallen to the same extent if B's land had been in its natural condition, C is, and B is not, subject to liability to A under the rule stated in this Subsection.

h. What is a subsidence. A subsidence is any movement of the soil from its natural position. This movement may be in any direction. It may be of surface or subsurface soil. A shifting, falling, slipping, seeping or oozing of the soil is a subsidence within the meaning of the term as used in this Chapter. The outflow of water, oil or gas is not itself a subsidence within the meaning of the term as used in this Chapter, but it may produce a subsidence. (See § 818).

Illustration:

8. A is in possession of land containing asphalt. B is in possession of land adjoining. B makes an excavation in his land. The asphalt, being of a semi-fluid nature, oozes into the excavation. This is a subsidence of A's land and B is subject to liability to A.

i. Liability is for subsidence. The withdrawal of the naturally necessary lateral support (Comments *d* to *h*) subjects the actor to liability (see § 5) but does not make him liable in an action for damages unless, and until, a subsidence occurs. (On the actor's liability to be enjoined by a court having equitable jurisdiction, see §§ 933-951.) The actor may provide artificial support to replace natural lateral support, and if he does so and it prevents subsidence no action lies against him. The statute of limitations does not begin to run until a subsidence occurs and it runs then only for that subsidence. The actor continues subject to liability for a further distinct subsidence although it flows from the same act.

To make the actor liable, the subsidence must be substantial. The rule that the law will not concern itself with trifles is applicable. Thus the fall of a few grains of sand is not actionable.

Pecuniary damage apart from a subsidence does not impose this liability, although it may make the actor liable for breach of some other duty. Thus the existence of an excavation in the actor's land does not of itself impose this liability

upon the actor, although it may make him liable upon the principles of the law of nuisance. (See Chapter 40).

j. Persons subject to liability -- Liability of transferees. The person liable under the rule stated in this Subsection is the actor who withdraws the naturally necessary support. It is immaterial whether in respect to the supporting land the actor is owner, possessor, licensee or trespasser. The owner or possessor of this land is not liable under the rule stated in this Subsection unless he was an actor in the withdrawal of support.

A possessor of land becomes subject to the liability stated in this Subsection when he withdraws from another's land the natural support furnished by his land, but he does not become liable under the rule stated in this Subsection unless the other's land subsides. Transfer of his land to a third person does not relieve him of the liability or subject the subsequent possessor to this liability.

k. Substituted or remote support. The actor may avoid liability by furnishing artificial support, such as a retaining wall, sufficient to replace the natural lateral support withdrawn. The later withdrawal of the artificial support subjects the person who withdraws it to the liability stated in this Subsection. Even if the artificial support is not withdrawn, the actor remains liable if it proves inadequate and subsidence occurs that would not have occurred if the natural support had not been withdrawn. This is true regardless of the care exercised in providing the artificial support.

Illustration:

9. A and B are in possession of adjoining lands. A's land is in its natural condition. B makes an excavation on his land, and shores up A's land with artificial supports. In doing so he exercises reasonable care. Nevertheless the supports give way, and A's land falls into the excavation. B is subject to liability to A under the rule stated in this Section.

So, too, if a possessor of the area of natural support lessens the supporting quality of the land, as by mining for coal, but the less stable land aided by the support of more remote land prevents a subsidence, the actor is not liable. In this case, if the actor owned the more remote land when he lessened the supporting quality of the area of natural support, the later withdrawal of the support of the more remote land subjects the person who withdraws it to the liability stated in this Subsection. This is true because the first possessor left sufficient support from land under his control, and anyone who withdraws it becomes subject to liability as in the case of withdrawal of artificial support. But if the actor had no power of disposition over the more remote land, he could not shift the burden of support to it, and when he lessens the supporting quality of the area of natural support, he becomes and continues to be subject to the liability stated in this Subsection. But the liability of another person who withdraws the lateral support of the more remote land depends upon the rule stated in Comment *g*; if the more remote land is within the area of natural support, the person who withdraws the support furnished by it is subject to this liability, but if the more remote land is outside this area, he is not. (See Illustration 7).

Illustrations:

10. A and B are severally in possession of adjoining lands. A's land is in its natural condition. B makes an excavation in his land. B transfers his land to C. The excavation causes A's land to subside. B is, and C is not, subject to liability to A under the rule stated in this Subsection.

11. A and B are severally in possession of adjoining lands. A's land is in its natural condition. B makes an excavation in his land and erects a retaining wall sufficient to sustain the land of A. B transfers his land to C. C removes this retaining wall and A's land subsides. C is, and B is not, subject to liability to A under the rule stated in this Subsection.

12. A is in possession of land in its natural condition. B is in possession of land 100 feet wide adjoining A's land. The 55 feet of B's land next to A's land would sustain A's land in its natural condition. B takes coal from under this 55 feet of his land, thereby making it so unstable that without the support of the remaining 45 feet in a solid condition, A's

land will subside. B transfers his land to C. C takes coal from under the 45 feet. A's land subsides. C is, and B is not, subject to liability to A under the rule stated in this Subsection.

13. B is in possession of land 20 feet wide lying between land in possession of A and land in possession of C. The lands of all three are in their natural condition. B's land in its natural condition is sufficient to support A's land in its natural condition. B undermines his land. In the then unstable condition of B's land, 10 feet of C's land is needed to support A's land in its natural condition.

(i) C transfers his land to B. B makes an excavation in his land. A's land subsides. B is subject to liability to A under the rule stated in this Subsection.

(ii) B transfers his land to C. C makes an excavation in his originally possessed land. A's land subsides. B is, and C is not, subject to liability to A under the rule stated in this Subsection.

l. "Naturally dependent upon the support withdrawn." The actor is subject to the liability stated in this Subsection when, and only when, he withdraws naturally necessary lateral support as defined in Comments *c* to *g*, or when he withdraws artificial support that has been substituted for the natural support. Furthermore, he is liable for the subsidence of the land, and only the land, that was naturally dependent upon the support withdrawn by him. If the land of A is bounded on one side by the land of B and the land of C adjoining the land of B, and B makes an excavation in his land within the area of natural support of A's adjoining land, so that A's land becomes more dependent upon C's land for support, the liability of C for withdrawing the support of his land, stated in this Subsection, is not increased by the action. C's excavation may be the immediate actual cause of the whole subsidence of A's land, but C's liability under the rule stated in this Subsection is only for the subsidence of the part of A's land that was naturally dependent upon the support withdrawn by him, and B is liable for the subsidence of the part of A's land that was naturally dependent upon the support withdrawn by him.

m. Superseding cause or other reason. A superseding cause is an act of a third person or other force that by its intervention prevents the actor from being liable for harm to another that his antecedent conduct is a substantial factor in bringing about. (See § 440). Generally the subsidence is wholly the result of the withdrawal of the naturally necessary lateral support by the actor, and no question of a superseding cause or other reason for relieving him arises. The fact that the subsidence is actually brought about by the act of a third party after the support was withdrawn may, or may not, relieve the actor who withdrew it from liability, depending upon whether the third party was privileged to do what he did. Situations in which the actor is, and is not, relieved from liability are stated in Comments *j* and *k*.

The intervention of ordinary forces of nature is not a superseding cause. Thus, the fact that a subsidence is brought on, after the support was withdrawn, by heat, rain, snow or frost, does not relieve the actor from liability. If, however, the subsidence is brought about by the intervention of an extraordinary and unforeseeable force of nature, of the kind commonly called an act of God, the actor is not subject to liability unless his conduct has substantially contributed to the result. While the cases do not make it clear, it may well be that he is not liable unless his conduct was negligent.

Comment on Subsection (2):

n. Liability for harm to artificial additions. Although the actor is not subject to the liability stated in Subsection (1) for withdrawing lateral support not naturally necessary (Comments *c* to *f*) and so is not subject to this liability for withdrawing support of artificial additions, he is subject to this liability for harm to artificial additions on the supported land that may be caused by his withdrawal of the naturally necessary support. The actor violates his duty to the other when he withdraws naturally necessary lateral support. He becomes liable to the other under the rule stated in Subsection (1) when, and only when, a subsidence of the other's land that was naturally dependent uponthe support withdrawn occurs. When harm to artificial additions results from the subsidence, the actor is liable for the harm.

Illustration:

14. A and B are severally in possession of adjoining lands. There is a building on A's land resting on foundation walls 6 feet deep. B excavates his land to a depth of 15 feet. A's land slides into this excavation and his building settles and cracks. If A's land would not have subsided if there had been no building on it, B is not liable under the rule stated in Subsection (1). If A's land would have fallen if there were no building on it, B is subject to liability for the subsidence of the land under the rule stated in Subsection (1), and he is subject to liability for harm to the building under the rule stated in this Subsection.

REPORTERS NOTES: This Section is changed by the deletion of the two caveats with the answers given in Comments *k* and *m* respectively. "Subject to liability" replaced "liable," with the result that the last phrase in Subsection 1 has been eliminated from the blackletter.

Leading cases in support of the strict liability are *Bonomi v. Backhouse, El. Bl. & El. 646, 120 Eng.Rep. 643 (1859),* affirmed *9 H.L. 503, 11 Eng.Rep. 825 (1861); Smith v. Thackerah, L.R. 1 C.P. 564 (1866); Corporation of Birmingham v. Allen, L.R. 6 Ch. Div. 284 (1877); Foley v. Wyeth, 84 Mass. (2 Allen) 131 (1861); Gilmore v. Driscoll, 122 Mass. 199 (1877); Home Brewing Co. v. Thomas Colliery Co., 274 Pa. 56, 117 A. 542 (1922); Prete v. Cray, 49 R.I. 209, 141 A. 609 (1928).*

Recent cases imposing strict liability include: *Blake Constr. Co., Inc. v. United States, 585 F.2d 998 (Ct.Cl.1978); St. Louis-S. F. R. R. v. Wade, 607 F.2d 126 (5th Cir. 1979); Gladin v. Von Engeln, 195 Colo. 88, 575 P.2d 418 (1978); Sipple v. Fowler, 151 Ga.App. 135, 259 S.E.2d 142 (1979); First Nat'l Bank & Trust Co. of Rockford v. Universal Mortgage & Realty Trust, 38 Ill.App.3d 345, 347 N.E.2d 198 (1976); St. Joseph Light & Power Co. v. Kaw Valley Tunneling, 589 S.W.2d 260 (Mo.1979).*

Comment b: The statement that liability for withdrawing naturally necessary support does not depend upon negligence is supported by *Urosevic v. Hayes, 590 S.W.2d 77 (Ark.App.1979); Sanders v. State Highway Comm'n, 211 Kan. 776, 508 P.2d 981 (1973); Gilmore v. Driscoll, 122 Mass. 199 (1877); Schultz v. Bower, 57 Minn. 493, 59 N.W. 631 (1894); McKamy v. Bonanza Sirloin Pit, 195 Neb. 325, 237 N.W.2d 865 (1976); Crnkovich v. Scaletta, 203 Neb.* 22, 277 N.W.3d 416 (1979); *Mosier v. Oregon R. and Nav. Co., 39 Or. 256, 64 P. 453 (1901); McGettingan v. Potts, 149 Pa. 155, 24 A. 198 (1892); Matulys v. Philadelphia & Reading Coal & Iron Co., 201 Pa. 70, 50 A. 823 (1902); Simon v. Nance, 45 Tex.Civ.App. 480, 100 S.W. 1038 (1907); Richardson v. Vermont Central R. Co., 25 Vt. 465 (1853).*

Statutes in some states vary this rule. Some provide liability only for negligence if the actor meets certain statutory requirements. E.g., Mont.Rev.Code Ann. § 70-16-203 (1979); N.D.Cent. Code § 47-01-18 (1978); see *Hermanson v. Morrell, 252 N.W.2d 884 (N.D.1977).* Others impose strict liability only if the actor goes beyond a designated depth. E.g., Cal.Civ.Code § 683 (West, Supp.1980) (9 feet); Ky.Rev.Stat. § 381.440 (1970) (10 feet); N.J. Stat.Ann. § 46:10-1 (West, 1940) (8 feet). See *Holtz v. San Francisco Bay Area Rapid Transit Dist., 17 Cal.3d 648, 131 Cal.Rptr. 646, 552 P.2d 430 (1976).*

Comment d: That the defendant is not liable for withdrawing support required for structures on the supported land: *St. Louis-S. F. R. R. v. Wade, 607 F.2d 126 (5th Cir. 1974); Schmoe v. Cotton, 167 Ind. 364, 79 N.E. 184 (1906); Gilmore v. Driscoll, 122 Mass. 199 (1877); St. Joseph Light & Power Co. v. Kaw Valley Tunneling, 589 S.W.2d 260 (Mo. 1979); Matulys v. Philadelphia & Reading Coal & Iron Co., 201 Pa. 70, 50 A. 823 (1902); Home Brewing Co. v. Thomas Colliery Co., 274 Pa. 56, 117 A. 542 (1922); Simon v. Nance, 45 Tex.Civ.App. 480, 100 S.W. 1038 (1907); Bay v. Hein, 9 Wash.App. 774, 515 P.2d 536 (1973); Smith v. Tackerah, L.R. 1 C.P. 564 (1866).*

Comment e: This is supported by *Victor Mining Co. v. Morning Star Mining Co., 50 Mo.App. 525 (1892); Gillies v. Eckerson, 97 App.Div. 153, 89 N.Y.S. 609 (1904); Corporation of Birmingham v. Allen, L.R. 6 Ch.Div. 284 (1877).*

Comment f: Cases in accord are *Northern Transp. Co. v. Chicago, 99 U.S. 635, 25 L.Ed. 336 (1879); Gladin v. Von Engeln, 145 Colo. 88, 575 P.2d 418 (1978); Canfield Rubber Co. v. Leary, 99 Conn. 40, 121 A. 283 (1923); Smith v. Howard, 201 Ky. 249, 256 S.W. 402 (1923); McKamy v. Bonanza Sirloin Pit, 195 Neb. 325, 237 N.W.2d 865 (1976);*

Rector of Trinity Church v. City of New York, 134 Misc. 29, 234 N.Y.S. 281 (1920); Walker v. Strosnider, 67 W.Va. 39, 67 S.E. 1087 (1910); Green v. Belfast Tramway Co., 20 L.R. Ir. 35 (1887).

Comment g: Good statements of this are found in *Corporation of Birmingham v. Allen, L.R. 6 Ch.Div. 284* (Jessel, M.R., at 289) (1877); and *Caledonian R. Co. v. Sprot, 2 Macq.H.L.Cas. 449 (1856).*

The actor who excavates in the area of natural support is subject to liability although there is intervening land owned by a third person. *Keating v. City of Cincinnati, 38 Ohio St. 141, 43 Am. Rep. 421 (1882).*

One outside of the area of natural support is not subject to strict liability. *Corporation of Birmingham v. Allen, L.R. 6 Ch. Div. 284 (1877);* and *Darley Main Colliery Co. v. Mitchell, L.R. 11 App.Cas. 127 (1886).*

Comment h: This is supported by *Levi v. Schwartz, 201 Md. 575, 95 A.2d 322 (1953); Cabot v. Kingman, 166 Mass. 403, 44 N.E. 344 (1896); Matulys v. Philadelphia & Reading Coal & Iron Co., 201 Pa. 70, 50 A. 823 (1902); Prete v. Cray, 49 R.I. 209, 141 A. 609 (1928);* Trinidad Asphalt Co. v. Ambord, [1899] A.C. 594; *Jordeson v. Sutton S. & D. Gas Co., [1899] 2 Ch. 217.*

Comment i: The position here taken is supported by the majority of the courts. *West Pratt Coal Co. v. Dorman, 161 Ala. 389, 49 So. 849 (1909); Kansas City N. W. R. Co. v. Schwake, 70 Kan. 141, 78 P. 431 (1904); Church of Holy Communion v. Paterson Extension R. Co., 66 N.J.L. 218, 49 A. 1030 (1901);* Ludlow v. Hudson River R. Co., 6 Lan. (N.Y.) 128 (1872); *Pollock v. Pittsburgh, Bessemer & L. E. R. Co., 275 Pa. 467, 119 A. 547 (1923); Smith v. City of Seattle, 18 Wash. 484, 51 P. 1057 (1898); Backhouse v. Bonomi, 9 H.L. 502 (1861); Darley Main Colliery Co. v. Mitchell, L.R. 11 App.Cas. 127 (1886);* West Leigh Colliery Co. v. Tunnicliffe & Hampson, [1908] A.C. 27.

In *Lamb v. Walker, L.R. 3 Q. B.D. 389 (1878)* it was held that prospective damages could be recovered, and a few American cases have followed that decision. *Williams v. Missouri Furnace Co., 13 Mo.App. 70 (1882); Gatson v. Farber Fire Brick Co., 219 Mo. App. 558, 282 S.W. 179 (1926); McGowan v. Bailey, 146 Pa. 572, 23 A. 387 (1892).*

But Lamb v. Walker was overruled in *Darley Main Colliery Co. v. Mitchell, L.R. 11 App.Cas. 127 (1886),* and the general American rule is that prospective damages can not be recovered. *Sloss-Sheffield Steel & Iron Co. v. Sampson, 158 Ala. 590, 48 So. 493 (1909); Catlin Coal Co. v. Lloyd, 109 Ill. App. 122 (1902); Morris v. Saline County Coal Co., 211 Ill.App. 178 (1918); Jackson Hill Coal & Coke Co. v. Bales, 183 Ind. 276, 108 N.E. 962 (1915); Schultz v. Bower, 57 Minn. 493, 59 N.W. 631 (1894).*

There may be successive actions for successive subsidences. *Darley Main Colliery Co. v. Mitchell, L.R. 11 App.Cas. 127 (1886); Crumbie v. Wallsend Local Board, [1891] 1 Q.B. 503.*

The subsidence must be substantial. *Smith v. Thackerah, L. R. 1 C.P. 564 (1886).*

Comment j: Liability may be incurred by an actor who is a lessee of the supporting land. *Jackson Hill Coal & Coke Co. v. Bales, 183 Ind. 276, 108 N.E. 962 (1915).* Or a licensee. *Gilmore v. Driscoll, 122 Mass. 199 (1877).* Or a lessor. *Paltey v. Egan, 200 N.Y. 83, 93 N.E. 267 (1910).* Or a trespasser. *Jesfries v. Williams, 5 Ex. 792, 4 H. & N. 153, 157 Eng.Rep. 795 (1850).*

The defendant is not liable unless he is an actor. *Sipple v. Fowler, 151 Ga.App. 135, 259 S.E.2d 142 (1979); First Nat'l Bank & Trust Co. v. Universal Mtge. & Realty Trust, 38 Ill.App.3d 345, 347 N.E.2d 198 (1976); Secongost v. Missouri Pacific R. Co., 53 Mo.App. 369 (1893); Greenwell v. Low Beechburn Coal Co., [1897] 2 Q.B. 165; Hall v. Norfolk, [1900] 2 Ch. 493.*

But a landowner cannot delegate to an independent contractor his responsibility to provide support. *Urosevic v. Hayes, 590 S.W.2d 77 (Ark.App.1979); St. Joseph Light & Power Co. v. Kaw Valley Tunneling, 589 S.W.2d 260 (Mo.1979); Crnkovich v. Scaletta, 203 Neb. 22, 277 N.W.2d 416 (1979).*

Comment k: Artificial support may be substituted if it remains adequate. *Stimmel v. Brown, 7 Houst.Del. 219, 30 A. 996 (1885); Wier's Appeal, 81 Pa. 203 (1874); Bower v. Peate, L.R. 1 Q.B.D. 321 (1876).*

If artificial support is substituted and subsequently fails, the actor is liable regardless of negligence. *Blake Constr. Co. v. United States, 585 F.2d 998 (Ct.Cl. 1978); McKamy v. Bonanza Sirloin Pit, 195 Neb. 325, 237 N.W.2d 865 (1976); McGettingan v. Potts, 149 Pa. 155, 24 A. 198 (1892);* cf. *Sager v. O'Connell, 67 Cal.App.2d 27, 53 P.2d 569 (1944).*

As to the subsequent withdrawal of support by a third person, see *Manley v. Burn, [1916] 2 K.B. 121;* also *Darley Main Colliery Co. v. Mitchell, L.R. 11 App.Cas. 127 (1886); Corporation of Birmingham v. Allen, L.R. 6 Ch.Div. 284 (1877).*

Comment l: That the actor is liable only for the subsidence of the land naturally dependent upon the support withdrawn by him is supported by *Corporation of Birmingham v. Allen, L.R. 6 Ch.Div. 284 (1877); Darley Main Colliery Co. v. Mitchell, L.R. 11 App.Cas. 127 (1886).*

Comment m: The causal connection between the act and the subsidence is not broken by ordinary forces of nature. *Gilmore v. Driscoll, 122 Mass. 199 (1877); Schultz v. Bower, 57 Minn. 493, 59 N.W. 631 (1894); Murray v. Pannaci, 64 N.J.Eq. 147, 53 A. 595 (1902); Hannicker v. Lepper, 20 S.D. 371, 107 N.W. 202 (1906).* The actor is not liable, however, when lateral support is destroyed by a force of nature so extraordinary as to be classed as an act of *God. Carrig v. Andrews, 127 Conn. 403, 17 A.2d 520 (1941)* (hurricane); *Gates v. Fulkerson, 129 Mo.App. 620, 107 S.W. 1032 (1908)* (bursting of water pipe); *Foss, Schneider Brewing Co. v. Ulland, 97 Ohio St. 210, 119 N.E. 454 (1918)* (extraordinary storm, efforts to pump out water); *Carlin v. Chappel, 101 Pa. 348 (1882)* (dictum, "earthquakes or acts of God"). But cf. *Urosevic v. Hayes, 590 S.W.2d 77 (Ark.App. 1977)* (actor and Act of God both contributed to subsidence).

Comment n: This Comment is supported by the English cases. *Brown v. Robbins, 4 H. & N. 186, 157 Eng.Rep. 809 (1859); Strayan v. Knowles, 6 H. & N. 454, 158 Eng.Rep. 186 (1861).*

Also by a majority of the American decisions. See, among others, *Smith v. Howard, 201 Ky. 249, 256 S.W. 402 (1923); Langhorne v. Turman, 141 Ky. 809, 133 S.W. 1008 (1911); Busby v. Holthaus, 46 Mo. 161 (1870); White v. Tebo, 43 App.Div. 418, 60 N.Y.S. 231 (1899); Riley v. Continuous Rail Joint Co., 110 App.Div. 787, 97 N.Y.S. 283 (1906),* aff'd, *193 N.Y. 643, 86 N.E. 1132 (1908); Prete v. Cray, 49 R.I. 209, 141 A. 609 (1906); Farnandis v. Great Northern R. Co., 41 Wash. 486, 84 P. 18 (1906).*

There is a line of authority to the contrary. *Moellering v. Evans, 121 Ind. 195, 22 N.E. 989 (1889); Winn v. Abeles, 35 Kan. 85, 10 P. 443 (1886); Foley v. Wyeth, 84 Mass. (2 Allen) 131 (1861); Gilmore v. Driscoll, 122 Mass. 199 (1877); McGettingan v. Potts, 149 Pa. 155, 24 A. 198 (1892); Home Brewing Co. v. Thomas Colliery Co., 274 Pa. 56, 117 A. 542 (1922).*

CROSS REFERENCES: ALR Annotations:

Liability of landowner withdrawing ground water from own land for subsidence of adjoining owner's land. *5 A.L.R.4th 614.*
Measure of damages for loss of or interference with lateral support. *36 A.L.R.2d 1253.*
Liability of mine operator for damage to surface structure by removal of support. *32 A.L.R.2d 1309.*

Digest System Key Numbers:

C.J.S. Adjoining Landowners §§ 11, 18, 38.
West's Key No. Digests, Adjoining Landowners 3, 4.

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Rules and Principles

Division 10 - Invasions of Interests in Land Other Than by Trespass

Chapter 39 - Interests in the Support of Land

Topic 1 - Withdrawing Lateral Support

Restat 2d of Torts, § 818

§ 818 Withdrawing Subterranean Substances

One who is privileged to withdraw subterranean water, oil, minerals or other substances from under the land of another is not for that reason privileged to cause a subsidence of the other's land by the withdrawal.

COMMENTS & ILLUSTRATIONS: Comment:

a. Subterranean, or ground, waters are defined in § 845. The rules for determining liability for withdrawing ground waters are stated in §§ 858-863.

b. The rule stated in this Section applies to the withdrawal of any substance from under the land of another, whether it is solid, liquid, or gaseous. Thus it applies to the withdrawal of minerals, soil, water, oil, gas, mud, silt or quicksand. The rule applies whether the privilege to withdraw the substance itself arises from the consent of the surface owner, as in the case of a lease of mineral rights or whether it is independent of consent, as in the case of one who has under his own land a vein of ore and is permitted by the mining law of the jurisdiction to follow itunder the land of the other. It applies regardless of the means of withdrawal. The right of the surface owner to lateral and subjacent support of his land in its natural state is paramount and the privilege of withdrawal does not in itself serve as a defense to the strict liability stated in §§ 817 and 820.

Illustration:

1. A and B are severally in possession of adjoining lands containing asphalt. A's land is in its natural condition. B excavates his land and removes the asphalt under it up to the boundary of A's land. The heat of the sun causes the exposed asphalt to flow from A's land to B's land, and A's land cracks and sinks. B is subject to liability to A although he has exercised all reasonable care.

2. A and B are severally in possession of adjoining lands. B drills a well on his own land and reaches a pool of ground water, which he withdraws by pumping. As a result A's land subsides. B is subject to liability to A, although he

exercised all reasonable care.

c. The rule stated in this Section does not prevent the existence of a privilege to interfere with either lateral or subjacent support, arising apart from the privilege of withdrawal of the substance. Thus a lease of mineral rights may specifically provide that the defendant is privileged to interfere with the support, in which case the provision will be given effect.

REPORTERS NOTES: This Section reverses the position taken by the first Restatement and is broadened beyond water to other subterranean substances.

The position in the first Restatement originated in *Popple-will v. Hodkinson, L.R. 4 Ex. 248 (1869).* It was followed in *New York Continental Jewell Filtration Co. v. Jones, 37 App.D.C. 511 (1911);* and *Finley v. Teeter Stone, Inc., 251 Md. 428, 248 A.2d 106 (1968).*

In *Jordeson v. Sutton Southcoates & Drypool Gas Co., [1899] 2 Ch. 217,* the English court doubted the Popplewill case and refused to follow it for quicksand, but it reasserted the position in *Langbrook Properties, Ltd. v. Surrey County Council, [1969] 2 All E.R. 1424 (Ch.1969).*

Supporting the present Section: *Farnandis v. Great Northern R. Co., 41 Wash. 486, 84 P. 18 (1906); Muskatell v. City of Seattle, 10 Wash.2d 221, 116 P.2d 363 (1941); Bjorvatn v. Pacific Mechanical Constr. Inc., 77 Wash.2d 563, 464 P.2d 432 (1920).*

See also *Chicago City R. Co. v. Rothschild & Co., 213 Ill.App. 178 (1919)* (quicksand, but court declares that the Popplewill case would not be followed even for water alone).

Other cases of withdrawal of water with mud and quicksand, in accord with this Section: *Cabot v. Kingman, 166 Mass. 403, 44 N.E. 344 (1896);* People ex. rel. Barber v. Canal Board, 2 Thom. & C. 275 (N.Y.1873); *City of Columbus v. Willard, 7 Ohio C.C. 113 (1899); Prete v. Gray, 49 R.I. 209, 141 A. 609 (1928).*

In accord for minerals, *Nichols v. Woodward Iron Co., 267 Ala. 401, 103 So.2d 319 (1958); Woodward Iron Co. v. Mumpower, 248 Ala. 502, 28 So.2d 625 (1946); Paris Purity Coal Co. v. Pendergrass, 193 Ark. 1031, 104 S.W.2d 455 (1936); Western Coal & Mining Co. v. Randolph, 191 Ark. 1115, 89 S.W.2d 741 (1936); Colorado Fuel and Iron Corp. v. Salardino, 125 Colo. 516, 245 P.2d 461 (1952); Lloyd v. Catlin Coal Co., 210 Ill. 460, 71 N.E. 335 (1904); Mason v. Peabody Coal Co., 320 Ill.App. 350, 51 N.E.2d 285 (1943); NorthEast Coal Co. v. Hayes, 244 Ky. 639, 51 S.W.2d 960 (1932); Noonan v. Pardee, 200 Pa. 479, 50 A.2d 255 (1901); Peters v. Bellingham Coal Mines, 173 Wash. 123, 21 P.2d 1024 (1933).*

The American case discussing the problem most completely is *Friendswood Dev. Co. v. Smith-Southwest Industries, Inc., 576 S.W.2d 21 (Tex.1978).* A divided court holds that the Texas rule has been in accord with the English rule in Popplewill v. Hodgkinson, based primarily on the English rule of absolute ownership of ground water; but it changed the position for the future to impose liability on a landowner for subsidence of another's land caused by withdrawal of ground water from his own land, if the withdrawal "is negligent, wilfully wasteful, or for the purpose of malicious injury." A vigorous dissenting opinion espoused strict liability.

Massachusetts also holds that liability is imposed for negligent action. *New York Central R. Co. v. Marinucci Bros. & Co., 337 Mass. 469, 149 N.E.2d 680 (1958); Gamer v. Milton, 346 Mass. 617, 195 N.E.2d 65 (1963)* (expressly rejecting *Popplewill*).

Illustration 1 is based on Trinidad Asphalt Co. v. Amboard, [1899] A.C. 594.

Comment c: See *Kenny v. Texas Gulf Sulphur Co., 351 S.W.2d 612 (Tex.Civ.App.1961)* (mineral lease; lessee not liable to surface owner for subsidence caused by removal of sulphur).

The Friendship case contains citations to numerous law review articles on the Texas situation produced by withdrawal of ground water.

CROSS REFERENCES: ALR Annotations:

Measure of damages for loss of or interference with lateral support. *36 A.L.R.2d 1253.*
Liability of mine operator for damage to surface structure by removal of support. *32 A.L.R.2d 1309.*

Digest System Key Numbers:

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Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawLitigation & Administrative ProceedingsToxic Torts

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Division 10 - Invasions of Interests in Land Other Than by Trespass

Chapter 39 - Interests in the Support of Land

Topic 1 - Withdrawing Lateral Support

Restat 2d of Torts, § 819

§ 819 Negligent Withdrawal of Lateral Support

One who negligently withdraws lateral support of land in another's possession, or of artificial additions to it, is subject to liability for harm resulting to the other's land and to the artificial additions on it.

COMMENTS & ILLUSTRATIONS: Comment:

a. Liability irrespective of nature of lateral support withdrawn. For withdrawing naturally necessary support (§ 817, Comments *c* to *g*) the actor is subject to the liability stated in § 817, that is, strict liability, irrespective of negligence. (See § 817, Comment *b*). This does not prevent him, if negligent, from being subject also to the liability stated in this Section.

Although one who withdraws support that is not naturally necessary is not subject to the strict liability stated in § 817, he is, if negligent, subject to the liability stated in this Section. Thus, while it is stated in Illustrations 3, 4, 5 and 7 of §817 that the actor is not liable under the rule stated in that Section, he is, if negligent, subject to the liability stated in this Section.

b. Liability for harm to any land or artificial additions. The liability stated in § 817 is for a subsidence of land that was naturally dependent upon the lateral support withdrawn, and for harm to artificial additions that results from the subsidence. It does not include liability for harm caused by withdrawing support that is not naturally necessary. The liability stated in this Section is for harm to any land or artificial additions on it caused by the negligent conduct of the actor in withdrawing lateral support whether it is naturally necessary or not.

c. Elements required to render the actor liable. The elements required to render the actor liable under the rule stated in § 817 are: (1) the withdrawal of naturally necessary lateral support; (2) a subsidence of land; and (3) natural dependence of the supported land upon the support withdrawn. The elements necessary to render the actor liable under the rule stated in this Section are: (1) the withdrawal of lateral support; (2) the negligent character of the withdrawal; (3) harm to land or to artificial additions on it that is the legal consequence of the negligent withdrawal: (4) absence of

conduct on the part of the person suffering the harm that disables him from maintaining an action.

In a proceeding based upon the rule stated in § 817, the kind of lateral support withdrawn is material, but the quality of the actor's conduct is immaterial; in a proceeding based upon the rule stated in this Section, the kind of lateral support withdrawn is immaterial, and the quality of the actor's conduct is material.

d. The standard for determining negligence is stated in §§ 282-284 and 497. Factors important in the determination of reasonable conduct are stated in §§ 289-296. Other types of negligent acts are stated in §§ 297-309.

e. Important factors in reasonable conduct. The recognition that the law accords to the interest of an owner of land in the utilization and improvement of his land has important consequences in determining what constitutes reasonable conduct on the part of the owner of the supporting land in withdrawing lateral support from another's land. This legal recognition stops short of sanctioning the withdrawal of lateral support that is naturally necessary, and for the withdrawal the owner of the supporting land is subject to strict liability. (See § 817, Comment *b*). But for withdrawal of lateral support that is not naturally necessary, the owner of the supporting land is subject to liability only for unreasonable conduct.

The owner of land may be unreasonable in withdrawing lateral support needed by his neighbor for artificial conditions on the neighbor's land in either of two respects. First, he may make an unnecessary excavation, believing correctly that it will cause his neighbor's land to subside because of the pressure of artificial structures on the neighbor's land. If his conduct is unreasonable either in the digging or in the intentional failure to warn his neighbor of it, he is subject to liability to the neighbor for the harm caused by it. The high regard that the law has by long tradition shown for the interest of the owner in the improvement and utilization of his land weighs heavily in his favor in determining what constitutes unreasonable conduct on his part in such a case. Normally the owner of the supporting land may withdraw lateral support that is not naturally necessary, for any purpose that he regards as useful provided that the manner in which it is done is reasonable. But all the factors that enter into the determination of the reasonableness or unreasonableness of the actor's conduct must be considered, and in a particular case the withdrawal itself may be unreasonable. Thus, if the actor's sole purpose in excavating his land is to harm his neighbor's structures, the excavation itself is unreasonable. Furthermore, although for the purpose of permanently levelling the land it may be reasonable to withdraw support that is not naturally necessary, it may be unreasonable to make an excavation for a building that will itself require a foundation, without providing for the safeguarding of the neighbor's structures during the progress of the work. Likewise it is normally unreasonable not to notify an adjacent landowner of excavations that certainly will harm his structures, unless the neighbor otherwise has notice.

Secondly, the owner of land may be negligent in failing to provide against the risk of harm to his neighbor's structures. This negligence may occur either when the actor does not realize that any harm will occur to his neighbor's structures or when the actor realizes that there is a substantial risk to his neighbor's land and fails to take adequate provisions to prevent subsidence, either by himself taking precautions or by giving his neighbor an opportunity to take precautions. Although the law accords the owner of the supporting land great freedom in withdrawing from another's land support that is not naturally necessary in respect to the withdrawal itself, it does not excuse withdrawal in a manner that involves an unreasonable risk of harm to the land of another. The owner in making the excavation is therefore required to take reasonable precautions to minimize the risk of causing subsidence of his neighbor's land. In determining whether a particular precaution is reasonably required, the extent of the burden that the taking of it will impose upon the actor is a factor of great importance. Particulars in which precautions must be taken are stated in Comment *f.*

Conduct that would be reasonable when engaged in by the owner of the supporting land may be unreasonable when engaged in by a person who has no legally protected interest in the supporting land and is merely trespassing on it. The owner of the supporting land and a trespasser on it are alike subject to strict liability (see § 817, Comment *b*) for withdrawing support that is naturally necessary. (See § 817, Comments *c* to *g*). For withdrawing support that is not naturally necessary, neither of them is subject to strict liability, but each of them is subject to liability for negligence.

Conduct on the supporting land that would be reasonable on the part of the owner of it may be unreasonable on the part of a trespasser on it. This is because the interest that the trespasser is promoting by his conduct on the supporting land is normally not so highly regarded as the interest of the owner of it. In a given case, unless there are peculiar circumstances that increase the utility of the conduct of the trespassing actor, a comparatively slight risk of harm either from the withdrawal of support or from the particular manner in which it is withdrawn is unreasonable, and the conduct is negligent.

f. Specific acts or omissions that may be negligent. Under particular circumstances and conditions it may be negligence: (1) to excavate sand, gravel, loam or other friable soil otherwise than in sections; (2) to fail to furnish temporary support by shoring; (3) to fail to give timely and sufficient notice of the proposed excavation; (4) to maintain an excavation under such conditions or for such a length of time as to expose the adjoining lands with artificial additions to unreasonable risk of harm as by exposure to rain, frost or weathering; (5) to make use of improper instrumentalities or improper use of proper instrumentalities; (6) to employ incompetent workmen; (7) to neglect to ascertain in advance whether the excavation as planned is likely to expose adjoining lands with artificial additions to unreasonable risk of harm; (8) to represent to the adjoining landowner that a certain method will be followed or that certain precautions will be taken and thereafter without adequate notice change the method or omit the precautions. Any act or omission that would constitute negligence because of its tendency to harm the land or structures of another in cases other than the making of excavations is equally negligent if done or omitted in the course of excavating.

g. Contributory negligence. The principles of contributory negligence stated in §§ 463-496, 498, have a scope, but a limited scope, in respect to withdrawal of lateral support. (See also §§ 496A-496G, on assumption of risk). So long as the possessor of the supported premises has no reason to know of the danger from an excavation, weaknesses in them do not constitute contributory negligence on his part. These weaknesses are regarded as conditions that enter into the determination of the measure of care that the actor must exercise. Thus the fact that a building is defectively constructed or is dilapidated does not of itself constitute contributory negligence. These conditions, if known or apparent to the actor, are circumstances requiring him to exercise more care than would ordinarily suffice if the building were sound.

Knowledge, or reason to know, of the danger arising from an excavation is necessary to contributory negligence. Vigilance to discover that an excavation is being made and the danger arising from it is not required of the possessor of the supported land. But when he knows or has reason to know of the danger he is guilty of contributory negligence if he fails to take such precautions as an ordinarily prudent person would take under like circumstances to guard his premises against harm.

Want of proper notice may serve to absolve the possessor of the supported premises from contributory negligence. Representations by the actor of methods to be followed or precautions to be taken, if not followed, and undertakings to protect the other's structures may relieve the other from taking precautions for the safety of his structures, the omission of which otherwise might constitute contributory negligence.

On the issue of contributory negligence, the fact that the excavator is the active party, and the comparative helplessness of the possessor of the supported land with artificial additions or artificial conditions upon it, weigh in favor of the latter.

h. Statutes and city ordinances. Statutes and city ordinances that modify the liability stated in this Section are not infrequent. The city ordinances and most of the statutes apply only to particular cities, and vary greatly in content. Some of them impose on a landowner who makes an excavation beyond a certain depth an absolute duty to protect structures on adjoining lands at his own expense and subject him to liability for damage resulting from failure to furnish the protection. Others require the landowner to give notice of the intended excavation to adjoining owners whose premises might be damaged.

REPORTERS NOTES: The blackletter is reworded without change in meaning.

Comment b: An actor is liable for harm to artificial additions to land caused by negligent withdrawal of lateral support. *Blake Constr. Co. v. United States, 585 F.2d 998 (Ct.Cl.1978); Port Royale Apartments v. Delnick, 358 So.2d 269 (Fla.App.1978); Pacific Indemnity Co. v. Rathje, 188 N.W.2d 338 (Iowa 1971); St. Joseph Light & Power Co. v. Kaw Valley Tunneling, 589 S.W.2d 260 (Mo.1979); Royal Indemnity Co. v. Schneider, 485 S.W.2d 452 (Mo.App.1972); Lyon v. Walker Boudwin Constr. Co., 88 Nev. 646, 503 P.2d 1219 (1972);* cf. *Holtz v. Superior Court, 3 Cal.2d 296, 90 Cal.Rptr. 345, 475 P.2d 441 (1970)* (inverse condemnation for damage to land and buildings when defendant is a public authority, negligence not necessary).

Comment d: The standard of care is the same as that laid down in § 283. *Huber v. H. R. Douglas, Inc., 94 Conn. 167, 108 A. 727 (1919); Moore v. Anderson, 28 Del. (5 Boyce) 477, 94 A. 771 (1915); Charless v. Rankin, 22 Mo. 566, 66 Am.Dec. 642 (1865).*

Danger of injury to adjoining structure must have been foreseeable. *Blake Constr. Co. v. United States, 585 F.2d 988 (Ct.Cl.1978).*

Comment e: That an excavation is itself unreasonable when made for the sole purpose of harming another's premises, is supported by strong dicta in *City of Quincy v. Jones, 76 Ill. 231 (1875); McGuire v. Grant, 25 N.J.L. (1 Dutch.) 356 (1856); Panton v. Holland, 17 Johns. (N.Y.) 92 (1819).*

That a trespasser upon the supporting land is held to a higher standard of care than the owner, is supported by *Jeffries v. Williams, 5 Ex. 792, 155 Eng.Rep. 347 (1850); Bibby v. Carter, 4 H. & N. 153, 157 Eng.Rep. 795 (1859); Richards v. Jenkins, 18 L.T. 437 (1868).* See also *Finegan v. Eckerson, 26 Misc. 574, 57 N.Y.S. 605 (1891).*

Comment f: Negligence to excavate gravel, sand, loam, or other friable soil otherwise than in sections: *Gildersleeve v. Hammond, 109 Mich. 431, 67 N.W. 519 (1891); Larson v. Metropolitan St. R. Co., 110 Mo. 234, 33 Am.St.Rep. 439 (1892); Davis v. Summerfield, 131 N.C. 352, 42 S.E. 818 (1902).*

Negligence not to furnish temporary support by shoring: *Hartshorn v. Tobin, 244 Mass. 334, 138 N.E. 805 (1923); Walker v. Strosnider, 67 W.Va. 39, 67 S.E. 1087 (1910);* Contra: *Horowitz v. Blay, 193 Mich. 493, 160 N.W. 438 (1916).*

Negligence not to give timely and sufficient notice of the proposed excavation: *Schultz v. Byers, 53 N.J.L. 442, 22 A. 514 (1891); Walker v. Strosnider, 67 W.Va. 39, 67 S.E. 1087 (1910); Canfield Rubber Co. v. Leary Co., 99 Conn. 44, 121 A. 283 (1923); Smith v. Howard, 201 Ky. 249, 256 S.W. 402 (1923); Bonaparte v. Wiseman, 89 Md. 12, 42 A. 918 (1899); Gerst v. City of St. Louis, 185 Mo. 191, 84 S.W. 34 (1904); St. Joseph Light & Power v. Kaw Valley Tunneling, 589 S.W.2d 260 (Mo.1979).*

Giving proper notice does not, apart from statute, relieve the excavator from the duty to exercise proper care in making the excavation. *Moore v. Anderson, 28 Del. (5 Boyce) 477, 94 A. 771 (1915); Weiss v. Kohlhagen, 58 Or. 144, 113 P. 46 (1916); Stockgrowers' Bank v. Gray, 24 Wyo. 18, 154 P. 593 (1916).*

But if due notice is given the plaintiff is required to protect his own property. *Vandegrift v. Boward, 129 Md. 140, 98 A. 528 (1918); Obert v. Dunn, 140 Mo. 476, 41 S.W. 901 (1897); Eggert v. Kullman, 204 Wis. 60, 234 N.W. 349 (1931).*

The duty to give notice is frequently imposed by statuteor ordinance. See *Massell Realty Imp. Co. v. MacMillan Co., 168 Ga. 164, 147 S.E. 38 (1929); Newman v. Pasternack, 103 N.J.L. 434, 135 A. 877 (1927).*

It may be negligence to maintain an excavation under such conditions or for such a length of time as to expose adjoining land to unreasonable risk of harm. *Kirsh v. Ford, 19 Ky.L.Rep. 1167, 43 S.W. 237 (1897); Garvy v. Coughlan, 92 Ill.App. 582 (1901)* (exposure to rain, snow and freezing for three years); *Bohrer v. Dienhart Harness Co., 19 Ind.App. 489, 49 N.E. 296 (1898)* (gutter blocked, surface water brought into excavation); *Hannicker v. Lepper,*

20 S.D. 371, 107 N.W. 202 (1906) (exposure to weathering); *Lochore v. City of Seattle, 98 Wash. 265, 167 P. 918 (1917)* (weathering); *Walker v. Strosnider, 67 W.Va. 39, 67 S.E. 1087 (1910).*

Negligence to represent that certain methods will be followed or precautions taken, not in fact done: *Huber v. H. R. Douglas, Inc., 94 Conn. 167, 108 A. 727 (1919); Larson v. Metropolitan St. R. Co., 110 Mo. 234, 19 S.W. 416 (1892); Cooper v. Altoona Concrete Construction & Supply Co., 231 Pa. 557, 80 A. 1047 (1911).*

Other negligence: *Canfield Rubber Co. v. Leary & Co., 99 Conn. 40, 121 A. 283 (1923)* (use of insufficient sheet piling); *Bissel v. Ford, 176 Mich. 64, 141 N.W. 860 (1913)* (failure to ascertain risk); *St. Joseph Light & Power v. Kaw Valley Tunneling, 589 S.W.2d 260 (Mo.1970)* (failure to investigate soil conditions adequately); *Stockgrowers' Bank v. Gray, 24 Wyo. 18, 154 P. 593 (1916)* (employment of incompetent workmen).

Comment g: Contributory negligence is a proper issue in negligent excavation cases. *Huber v. H. R. Douglas, Inc., 94 Conn. 167, 108 A. 727 (1919); Jamison v. Myrtle Lodge, 158 Iowa 264, 139 N.W. 547 (1913); Walker v. Strosnider, 67 W.Va. 39, 67 S.W. 1087 (1910); Walters v. Pfeil, Mood. & M. 362, 173 Eng.Rep. 189 (1829).*

In *Eggert v. Kullman, 204 Wis. 60, 234 N.W. 349 (1931);* and *Jones v. Hacker, 104 Kan. 187, 178 P. 424 (1919),* the plaintiff was found to have been negligent in not taking precautions to protect his buildings. But he is not contributorily negligent when there is no action he could have taken. *St. Joseph Light & Power v. Kaw Valley Tunneling, 589 S.W.2d 260 (Mo.1979).*

Want of proper notice may absolve the plaintiff from contributory negligence. *Huber v. H. R. Douglas, Inc., 94 Conn. 167, 108 A. 727 (1919); Gildersleeve v. Hammond, 109 Mich. 431, 67 N.W. 519 (1891); Cooper v. Altoona Concrete Construction & Supply Co., 231 Pa. 557, 80 A. 1047 (1911); Stockgrowers' Bank v. Gray, 24 Wyo. 18, 154 P. 593 (1916).*

The infirmity of the structure itself is regarded as a condition rather than as a cause. *Moore v. Anderson, 28 Del. (5 Boyce) 477, 94 A. 771 (1915); Shafer v. Wilson, 44 Md. 268 (1876); Cooper v. Altoona Concrete Construction & Supply Co., 53 Pa.Super. 141 (1913); Walker v. Strosnider, 67 W.Va. 39, 67 S.E. 1087 (1910); Dodd v. Holme, 1 Ad. & El. 493, 110 Eng.Rep. 1296 (1834); Walters v. Pfeil, Mood. & M. 362, 173 Eng.Rep. 189 (1829).*

On the issue of contributory negligence, the fact that the excavator is the active party is to be considered, and weighs in favor of the plaintiff. *Walker v. Strosnider, 67 W.Va. 39, 67 S.E. 1087 (1910); Walters v. Pfeil, Mood. & M. 372, 173 Eng.Rep. 189 (1829).*

CROSS REFERENCES: ALR Annotations:

Measure of damages for loss of or interference with lateral support. *36 A.L.R.2d 1253.*
Liability of mine operator for damage to surface structure by removal of support. *32 A.L.R.2d 1309.*

Digest System Key Numbers:

C.J.S. Adjoining Landowners §§ 11, 18, 38.
West's Key No. Digests, Adjoining Landowners 3, 4.

EXHIBIT H

Concrete shall have a specified compressive strength of not less than 3,000 psi (20.68 MPa) at 28 days.

Exceptions:

1. Group R or U occupancies of light-framed construction and two stories or less in height are permitted to use concrete with a specified compressive strength of not less than 2,500 psi (17.2 MPa) at 28 days.
2. Detached one- and two-family dwellings of light-frame construction and two stories or less in height are not required to comply with the provisions of ACI 318, Sections 21.10.1 to 21.10.3.

SECTION 1806
RETAINING WALLS

1806.1 General. Retaining walls shall be designed to ensure stability against overturning, sliding, excessive foundation pressure and water uplift. Retaining walls shall be designed for a safety factor of 1.5 against lateral sliding and overturning.

SECTION 1807
DAMPPROOFING AND WATERPROOFING

1807.1 Where required. Walls or portions thereof that retain earth and enclose interior spaces and floors below grade shall be waterproofed and dampproofed in accordance with this section, with the exception of those spaces containing groups other than residential and institutional where such omission is not detrimental to the building or occupancy.

Ventilation for crawl spaces shall comply with Section 1203.4.

1807.1.1 Story above grade plane. Where a basement is considered a story above grade plane and the finished ground level adjacent to the basement wall is below the basement floor elevation for 25 percent or more of the perimeter, the floor and walls shall be dampproofed in accordance with Section 1807.2 and a foundation drain shall be installed in accordance with Section 1807.4.2. The foundation drain shall be installed around the portion of the perimeter where the basement floor is below ground level. The provisions of Sections 1802.2.3, 1807.3 and 1807.4.1 shall not apply in this case.

1807.1.2 Under-floor space. The finished ground level of an under-floor space such as a crawl space shall not be located below the bottom of the footings. Where there is evidence that the ground-water table rises to within 6 inches (152 mm) of the ground level at the outside building perimeter, or that the surface water does not readily drain from the building site, the ground level of the under-floor space shall be as high as the outside finished ground level, unless an approved drainage system is provided. The provisions of Sections 1802.2.3, 1807.2, 1807.3 and 1807.4 shall not apply in this case.

1807.1.2.1 Flood hazard areas. For buildings and structures in flood hazard areas as established in Section 1612.3, the finished ground level of an under-floor space such as a crawl space shall be equal to or higher than the outside finished ground level.

Exception: Under-floor spaces of Group R-3 buildings that meet the requirements of FEMA/FIA-TB-11.

1807.1.3 Ground-water control. Where the ground-water table is lowered and maintained at an elevation not less than 6 inches (152 mm) below the bottom of the lowest floor, the floor and walls shall be dampproofed in accordance with Section 1807.2. The design of the system to lower the ground-water table shall be based on accepted principles of engineering that shall consider, but not necessarily be limited to, permeability of the soil, rate at which water enters the drainage system, rated capacity of pumps, head against which pumps are to operate and the rated capacity of the disposal area of the system.

1807.2 Dampproofing required. Where hydrostatic pressure will not occur as determined by Section 1802.2.3, floors and walls for other than wood foundation systems shall be dampproofed in accordance with this section. Wood foundation systems shall be constructed in accordance with AF&PA Technical Report No. 7.

1807.2.1 Floors. Dampproofing materials for floors shall be installed between the floor and the base course required by Section 1807.4.1, except where a separate floor is provided above a concrete slab.

Where installed beneath the slab, dampproofing shall consist of not less than 6-mil (0.006 inch; 0.152 mm) polyethylene with joints lapped not less than 6 inches (152 mm), or other approved methods or materials. Where permitted to be installed on top of the slab, dampproofing shall consist of mopped-on bitumen, not less than 4-mil (0.004 inch; 0.102 mm) polyethylene, or other approved methods or materials. Joints in the membrane shall be lapped and sealed in accordance with the manufacturer's installation instructions.

1807.2.2 Walls. Dampproofing materials for walls shall be installed on the exterior surface of the wall, and shall extend from the top of the footing to above ground level.

Dampproofing shall consist of a bituminous material, 3 pounds per square yard (16 N/m^2) of acrylic modified cement, 0.125 inch (3.2 mm) coat of surface-bonding mortar complying with ASTM C 887, any of the materials permitted for waterproofing by Section 1807.3.2 or other approved methods or materials.

1807.2.2.1 Surface preparation of walls. Prior to application of dampproofing materials on concrete walls, holes and recesses resulting from the removal of form ties shall be sealed with a bituminous material or other approved methods or materials. Unit masonry walls shall be parged on the exterior surface below ground level with not less than 0.375 inch (9.5 mm) of portland cement mortar. The parging shall be coved at the footing.

Exception: Parging of unit masonry walls is not required where a material is approved for direct application to the masonry.

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TABLE 1804.2
ALLOWABLE FOUNDATION AND LATERAL PRESSURE

CLASS OF MATERIALS	ALLOWABLE FOUNDATION PRESSURE (psf)[d]	LATERAL BEARING (psf/f below natural grade)[d]	LATERAL SLIDING	
			Coefficient of friction[a]	Resistance (psf)[b]
1. Crystalline bedrock	12,000	1,200	0.70	—
2. Sedimentary and foliated rock	4,000	400	0.35	—
3. Sandy gravel and/or gravel (GW and GP)	3,000	200	0.35	—
4. Sand, silty sand, clayey sand, silty gravel and clayey gravel (SW, SP, SM, SC, GM and GC)	2,000	150	0.25	—
5. Clay, sandy clay, silty clay, clayey silt, silt and sandy silt (CL, ML, MH and CH)	1,500[c]	100	—	130

For SI: 1 pound per square foot = 0.0479 kPa, 1 pound per square foot per foot = 0.157 kPa/m.

a. Coefficient to be multiplied by the dead load.

b. Lateral sliding resistance value to be multiplied by the contact area, as limited by Section 1804.3.

c. Where the building official determines that in-place soils with an allowable bearing capacity of less than 1,500 psf are likely to be present at the site, the allowable bearing capacity shall be determined by a soils investigation.

d. An increase of one-third is permitted when using the alternate load combinations in Section 1605.3.2 that include wind or earthquake loads.

1805.2 Depth of footings. The minimum depth of footings below the undisturbed ground surface shall be 12 inches (305 mm). Where applicable, the depth of footings shall also conform to Sections 1805.2.1 through 1805.2.3.

1805.2.1 Frost protection. Except where otherwise protected from frost, foundation walls, piers and other permanent supports of buildings and structures shall be protected by one or more of the following methods:

1. Extending below the frost line of the locality;
2. Constructing in accordance with ASCE 32; or
3. Erecting on solid rock.

Exception: Free-standing buildings meeting all of the following conditions shall not be required to be protected:

1. Classified in Occupancy Category I, in accordance with Section1604.5;
2. Area of 600 square feet (56 m^2) or less for light-frame construction or 400 square feet (37 m^2) or less for other than light-frame construction; and
3. Eave height of 10 feet (3048 mm) or less.

Footings shall not bear on frozen soil unless such frozen condition is of a permanent character.

1805.2.2 Isolated footings. Footings on granular soil shall be so located that the line drawn between the lower edges of adjoining footings shall not have a slope steeper than 30 degrees (0.52 rad) with the horizontal, unless the material supporting the higher footing is braced or retained or otherwise laterally supported in an approved manner or a greater slope has been properly established by engineering analysis.

1805.2.3 Shifting or moving soils. Where it is known that the shallow subsoils are of a shifting or moving character, footings shall be carried to a sufficient depth to ensure stability.

1805.3 Footings on or adjacent to slopes. The placement of buildings and structures on or adjacent to slopes steeper than one unit vertical in three units horizontal (33.3-percent slope) shall conform to Sections 1805.3.1 through 1805.3.5.

1805.3.1 Building clearance from ascending slopes. In general, buildings below slopes shall be set a sufficient distance from the slope to provide protection from slope drainage, erosion and shallow failures. Except as provided for in Section 1805.3.5 and Figure 1805.3.1, the following criteria will be assumed to provide this protection. Where the existing slope is steeper than one unit vertical in one unit horizontal (100-percent slope), the toe of the slope shall be assumed to be at the intersection of a horizontal plane drawn from the top of the foundation and a plane drawn tangent to the slope at an angle of 45 degrees (0.79 rad) to the horizontal. Where a retaining wall is constructed at the toe of the slope, the height of the slope shall be measured from the top of the wall to the top of the slope.

1805.3.2 Footing setback from descending slope surface. Footings on or adjacent to slope surfaces shall be founded in firm material with an embedment and set back from the slope surface sufficient to provide vertical and lateral support for the footing without detrimental settlement. Except as provided for in Section 1805.3.5 and Figure 1805.3.1, the following setback is deemed adequate to meet the criteria. Where the slope is steeper than 1 unit vertical in 1 unit horizontal (100-percent slope), the required setback shall be measured from an imaginary plane 45 degrees (0.79 rad) to the horizontal, projected upward from the toe of the slope.

1805.3.3 Pools. The setback between pools regulated by this code and slopes shall be equal to one-half the building footing setback distance required by this section. That portion of the pool wall within a horizontal distance of 7 feet

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(2134 mm) from the top of the slope shall be capable of supporting the water in the pool without soil support.

1805.3.4 Foundation elevation. On graded sites, the top of any exterior foundation shall extend above the elevation of the street gutter at point of discharge or the inlet of an approved drainage device a minimum of 12 inches (305 mm) plus 2 percent. Alternate elevations are permitted subject to the approval of the building official, provided it can be demonstrated that required drainage to the point of discharge and away from the structure is provided at all locations on the site.

1805.3.5 Alternate setback and clearance. Alternate setbacks and clearances are permitted, subject to the approval of the building official. The building official is permitted to require an investigation and recommendation of a registered design professional to demonstrate that the intent of this section has been satisfied. Such an investigation shall include consideration of material, height of slope, slope gradient, load intensity and erosion characteristics of slope material.

1805.4 Footings. Footings shall be designed and constructed in accordance with Sections 1805.4.1 through 1805.4.6.

1805.4.1 Design. Footings shall be so designed that the allowable bearing capacity of the soil is not exceeded, and that differential settlement is minimized. The minimum width of footings shall be 12 inches (305 mm).

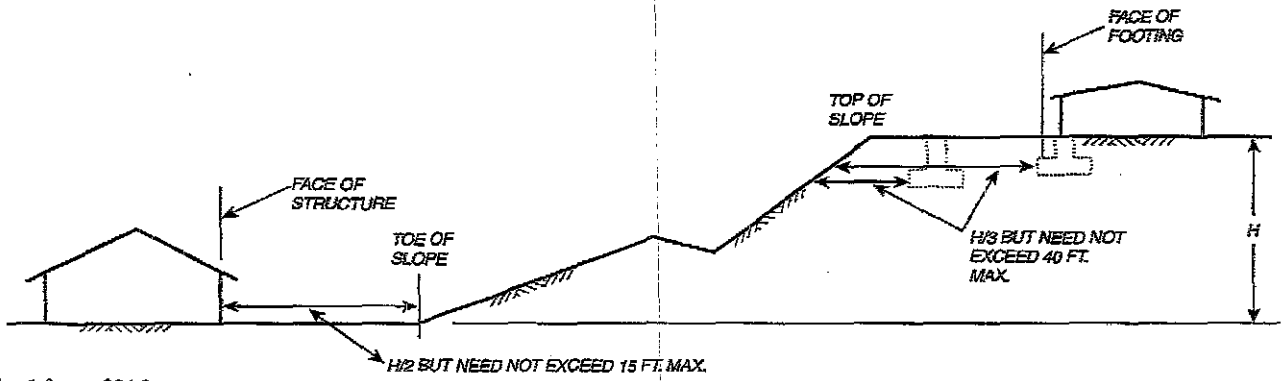
Footings in areas with expansive soils shall be designed in accordance with the provisions of Section 1805.8.

1805.4.1.1 Design loads. Footings shall be designed for the most unfavorable effects due to the combinations of loads specified in Section 1605.2 or 1605.3. The dead load is permitted to include the weight of foundations, footings and overlying fill. Reduced live loads, as specified in Sections 1607.9 and 1607.11, are permitted to be used in the design of footings.

1805.4.1.2 Vibratory loads. Where machinery operations or other vibrations are transmitted through the foundation, consideration shall be given in the footing design to prevent detrimental disturbances of the soil.

1805.4.2 Concrete footings. The design, materials and construction of concrete footings shall comply with Sections 1805.4.2.1 through 1805.4.2.6 and the provisions of Chapter 19.

Exception: Where a specific design is not provided, concrete footings supporting walls of light-frame construction are permitted to be designed in accordance with Table 1805.4.2.



For SI: 1 foot = 304.8 mm.

FIGURE 1805.3.1
FOUNDATION CLEARANCES FROM SLOPES

TABLE 1805.4.2
FOOTINGS SUPPORTING WALLS OF LIGHT-FRAME CONSTRUCTION[a, b, c, d, e]

NUMBER OF FLOORS SUPPORTED BY THE FOOTING[f]	WIDTH OF FOOTING (inches)	THICKNESS OF FOOTING (inches)
1	12	6
2	15	6
3	18	8[g]

For SI: 1 inch = 25.4 mm, 1 foot = 304.8 mm.

a. Depth of footings shall be in accordance with Section 1805.2.

b. The ground under the floor is permitted to be excavated to the elevation of the top of the footing.

c. Interior-stud-bearing walls are permitted to be supported by isolated footings. The footing width and length shall be twice the width shown in this table, and footings shall be spaced not more than 6 feet on center.

d. See Section 1908 for additional requirements for footings of structures assigned to Seismic Design Category C, D, E or F.

e. For thickness of foundation walls, see Section 1805.5.

f. Footings are permitted to support a roof in addition to the stipulated number of floors. Footings supporting roof only shall be as required for supporting one floor.

g. Plain concrete footings for Group R-3 occupancies are permitted to be 6 inches thick.

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J104.2 Grading plan requirements. All grading plans shall be prepared, stamped, and signed by a registered design professional. The following items must be included on all grading plan submittals.

1. General vicinity of the proposed site.
2. Property limits and accurate contours of existing ground and details of terrain and area drainage.
3. Limiting dimensions, elevations or finish contours to be achieved by the grading, proposed drainage channels and related construction.
4. Location of any buildings or structures on the property where the work is to be performed and the location of any buildings or structures on land of adjacent owners that are within 100 feet of the property or that may be affected by the proposed grading operations.
5. Recommendations included in the geotechnical and the engineering geology report shall be incorporated in the grading plans or specifications as follows:
    a. Locations and dimensions of all cut and fill slopes,
    b. Locations of all cross sections presented in the geotechnical report,
    c. Locations and sizes of all recommended remedial measures such as buttress fills, stability fills, deep foundation systems, reinforced earth, retaining walls, etc.,
    d. Location and layout of proposed subdrainage system.
6. A statement that the site shall be graded in accordance with the approved geotechnical report. This statement shall include the firm name that prepared the geotechnical report, the report number, and the date of the geotechnical report.
7. Locations of other existing topographic features either natural or man-made such as streets, drainage structures, pavements, walls, mining pits, etc.
8. The cut to fill transition line.
9. Positive drainage away from the foundation per Section 1803.3.
10. Details and cross sections at property lines, fence walls, retaining walls, berms, etc.
11. Elevation datum and benchmarks (NAVD 88).
12. Existing contours at least 100 feet beyond the property lines.
13. Proposed finish contours or spot elevations at the property corners and at swale flow lines.
14. Elevations of curbs or centerlines of roads or streets.
15. Earthwork quantities in cubic yards.
16. Finish floor elevations.
17. Details and cross sections of typical fill slopes and cut slopes.
18. Typical details of fill-over-natural slopes and fill-over-cut slopes where fill is to be placed on natural or cut slopes steeper than 5H:1V in accordance with Section J107.
19. Setback dimensions of cut and fill slopes from site boundaries per Section J108.
20. The placement of buildings and structures on and or adjacent to slopes steeper than 3H:1V (33.3% slope) shall be in accordance with Section 1805.3.
21. Provide terracing in accordance with Section J109 for slopes steeper than 3H:1V (33.3% slope).
22. Provide the locations and dimensions of all terrace drains for all slopes steeper than 3H:1V in accordance with Section J109.
23. Registered design professional original seal (wet seal), signature and date or a Records stamp and signature stating, "*This is a true and exact copy of the original document on file in this office.*"

EXHIBIT I

Chapter 3
PERMITS AND INSPECTIONS

SECTION 301 — PERMITS

301.1 Permits Required. Except as specified in Section 301.2, no building, structure or building service equipment regulated by this code and the technical codes shall be erected, constructed, enlarged, altered, repaired, moved, improved, removed, converted or demolished unless a separate, appropriate permit for each building, structure or building service equipment has first been obtained from the building official.

301.2 Work Exempt from Permit. A permit shall not be required for the types of work in each of the separate classes of permit as listed below. Exemption from the permit requirements of this code shall not be deemed to grant authorization for any work to be done in violation of the provisions of the technical codes or any other laws or ordinances of this jurisdiction.

301.2.1 Building permits. A building permit shall not be required for the following:

1. One-story detached accessory buildings used as tool and storage sheds, playhouses and similar uses, provided the floor area does not exceed 120 square feet (11.15 m^2).

2. Fences not over 6 feet (1829 mm) high.

3. Oil derricks.

4. Movable cases, counters and partitions not over 5 feet 9 inches (1753 mm) high.

5. Retaining walls which are not over 4 feet (1219 mm) in height measured from the bottom of the footing to the top of the wall, unless supporting a surcharge or impounding flammable liquids. Required

6. Water tanks supported directly upon grade if the capacity does not exceed 5,000 gallons (18 925 L) and the ratio of height to diameter or width does not exceed 2:1.

7. Platforms, walks and driveways not more than 30 inches (762 mm) above grade and not over any basement or story below.

8. Painting, papering and similar finish work.

9. Temporary motion picture, television and theater stage sets and scenery.

10. Window awnings supported by an exterior wall of Group R, Division 3, and Group U Occupancies when projecting not more than 54 inches (1372 mm).

11. Prefabricated swimming pools accessory to a Group R, Division 3 Occupancy in which the pool walls are entirely above the adjacent grade and if the capacity does not exceed 5,000 gallons (18 925 L).

Unless otherwise exempted by this code, separate plumbing, electrical and mechanical permits will be required for the above exempted items.

301.2.2 Plumbing permits. A plumbing permit shall not be required for the following:

1. The stopping of leaks in drains, soil, waste or vent pipe, provided, however, that should any concealed trap, drain pipe, soil, waste or vent pipe become defective and it becomes necessary to remove and replace the same with new material, the same shall be considered as new work and a permit shall be procured and inspection made as provided in this code.

2. The clearing of stoppages or the repairing of leaks in pipes, valves or fixtures, nor for the removal and reinstallation of water closets, provided such repairs do not involve or require the replacement or rearrangement of valves, pipes or fixtures.

301.2.3 Electrical permits. An electrical permit shall not be required for the following:

1. Portable motors or other portable appliances energized by means of a cord or cable having an attachment plug end to be connected to an approved receptacle when that cord or cable is permitted by the Electrical Code.

2. Repair or replacement of fixed motors, transformers or fixed approved appliances of the same type and rating in the same location.

3. Temporary decorative lighting.

4. Repair or replacement of current-carrying parts of any switch, contactor or control device.

5. Reinstallation of attachment plug receptacles, but not the outlets therefor.

6. Repair or replacement of any overcurrent device of the required capacity in the same location.

7. Repair or replacement of electrodes or transformers of the same size and capacity for signs or gas tube systems.

8. Taping joints.

9. Removal of electrical wiring.

10. Temporary wiring for experimental purposes in suitable experimental laboratories.

11. The wiring for temporary theater, motion picture or television stage sets.

12. Electrical wiring, devices, appliances, apparatus or equipment operating at less than 25 volts and not capable of supplying more than 50 watts of energy.

13. Low-energy power, control and signal circuits of Class II and Class III as defined in the Electrical Code.

14. A permit shall not be required for the installation, alteration or repair of electrical wiring, apparatus or equipment or the generation, transmission, distribution or metering of electrical energy or in the operation of signals or the transmission of intelligence by a public or private utility in the exercise of its function as a serving utility.

301.2.4 Mechanical permits. A mechanical permit shall not be required for the following:

1. A portable heating appliance.

2. Portable ventilating equipment.

3. A portable cooling unit.

4. A portable evaporative cooler.

5. A closed system of steam, hot or chilled water piping within heating or cooling equipment regulated by the Mechanical Code.

6. Replacement of any component part of assembly of an appliance which does not alter its original approval and complies with other applicable requirements of the technical codes.

7. Refrigerating equipment which is part of the equipment for which a permit has been issued pursuant to the requirements of the technical codes.

8. A unit refrigerating system as defined in the Mechanical Code.

SECTION 302 — APPLICATION FOR PERMIT

302.1 Application. To obtain a permit, the applicant shall first file an application therefor in writing on a form furnished by the code enforcement agency for that purpose. Every such application shall:

1. Identify and describe the work to be covered by the permit for which application is made.

2. Describe the land on which the proposed work is to be done by legal description, street address or similar description that will readily identify and definitely locate the proposed building or work.

3. Indicate the use or occupancy for which the proposed work is intended.

4. Be accompanied by plans, diagrams, computations and specifications, and other data as required in Section 302.2.

5. State the valuation of any new building or structure or any addition, remodeling or alteration to an existing building.

6. Be signed by the applicant, or the applicant's authorized agent.

7. Give such other data and information as may be required by the building official.

302.2 Submittal Documents. Plans, specifications, engineering calculations, diagrams, soil investigation reports, special inspection and structural observation programs and other data shall constitute the submittal documents and shall be submitted in one or more sets with each application for a permit. When such plans are not prepared by an architect or engineer, the building official may require the applicant submitting such plans or other data to demonstrate that state law does not require that the plans be prepared by a licensed architect or engineer. The building official may require plans, computations and specifications to be prepared and designed by an engineer or architect licensed by the state to practice as such even if not required by state law.

> **EXCEPTION:** The building official may waive the submission of plans, calculations, construction inspection requirements and other data if it is found that the nature of the work applied for is such that reviewing of plans is not necessary to obtain compliance with this code.

302.3 Information on Plans and Specifications. Plans and specifications shall be drawn to scale on substantial paper or cloth and shall be of sufficient clarity to indicate the location, nature and extent of the work proposed and show in detail that it will conform to the provisions of this code and all relevant laws, ordinances, rules and regulations.

Plans for buildings of other than Group R, Division 3 and Group U Occupancies shall indicate how required structural and fire-resistive integrity will be maintained where penetrations will be made for electrical, mechanical, plumbing and communication conduits, pipes and similar systems.

302.4 Architect or Engineer of Record.

302.4.1 General. When it is required that documents be prepared by an architect or engineer, the building official may require the owner to engage and designate on the building permit application an architect or engineer who shall act as the architect or engineer of record. If the circumstances require, the owner may designate a substitute architect or engineer of record who shall perform all the duties required of the original architect or engineer of record. The building official shall be notified in writing by the owner if the architect or engineer of record is changed or is unable to continue to perform the duties.

The architect or engineer of record shall be responsible for reviewing and coordinating all submittal documents prepared by others, including deferred submittal items, for compatibility with the design of the building.

302.4.2 Deferred submittals. For the purposes of this section, deferred submittals are defined as those portions of the design which are not submitted at the time of the application and which are to be submitted to the building official within a specified period.

Deferral of any submittal items shall have prior approval of the building official. The architect or engineer of record shall list the deferred submittals on the plans and shall submit the deferred submittal documents for review by the building official.

Submittal documents for deferred submittal items shall be submitted to the architect or engineer of record who shall review them and forward them to the building official with a notation indicating that the deferred submittal documents have been reviewed and that they have been found to be in general conformance with the design of the building. The deferred submittal items shall not be installed until their design and submittal documents have been approved by the building official.

302.5 Inspection and Observation Program. When special inspection is required by Section 306, the architect or engineer of record shall prepare an inspection program which shall be submitted to the building official for approval prior to issuance of the building permit. The inspection program shall designate the portions of the work to have special inspection, the name or names of the individuals or firms who are to perform the special inspections and indicate the duties of the special inspectors.

The special inspector shall be employed by the owner, the engineer or architect of record, or an agent of the owner, but not the contractor or any other person responsible for the work.

When structural observation is required by Section 307, the inspection program shall name the individuals or firms who are to perform structural observation and describe the stages of construction at which structural observation is to occur.

The inspection program shall include samples of inspection reports and provide time limits for submission of reports.

SECTION 303 — PERMITS ISSUANCE

303.1 Issuance. The application, plans, specifications, computations and other data filed by an applicant for permit shall be reviewed by the building official. Such plans may be reviewed by other departments of this jurisdiction to verify compliance with any applicable laws under their jurisdiction. If the building official finds that the work described in an application for a permit and the plans, specifications and other data filed therewith conform to the requirements of this code and the technical codes and other pertinent laws and ordinances, and that the fees specified in Section 304 have been paid, the building official shall issue a permit therefor to the applicant.

When a permit is issued when plans are required, the building official shall endorse in writing or stamp the plans and specifications APPROVED. Such approved plans and specifications shall not be changed, modified or altered without authorizations from the building official, and all work regulated by this code shall be done in accordance with the approved plans.

The building official may issue a permit for the construction of part of a building, structure or building service equipment before the entire plans and specifications for the whole building, struc-

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EXHIBIT J

Mesquite
Nevada

Development Services
Dale Tobler, Senior Plans Examiner/CBO
10 East Mesquite Boulevard
Mesquite, Nevada 89027
(702) 346-2835 Fax: (702) 346-5382
dtobler@mesquitenv.gov

May 1, 2018

Stephen Raridan
558 Los Altos Circle
Mesquite, NV 89027

Dear Mr. Raridan:

The retaining walls and screen walls along your property that are in dispute between ROCKSPRINGS II and yourself must have permits applied for with engineering to repair, demo, or install new walls per the 1997 Uniform Administrative Code adopted by the City of Mesquite with amendments. I am aware of the cracking and movement of existing walls along the southwest corner of your property. The retaining walls in need of repair must have engineering and go through permit application process with the City of Mesquite for review & approval of construction methods.

A licensed Nevada contractor will be required to apply for permit/s for walls located on the ROCK SPRINGS Condo property because of it being multi-family rental property per NRS 624.

Please call our office if you have any questions.

Sincerely,

Dale Tobler

Dale Tobler
Senior Plans Examiner/CBO

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Steven D. Grierson
CLERK OF THE COURT

OMD
Edward D. Boyack
Nevada Bar No. 5229
Christopher B. Anthony
Nevada Bar No. 9748
BOYACK ORME & ANTHONY
7432 W. Sahara Ave., Suite 101
Las Vegas, Nevada 89117
Tel: (702) 562-3415
Fax: (702) 562-3570
Ted@BoyackLaw.com
Canthony@boyacklaw.com
Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

ROCK SPRINGS MESQUITE II OWNERS' ASSOCIATION, a Nevada domestic non-profit corporation,

Plaintiff,

v.

STEPHEN J. RARIDAN and JUDITH A. RARIDAN, husband and wife, and DOES I through X, inclusive

Defendant(s).

Case No.: A-18-772425-C
Dept. No.: XVI

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

Plaintiff, ROCK SPRINGS MESQUITE II OWNERS' ASSOCIATION (the "HOA"), by and through its counsel of record Boyack Orme & Anthony, hereby opposes Defendants STEPHEN J. RARIDAN and JUDITH A. RARIDAN's (the "Defendants") Motion to Dismiss or, in the Alternative, Motion for Summary Judgment.

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This Opposition is supported by the following Memorandum of Points and Authorities and all pleadings and papers on file with the Court and any oral argument that may be presented at the hearing on this matter.

DATED this June 6, 2018.

BOYACK ORME & ANTHONY

By: /s/ *Edward D. Boyack*
Edward D. Boyack
Nevada Bar No. 5229
Christopher B. Anthony
Nevada Bar No. 9748
7432 W. Sahara Ave., Suite 101
Las Vegas, Nevada 89117
Attorneys for Plaintiff

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In their Motion, the Defendants argue that the HOA's Complaint should be dismissed because the claim is precluded, and in the alternative, that the Court, through summary judgment, should find that the HOA has a duty of lateral support. This Court should DENY the Defendants' motion because (1) claim preclusion does not apply to declaratory relief actions (2) there is no issue preclusion as this matter deals with legal obligations to provide lateral support as opposed to liability for damages (3) the HOA does not owe a duty of lateral support according to Nevada case law and to widely accepted law around the country, and (4) there are no administrative remedies for the HOA to exhaust at this time.

II. RELEVANT FACTS

In this current litigation, the HOA seeks declaratory relief. The HOA's basis for this relief stems—simply—from the Defendants' failure to maintain their wall.

Previous owners, Floyd E. Olsen and Gayle G. Olsen, 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 HOA's real

property interest is adjacent and west of the Property, separated by the HOA's retaining/perimeter wall, and the previous owners' subsequently installed masonry wall. This wall abuts the HOA's property and is in close proximity to the HOA's retaining perimeter wall. The installation of this wall eventually caused severe damage to the HOA's wall (that left untreated would lead to the collapse of both walls), and forced 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 owners never made any attempt to remedy their own wall.

In Case No. A-11-640682-C, the HOA brought an action against the previous owners after the previous owners had constructed a failing masonry wall that was compromising the HOA's adjacent wall. The HOA sought the following kinds of monetary relief: (1) relief from trespass (2) relief from nuisance (3) relief from encroachment, and (4) relief from negligence. Ultimately, the jury found those claims in favor of the previous owners. However, the issues of declaratory and more specifically, whether the HOA now had an ongoing obligation to provide lateral support for the homeowners' wall in light of the verdict, were never adjudicated.

The previous homeowners eventually sold the Property to the Defendants. The current litigation surrounds the same failing wall previously litigated; however, the HOA is only seeking relief from the 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, to the HOA's continuing financial detriment and which presents a safety hazard. To be clear, the HOA is not seeking monetary damages by way of the instant suit, but only seeks a court order affirming its right to tear down its own wall and imposing an affirmative duty on the Defendants to support their own wall. The removal of the HOA's wall may negatively impact the stability of the Defendants' wall and the HOA continues, and will continue, to be harmed as described. Accordingly, the HOA brings forth this action seeking declaratory relief to finally settle this matter.

Defendants have now filed their Motion to Dismiss, or in the Alternative, for Summary Judgment. For the reasons set forth herein, that Motion should be denied.

. . . .

III. LEGAL STANDARD

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).

The "test" for determining whether allegations of a complaint are sufficient to assert a claim for relief is whether allegations give "fair notice" of the nature and basis of a legally sufficient claim and relief requested. *Vacation Village, Inc. v. Hitachi America, Ltd*., 874 P.2d 744, 746, 110 Nev. 481, 484 (1994). *See also, Smith v. Eighth Judicial District Court*, 113 Nev. 1343, 1348, 950 P. 2d 280, 283 (1997)(Nevada is a notice-pleading jurisdiction and pleadings should be liberally construed to allow issues that are fairly noticed to the adverse party). The liberal rules of notice pleading do not require a plaintiff to set out in detail the facts supporting his claim. *Smith, supra* at 1348, 950 P. 2d 280, 283. *See also*, NRCP 8(e)(1). Therefore, a plaintiff must merely plead sufficiently to establish a basis for judgment against the defendant. *Smith, supra* at 1348, 950 P. 2d 280, 283.

As mentioned by Defendants in their Motion, where a motion to dismiss references sources outside of the pleadings, the Court can render a decision under the summary judgment

standard as set forth by NRCP 56. With respect to summary judgment, the Nevada Supreme Court has held as follows:

> Summary judgment is appropriate under NRCP 56 when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant. A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party.

Wood v. Safeway, Inc., 121 Nev. 724, 731, 121 P. 3d 1026, 1031 (2005). Notwithstanding, in cases such as this where the parties have had no opportunity to perform discovery, the Court may allow for additional discovery to take place before ruling on a motion for summary judgment.

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

NRCP 56(f).

IV. ARGUMENT

A. Claim preclusion does not apply to this declaratory relief action.

The Defendants contend that the declaratory exception does not apply in this case, and the HOA agrees with that contention, as the exception applies in cases where declaratory relief is the potential source for claim preclusion. Here, the HOA contends that there is no claim preclusion 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 caselaw 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 Defendants' argument of claim preclusion fails.

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

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). This clearly demonstrates that this Court has the jurisdictional power to grant declaratory relief, regardless of claim preclusion.

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.

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

Nevada caselaw 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.* describes a unique situation discussing an exception to the claim preclusion rule, which happens to deal with declaratory relief. 407 P.3d 761 (Nev. 2017). Contrary to Defendant's Motion, nothing in the opinion precludes the bringing of a declaratory relief action after other coercive claims have been decided upon. *Id.* 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. Simply put, when pure declaratory relief is sought first, it does not preclude the bringing of coercive claims

later.

Specifically, the *Boca Park* Court 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***.'

Id. at 764 (emphasis added). Accordingly, the Defendants' assertion that declaratory relief is precluded where it follows a suit for coercive action is incorrect, and this action for declaratory relief may proceed.

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 Defendants' 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 to its wall. Practically speaking, no parties contemplated in that case, the narrow legal issue of whether the HOA had a duty to support the wall because the suit focused on damages and repair. 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 came to be. 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? This is the very specific and narrow legal question sought to be answered in the current suit.

B. The issue is not precluded, because the HOA is seeking relief that is different from the prior litigation.

The Defendants contend that this issue has already been litigated, and therefore must be precluded as a matter of law. Issue preclusion bars relitigation of an issue when all four of the following factors are established: (1) the issue decided in prior litigation must be identical to the issue presented in the current actions; (2) the initial ruling must have been on the merits and have become final; (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation; and (4) the issue was actually and necessarily litigated. *Elyousef v. O'Reilly & Ferrario, LLC*, 126 Nev. 441, 550 (2010). The issue decided in prior litigation must be identical—including identical damages—to the issue presented in the current actions. *See Id.* (where issue preclusion was appropriate where damages asserted were identical to those litigated in the prior claim).

Here, the HOA seeks different relief than previously sought. 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. Contrary to the Defendants' Motion, the HOA is not seeking a determination of causation or fault as between the parties. The HOA is specifically not seeking any determination as to the claims set forth in the Defendants' Motion, including trespass, negligence or nuisance. The HOA is seeking a declaration as to the responsibility of future support for the wall, only. The HOA is not seeking monetary damages for their own wall because that issue has already been tried. This is an entirely different issue rooted in entirely different relief.

C. The HOA owes no duty of lateral support to the Defendants.

Defendants cite many cases—lacking in binding or persuasive authority—around the country claiming them to be more on-point and persuasive than Nevada's own case on the matter. However, ***all*** of Defendants' cited cases are grounded in the idea that the duty of care

extends only as far as the Defendants' wall is ***naturally supported***. Defendants have made no showing that their wall is naturally supported, or in other words, could stand on its own without the support of the HOA's wall. Defendants cite to *Blake Const. v. United States*,[1] as support for the contention that "property owners have an absolute obligation to support the soils of adjoining property owners in their natural condition."[2] 585 F.2d 998, 1006 (Ct. Cl. 1978). The United State Court of Claims (which was abolished in 1982) in *Blake* stated that every owner of land has the right to lateral support from the adjoining soil; however, "the right of lateral support applies only to the soil in its natural condition." *Id.* at 1007. The right or lateral support ***does not extend*** to structures on the land. *Id.* Therefore, according to *Blake*, the right of lateral support does not extend to Defendants' wall.

Again, Defendants rely upon another case that upholds the absolute duty of lateral support for naturally supported land in *Elliot v. Rodeo Land*, 297 P.2d 129 (Cal. Ct. App. 1956). In *Elliott*, the court found substantial evidence of a loss of lateral support when, a large, dense quantity of fill on the top of a hillside was naturally supported, and plaintiff's excavations, which removed the lateral support of the toe of the slope, caused the slide. *Id.* at 133. Again, there is only an absolute duty of lateral support when the land is naturally supported, which is not the case with the Defendants' wall.

Defendants cite to *Klebs v. Yim*[3], for the assertion that "retaining walls or bulkheads must both be adequate to provide lateral support and be maintained in a condition sufficient to provide lateral support in the future." Again, the lateral support reference in *Klebs*, refers to the lateral support of the wall, and specifically **not** an improvement made upon the land. *Klebs v. Yim*, 772 P.2d 523, 526 (Wa. Ct. App. 1989). The court in *Klebs* states, "Although adjacent landowners

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[1] In *Blake*, a contractor entered into a contract with the government to demolish a building owned by the government and build a new structure. During the demolition, adjacent buildings were severely damaged, and the government paid the owners for the damages to the buildings, and withheld those funds from the contractor. The court granted summary judgment in favor of the government, because the contractor breached its contract by failing to provide proper protection of adjacent structures as provided in the contract.

[2] *See Defendants' Motion*, 14.

[3] *See Defendants' Motion*, 15.

each have an absolute property rights to have their land laterally supported by the soil of their neighbor, this rights does not include the right to have the weight of the buildings or improvements placed on the land also supported." *Id.* Further, "[t]he landowner cannot, by placing an improvement upon his land, ***increase*** his neighbor's duty to support the land laterally. Accordingly, the owner of the lot with the duty to maintain the wall should only be required to reconstruct the wall under the right of lateral support if the failure of the wall was due to its inability to support, the ***natural, unimproved land***, rather than improvements on the supported lot." *Id.* This case—that Defendant cited—clearly states that the HOA owes no absolute duty of support to the Defendants' improvement—the wall.

Defendants cite to the *Lyon* and *Noone* cases, stating that a contractor must exercise due care in excavating and, that therefore the HOA cannot obtain a court order regarding any obligation to provide support.[4] In the event the court is inclined to rule on this issue under a summary judgment standard, it is premature to do so, and further discovery must be undertaken pursuant to NRCP 56(f). Additionally, none of the cases cited by Defendants to support this contention deal with a situation where the structure needing to be excavated/removed poses a threat to health and safety due to a high potential of collapse. The potential threat to health and safety, which comes from the HOA's wall, can be eliminated by simply removing the wall.

In the *Noone*[5] case, Defendants state that where a retaining wall is substituted for naturally occurring lateral support, the obligation of due care runs to the retaining wall to the same extent as it would run to the soils (or other naturally occurring lateral support) the wall is substituted for. While this 1982 case out of West Virginia is not binding on this Court, Defendants oversimplify the holding of the case. The West Virginia Court described in great detail that the liability of the land owner that allegedly fails to provide lateral support specifically turns on whether the adjacent homeowner's land would have been able to support the structures upon it in the land's **natural condition**. If the adjacent homeowner's land could not support its

[4] *See Defendants' Motion,* 15.

[5] *Noone v. Price*, 298 S.E.2d 218 (W. Va. 1982)

own structures in its natural condition, then the owner that removed lateral support from his land would have no liability.

Ultimately, not one of the non-binding cases cited by Defendants actually supports their assertion that the HOA has an absolute duty to maintain the Defendants' wall. Defendants tried thoroughly to explain how the "dissimilar" facts from a binding Nevada case (*Zivot*) render this authority "completely inapplicable" and "should be disregarded by the Court."[6] However, the only Nevada case that Defendants proffer in support of this motion is the more factually dissimilar *Lyon v. Boudwin Constr. Co.* In *Lyon*, the negligent excavation of an adjoining building removed the lateral support for the side of the building causing it to rotate and split from the basement to the roof seam. *Lyon v. Boudwin Const. Co.*, 88 Nev. 646, 503 P.2d 1219, 1220 (Nev. 1972). This case is entirely distinguishable to this case, because the wall referenced in that case, is an infrastructural wall adjoining two buildings. Therefore, of course, lateral ties would exist when literally the removal of one wall would tear down the entire building attached to the other side of the wall. The Defendants' wall in this case does not adjoin any HOA building to the Defendants' building, and the removal of the wall would not destroy the Defendants' home. Even the reference of the word "wall" in the *Lyon* case is definitionally different from the "wall" in this case, because the *Lyon* wall supported the building by being attached to the roof of the actual building. The *Lyon* case is only superficially relevant to the current case and therefore, is easily distinguishable. Again, the *Lyon* case only reiterates the same contention that the wall must be ***naturally supported***, as seen by the fact the excavation caused the adjoining building's land to rotate.

Contrary to Defendant's contention, 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 of the wall and added to the height of a boundary wall shared with the defendant. 90 Nev. 361. 526 P.2d 1177 (Nev. 1974). In addition to the

[6] *See Defendants' Motion*, 18.

substantial fill that had been placed next to the wall, the plaintiff planted numerous trees adjacent to the wall. *Id.* 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* (citing Restatement (Second) of Torts § 817 (1979)).

This court will find factual similarities between *Carlson v. Zivot,* and in the instant case. Here, the Defendants bought a house with a masonry wall that was built in 2010. The previous owners' wall was an artificial addition to the natural condition of the land, and thus, was not naturally supported. For reasons not readily known to the HOA, both walls appear to be suffering ongoing damage, and the HOA's wall is becoming increasingly unstable. Just as in *Carlson*, the HOA holds no duty to provide the necessary lateral support to counteract the force resulting from the previous owners' construction of their masonry wall. *See also Paila 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 on the neighbor's part). Because there is no agreement between the parties or any legal or contractual obligation to each other, the HOA therefore has no duty to support its own wall at the unintended benefit of the Defendants.

Ultimately, Defendants provided no support for their assertion, and the HOA has binding authority from the Supreme Court of Nevada that the HOA owes no duty of lateral support to Defendants' wall. For these reasons, the Court should reject the Defendants' Motion as to this point. At a minimum, additional discovery would need to be completed before any of the Defendant's assertions could be proven.

D. There is no duty for the HOA to exhaust its administrative remedies, because the HOA is not appealing a "final action, decision or order of any governing body, commission or board", and is entitled to seek a remedy from the district court.

There is no duty for the HOA to exhaust its administrative remedies, because the HOA is not appealing a "final action, decision or order of any governing body, commission or board," and is entitled to seek a remedy from the district court.

Defendants argue that the declaratory relief sought by Plaintiff is premature, because Plaintiffs failed to "exhaust its administrative remedies" prior to filing the action. Defendants cite to NRS 278.0235 *et seq*. to justify this position. Defendants further argue that Plaintiff's declaratory relief action is premature because Plaintiff has not previously created plans, obtained engineering opinions, obtained permits, etc. *See* Defendants Opp. at 18-20:17-13. Defendants miss the point of this declaratory relief action.

NRS 278.0235 states as follows:

> No action or proceeding may be commenced for the purpose of seeking ***judicial relief or review from or with respect to any final action, decision or order of any governing body, commission or board*** authorized by NRS 278.010 to 278.630, inclusive, unless the action or proceeding is commenced within 25 days after the date of filing of notice of the final action, decision or order with the clerk or secretary of the governing body, commission or board.

NRS 278.0235 (emphasis added). This is not an action to appeal a final decision by any governing body. Further, Defendants cite no law requiring the HOA to obtain permits prior to bringing a cause of action for declaratory relief.

Naturally, the HOA understands that permission from the appropriate governing bodies is necessary to perform any wall removal of this magnitude. Clearly, that permission will require proper contractor bids and engineering evaluations. Based upon its history in dealing with this wall situation, however, the HOA understands that all of those things will likely be impossible without a court order allowing the wall's removal. As the HOA stated clearly in its complaint, there is a high chance that Defendants' wall will be damaged or collapse if the HOA's wall is removed. This is obvious from just looking at the wall. Accordingly, the HOA will not be able to

obtain any permits or fulfill any of the other requirements mentioned by Defendants without first seeking an order from the court confirming that the HOA is legally allowed to tear down its own wall.

V. CONCLUSION

Because the HOA is seeking relief not previously adjudicated in the similar matter, and because there is not duty for the HOA to provide lateral support for the Defendants' wall, the HOA respectfully requests this Court to DENY the Defendants' Motion to Dismiss, or, in the Alternative, Motion for Summary Judgment.

DATED this June 6, 2018.

BOYACK ORME & ANTHONY

By: /s/ *Edward D. Boyack*
Edward D. Boyack
Nevada Bar No. 5229
Christopher B. Anthony
Nevada Bar No. 9748
7432 W. Sahara Ave., Suite 101
Las Vegas, Nevada 89117
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2018, service of the foregoing **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT** via electronic means by operation of the Court's electronic filing system, upon each party in the case who is registered as an electronic case filing user with the Clerk.

By: /s/ *Norma Ramirez*
An Employee of Boyack Orme & Anthony

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Steven D. Grierson
CLERK OF THE COURT

RPLY

BINGHAM SNOW & CALDWELL
Clifford Gravett, Nevada Bar No. 12586
Jedediah Bo Bingham, Nevada Bar No. 9511
840 Pinnacle Court, Suite 202
Mesquite, Nevada 89027
(702) 346-7300 phone
(702) 346-7313 fax
mesquite@binghamsnow.com
Attorneys for the Raridans

DISTRICT COURT

CLARK COUNTY

ROCK SPRINGS MESQUITE 2 OWNERS' ASSOCIATION, a Nevada domestic non-profit corporation, Plaintiff, v. STEPHEN J. RARIDAN and JUDITH A. RARIDAN, husband and wife, and DOES I through X, inclusive, Defendants.	**REPLY IN SUPPORT OF MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT** Case No. A-18-772425-C Dept. No. XVI

COME NOW Defendants, Stephen J. Raridan and Judith A. Raridan, by and through counsel and reply in support of their Motion to Dismiss.

INTRODUCTION

Although the Plaintiff Rock Springs Mesquite 2 HOA ("Plaintiff") attempts to be coy about the previous litigation regarding their retaining walls, no amount of wordsmithing, however clever can change the fact that Plaintiff sued the Raridans' predecessors-in-interest (the "Olsens") for alleged damage to Plaintiff's retaining walls and lost. Included in the issues raised during the litigation was the question of whether adjacent property owners owe each other a duty of care (they do) and, particularly, whether Plaintiff had an obligation to the Olsens (and thus to the Raridans) to provide continuing lateral support. Nothing has changed from the time Plaintiff sued

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the Olsens to the present time except for Plaintiff's loss in the prior case. That fact is fatal to the instant case and requires that the case be dismissed on preclusion grounds or, alternatively, that the Court issue summary judgment in favor of the Raridans and hold that Plaintiff does owe—at minimum—a duty of due care to the Raridans. Finally, as a practical matter, the City of Mesquite is almost certainly going to require that Plaintiff continue providing lateral support to the Raridans as a condition for issuance of permits regardless of the outcome of this case, which is an additional reason to dismiss this case.

REBUTTAL FACTS

Plaintiff previously litigated the issue of lateral support and claims to the contrary are inaccurate and disingenuous.

Plaintiff claims that in the previous case it never contemplated and could not raise the issue of whether it owed a duty to provide lateral support to the Raridans' property.[1] This claim is untrue and, frankly, highly disingenuous to the Court. In fact, the issue of duties owed between property owners was one of the central issues litigated in the prior case and particularly, whether Plaintiff was obligated to support the wall they claimed belonged to the Olsens (now to the Raridans). Specifically, Plaintiff submitted a jury instruction to Judge Cory in the previous case asking that the jury be instructed as follows:

> **Lateral Support**
>
> Plaintiff is under no duty or obligation to provide lateral support for Defendants' ~~wall or~~ property to counteract the force resulting from Defendants' actions.[2]

[1] *See* Opposition at p. 7:14-27.

[2] Exhibit A, rejected jury instructions at p. 2. The instruction originally included the word "wall" which was removed by interlineation.

Plaintiff cited the *Zivot* case (the same case relied on in its Opposition) as authority for the instruction.[3] The proposed jury instruction was rejected (likely because it misstates Nevada law) but in any event, demonstrates that Plaintiff's claimed relief could have been raised and was in fact raised in the prior case.[4]

After the trial, Plaintiff appealed to the Nevada Supreme Court specifically on the Court's refusal to give the jury Plaintiff's proposed jury instruction regarding lateral support and Plaintiff's interpretation of the *Zivot* case.[5] In 2014 Plaintiff voluntarily dismissed its appeal and included in its motion to dismiss the appeal the following statement, "[Plaintiff's counsel] explained and informed [Plaintiff] of the legal effects and consequences of withdrawal of this appeal, including that [Plaintiff] cannot hereafter seek to reinstate this appeal and that any issues that were or could have been brought in this appeal are forever waived."[6]

Plaintiff states to this Court in its Opposition that,

> ...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...**no parties contemplated in that case [i.e. the case against the Olsens], the narrow legal issue of whether the HOA had a duty to support the wall because the suit focused on damages and repair.** It was only after the jury returned a verdict...that the issue of whether the HOA had to continue to support the wall came to be...the HOA, for the first time, was faced with a new problem: does the HOA now have to continue to support the wall to their continuing detriment?[7]

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[3] *Id.*
[4] *Id.*
[5] Exhibit B, Case Appeal Statement at p. 2.
[6] Exhibit C, Notice of Withdrawal of Appeal.
[7] Opposition at p. 7:14-27 (emphasis added); see also Opposition at p. 3:12-14 ("...the issues of declaratory (*sic.*) and more specifically, whether the HOA now had an option obligation to provide lateral support for the homeowners' wall in light of the verdict, were never adjudicated.").

This entire paragraph is false. A jury instruction on precisely the issue of lateral support was submitted by Plaintiff, rejected by Judge Cory, and the rejection appealed to the Nevada Supreme Court.[8]

In addition to the rejected jury instruction, the issue of the duty owed between adjacent property owners did go before the jury via a jury instruction which accurately stated Nevada law. Jury Instruction No. 27 from the prior case specifically included the following definition of landowner liability: "An owner of land must exercise reasonable care not to subject others to an unreasonable risk of harm. An owner of land must act as a reasonable person under all circumstances."[9] This instruction, taken in addition to the rejected jury instruction and subsequent appeal demonstrates that the type and nature of the duties owed between adjacent property owners was very much a part of the prior litigation.

Lest there be any doubt about the scope of the prior litigation, Plaintiff's briefs in the prior case show that, when the shoe was on the other foot (i.e. when it was asserting that the duties owed to it had been breached), Plaintiff strenuously advocated for the existence of a duty of care from the Olsens—as an adjacent property owner—to Plaintiff. For example, Plaintiff acknowledged in summary judgment proceedings in the prior case that adjacent property owners *do* owe each other duties to each other, stating, "...it seems unbelievable that a landowner is not responsible for his actions if he does something with his property that then causes damages to his neighbors."[10] Plaintiff obviously believed that adjacent property owners owe each other a duty of care when it sought to hold the Olsens responsible or the failure of its retaining walls. It is only

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[8] Exhibit A, Rejected jury instructions at p. 2; Exhibit B, Case Appeal Statement at p. 2.
[9] Exhibit D, Case 1 jury instructions, No. 27.
[10] Exhibit E, Plaintiff's Opposition to Summary Judgment Motion, Case #1 at p. 14 (emphasis added).

now, when it is trying to evade its own duties as an adjacent land owner, that it asserts there is no duty owed.

While Plaintiff did not expect to lose its case against the Olsens and likely believes the jury got the verdict wrong, Plaintiff clearly contemplated—and litigated—the issue of the duties owed between adjacent property owners. Judge Cory rejected Plaintiff's proposed jury instruction on lateral support, the jury rejected Plaintiff's the Olsens regarding the failures of its retaining walls, and Plaintiff chose to withdraw its appeal of the lateral support issue filed the Nevada Supreme Court. Against the history in the prior case, Plaintiff's claim that it did not litigate or have the opportunity to litigate the issues it now brings in the present case simply does not pass the red-face test. Prior to the filing of this Reply, Plaintiff was made aware of the false nature of the assertions in the Opposition and, despite being given opportunity to do so, declined to amend its Opposition.[11]

The relevant factual issue for the Court to decide is whether Plaintiff could have litigated the nature and scope of adjacent landowner liability and, as the jury instructions and Plaintiff's previous briefs demonstrate, there was not only an opportunity but an actual effort to litigate just that issue.[12]

As a matter of law and law of the case, the Raridans' wall is not damaging Plaintiff's retaining wall and did not cause its failure.

The Court could perhaps be excused if, after reading the Opposition, it formed the belief that Plaintiff prevailed in the prior litigation; the Opposition certainly attempts to paint such a picture. From the beginning of its Opposition, Plaintiff claims that, "the installation of [the

[11] Exhibit F, E-mail to Plaintiff's counsel, dated June 14, 2018.
[12] Exhibit A, rejected jury instructions at p. 2.

Raridans'] wall eventually caused severe damage to the HOA's wall..."[13] Plaintiff goes on to claim, "...the previous owners had constructed a failing masonry wall that was compromising the HOA's adjacent wall...the HOA continues, and will continue, (*sic.*) to be harmed... "[14] There is one sentence from all the pleadings in the prior litigation completely fatal to these factual assertions found throughout the Opposition: "We, the jury, find in favor of the Defendants and against the Plaintiff."[15] Plaintiff had an opportunity to convince a jury that the wall on the Raridans' property damaged Plaintiff's retaining walls or caused them to fail; Plaintiff failed to do so. That failure was the end of the road for Plaintiff's claims and its continuing efforts to re-litigate the previous case must be put to an end.

LEGAL ARGUMENT

1. Nevada Cases Are Clear That A Complaint For Declaratory Relief Filed After Coercive Litigation Between Parties Is Subject To Dismissal On The Basis Of Claim Preclusion.

Declaratory relief is not a form of "super" litigation where a party can hale its opponent into court without observing the procedural and jurisdictional requirements to initiate and maintain a case. Rather, as the Nevada Supreme Court points out, "The Uniform Declaratory Judgments Act does not establish a new cause of action or grant jurisdiction to the court when it would not otherwise exist. Instead, the Act merely authorizes *a new form of relief*, which in some cases will provide a fuller and more adequate remedy than that which existed under common law."[16] As with all other forms of relief, a request for declaratory relief requires a valid cause of

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[13] Opposition at p. 3:4-6.
[14] Opposition at p. 3:9-10; 3:23.
[15] Exhibit G, Jury Verdict, Rock Springs Mesquite 2 Owners' Association v. Floyd Olsen *et. al.*
[16] *Builders Ass'n. of Northern Nevada*, 105 Nev. 368, 369, 776 P.2d 1234, 1234 (1989) (emphasis added).

action and justiciable controversy between parties.[17] The fact that the Uniform Declaratory Judgment act allows for the issuance of relief in a wide variety of circumstances does not mean that it provides for relief in any circumstance whatsoever. Declaratory relief—along with all other forms of relief based in law or equity—only when a plaintiff has a valid cause of action and justiciable complaint.[18]

The Nevada Supreme Court has made clear in numerous cases that declaratory relief is available only where a plaintiff has a valid cause of action and may not be sought in any situation in which a party simply would like a legal opinion from the court or second bite at the apple. For example, in *Knittle v. Progressive* the Nevada Supreme Court held that declaratory relief could not be sought prematurely where the plaintiff's claims had not yet ripened into a valid cause of action.[19] On the other end of the spectrum timewise, the Court also held that declaratory relief was not available to collaterally attack the validity of a decree of divorce after the decree had become final and the party seeking declaratory relief did not timely appeal or otherwise seek to set aside the decree in a timely fashion.[20]

Against this backdrop it is unsurprising that, while the Nevada Supreme Court allows complaints for declaratory relief to proceed *before* coercive litigation, it bars them *after* coercive litigation.[21] It makes sense to allow a party to request a declaration of rights prior to suing to

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[17] *Clark County v. Upchurch*, 114 Nev. 749, 756, 961 P.2d 754, 751 (1998) (setting forth the jurisdictional requirements for declaratory relief); *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986).

[18] *Knittle v. Progressive*, 112 Nev. 8, 11, 908 P.2d 724, 726 (1996); *see also Colby v. Colby*, 78 Nev. 150, 156, 369 P.2d 1019, 1022 (1962) (holding that finality of a decree of divorce could not be contested in subsequent declaratory relief action where decree of divorce had long before become final).

[19] *Knittle*, 112 Nev. at 11.

[20] *Colby*, 78 Nev. at 156.

[21] *Boca Park Marketplace v. Higco*, --- Nev. ---, 407 P.3d 761, 765 (2017).

enforce those same rights; indeed, without such an exception, the entire concept of declaratory relief would be pointless.[22] If a party could not enforce rights after having them declared, there would be no point in asking for declaratory relief. On the other hand, there is absolutely no rational justification for suing a party to enforce perceived rights (or bringing a case attempting to enforce perceived rights) and then, after losing the case, asking a court to opine as to what the rights between the parties were in the first place.[23] It is for that extremely logical reason that the *Boca Park* court held, "...we find the...reasons for a declaratory judgment exception persuasive and therefore hold that claim preclusion does not apply where the original action sought only declaratory relief.[24] The rationale for excepting declaratory relief from the bars imposed by claim and issue preclusion simply would not hold up if the *Boca Park* exception were reversed and a claim for declaratory relief followed an original action seeking to enforce rights.[25] Thus, "...courts have consistently held that the declaratory judgment exception applies only if the prior action solely sought declaratory relief."[26] Courts are very protective of the finality of judgements are do not want actions for declarative relief to become a backdoor route around the bars imposed by claim and issue preclusion.[27]

As Plaintiff's Motion set forth in great detail, the three elements for claim preclusion—1) identity of parties or privities; 2) a final, valid judgment; and 3) a subsequent action based on the same claims or any part of them which were, or could have been, raised in the prior litigation are

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[22] *Id.*, at 764.
[23] *See Id.*, at 765.
[24] *See Id.*
[25] *See Id.*
[26] *Laurel Sand & Gravel v. Wilson*, 519 F.3d 156, 164 (4th Cir. 2008) (*cited by Boca Park Marketplace*, 407 P.3d at 765).
[27] *See Zaidi v. United States Sentencing Commission*, 115 F. Supp.3d 80, 86 D.D.C. 2015).

satisfied in this case.[28] Because these three elements are satisfied, any future litigation between the parties or their privities is barred, regardless of the fact that the previous litigation did not raise a particular cause of action or (as in this case) seek a particular type of relief.[29]

Plaintiff's previous pleadings, the jury instructions (both the actual instruction regarding duty of care and the rejected, erroneous instruction regarding lateral support) make clear that the existence of a duty of care between adjacent landowners not only could have been litigated between the parties but was actually litigated.[30] Plaintiff's pleadings from the prior case also make clear that removal and repair of its failing retaining walls could have been and was actually litigated; the cost of doing so was the basis for its claimed damages.[31] Finally, the rejected jury instruction submitted to the Court shows that the issue of whether Plaintiff has an obligation to provide lateral support for the Raridans' wall (the only issue raised by Plaintiff in this case) could have been and was actually litigated in the prior case.[32] Claim preclusion applies to any and all claims and forms of relief not raised in an initial case including, in this case, declaratory relief and, as such, the Court should dismiss plaintiff's complaint.[33]

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[28] *See* Motion at p. 8; *see also Five Star Capital v. Ruby*, 124 Nev. 1048, 1052, 194 P.3d 709, 711 (2008).

[29] *Five Star Capital*, 124 Nev. at 1054-55 ("This test [for claim preclusion] maintains the well-established principle that claim preclusion applies to all grounds of recovery that were or could have been brought in the first case.").

[30] Exhibit A, Rejected Jury Instructions at p. 2; Exhibit E, Plaintiff's Opposition to Summary Judgment Motion at p. 14.

[31] Exhibit E, Plaintiff's Opposition to Summary Judgment Motion at p. 14.

[32] Exhibit A, Rejected Jury Instructions at p. 2.

[33] *Five Star Capital*, 124 Nev. at 1054-55.

2. The Nature Of Relief Sought by Plaintiff Is Irrelevant For Issue Preclusion to Require Dismissal of this Case.

Plaintiff asserts that, because it previously sought money damages rather than declaratory relief, issue preclusion does not bar the present litigation.[34] This assertion misstates the requirements for issue preclusion, which—as the parties agree—are fourfold: 1) identical issues decided; 2) a ruling on the merits which has become final; 3) identical parties or their privities; and 4) the issue must have been actually and necessarily litigated.[35] Notably absent from that list is the type or amount of damages claimed in the prior case; in fact, the type and nature of relief sought (whether money damages, equitable relief, or declaratory relief) is not even a consideration for the court in deciding whether to apply issue preclusion.[36] The relevant inquiry is whether the requested damages in two cases (of whatever type, amount or variety) arise from the same set of facts.[37] As the United States Supreme Court has noted, "We see no reason why the preclusive effects of an adjudication on parties and those 'in privity' with them, i.e., claim preclusion and issue preclusion (res judicata and collateral estoppel), should differ depending solely upon the type of relief sought in a civil action."[38]

The single case cited by Plaintiff in support of its position is *Elyousef*; the case does not remotely stand for the position Plaintiff advances to the Court: that claimed damages between cases must be identical for issue preclusion to apply.[39] In fact, *Elyousef* stands for precisely the opposite proposition, establishing that damages between two cases is a precluded issue when both

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[34] Opposition at p. 8: 8-11.
[35] *Elyousef v. O'Reilly & Ferrario*, 126 Nev. 441, 445, 245 P.3d 547, 550 (2010) (listing factors set out in *Five Star Capital*).
[36] *Howard v. City of Coos Bay*, 871 F.3d 1032, 1042 (9th Cir. 2017).
[37] *Id.*
[38] *Thomas v. Gen. Motors*, 522 U.S. 222, 234, 118 S. Ct. 657, 664, (1998).
[39] Opposition at p. 8: 8-11.

cases involve the same facts.[40] Thus, according to the *Elyousef* court, once a matter has been completely litigated in one case, issue preclusion prevents the re-litigation of new or different damages arising out of the same facts in a subsequent case.[41] The *Elyousef* court was in agreement with numerous other courts which hold that, "...issue preclusion is appropriate even though the plaintiff seeks different relief in this action than in the [prior] action."[42]

Given the clear state of the law, the fact that Plaintiff is seeking declaratory relief here and sought monetary relief in the prior case is irrelevant to the determination of this Motion. Issue preclusion prevents Plaintiff from relitigating all factual issues arising out of its claims in the prior case arising out of the failure of its retaining walls, including any relief arising therefrom.[43] As Plaintiff's proposed—but rejected—jury instruction clearly shows, Plaintiff did in fact previously raise the factual and legal issues of whether it owed a duty of lateral support to the Raridans' property.[44] Further, as Plaintiff's expert reports from the prior case (which were the basis of its claimed damages) clearly demonstrate, Plaintiff knew from the beginning of its case that it needed to replace its failing retaining walls.[45] In sum, other than the relief requested (declaratory relief) and the fact that Plaintiff lost the prior case, this case is nothing more than Plaintiff's attempt at a second bite of the apple.

The fact that the relief sought by Plaintiff—declaratory relief—is different from the relief (in the form of monetary damages) it sought in the prior case makes no difference to the preclusive effect of the prior litigation; plaintiffs are allowed to hale their opponents and their privities into

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[40] *Elyousef*, 126 Nev. at 445.
[41] *Id.*
[42] *See e.g. Morgan*, 657 F. Supp.2d at 153.
[43] *Id.*
[44] Exhibit A, Rejected jury instructions at p. 2.
[45] Exhibit H, Contractor estimate provided by Plaintiff in prior case for replacement of retaining walls.

court only once for any and all litigation arising from a single set of facts.[46] Because Plaintiff has already—exhaustively—litigated the facts surrounding the Raridans' property and Plaintiff's failing retaining walls, it cannot force the Raridans to participate in a new round of litigation that their predecessors the Olsens already prevailed in.

3. The Existence of a Duty of Lateral Support is a Matter of Hornbook, Black letter Law and Mandates Summary Judgment in the Raridans' Favor.

Plaintiff attempts, by misrepresenting the arguments set forth in the Raridans' Motion, to convince the Court that it may not issue summary judgment in the Raridans' favor as to the existence of a duty owed to them by Plaintiff. The Court should disregard Plaintiff's arguments. Adjacent property owners owe each other one or both of two duties in regards to lateral support, either: 1) a strict duty as to land in its natural state (including support of structures which do not increase lateral pressure above that exerted by the land in its natural state); or 2) a duty of due care for structures which have increased lateral pressure beyond that exerted by land in its natural state.[47] These duties have long been imposed on property owners and are not controversial.[48] Nevada courts have imposed such duties in various cases similarly with other jurisdictions.[49] Even if Plaintiff's case were not barred by the doctrines of claim and issue preclusion, the Raridans would still be entitled to summary judgment denying Plaintiff's request for a declaration that Plaintiff owes no duty of lateral support whatsoever because the requested relief is contrary to

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[46] *Zaidi*, 115 F.Supp.3d at 86.
[47] *Blake Const. v. United States*, 585 F.2d 998, 1006 (Ct. Cl. 1978) (strict liability); *Lyon v. Walker Boudwin Const.*, 88 Nev. 646, 649, 503 P.2d 1219, 1220-21 (1972) (due care).
[48] *See* Restatement of Torts, 2d. §817 (1979) (Exhibit G to Motion).
[49] *See Lyon*, 88 Nev. at 649.

and belied by the black letter law of practically every jurisdiction in the United States, including Nevada.[50]

Plaintiff has taken two completely contradictory positions regarding adjacent landowner duties between this and the prior case. In the prior case Plaintiff was emphatic that adjacent landowners do owe each other a duty of care, stating, "It seems unbelievable that a landowner is not responsible for his actions if he does something with his property that then causes damages to his neighbors…It is undisputed that Defendants owed a duty to neighboring landowners not to create a situation whereby the neighbor's land is damaged"[51] However, now that Plaintiff is trying to avoid liability for doing something that it knows will harm the Raridans, it takes the exact opposite position, stating: "Because there is no agreement between the parties or any legal or contractual obligation to each other, [Plaintiff] therefore has no duty to support its own wall at the unintended benefit of the Defendants."[52] The juxtaposition of Plaintiff's completely contradictory positions is, to say the least, jarring and disingenuous.

The central allegation in the prior case brought by Plaintiff was that the prior owners, the Olsens, violated the duty of due care they owed as adjacent landowners to Plaintiff through their activities on their property which, so Plaintiff claimed, damaged Plaintiff's retaining wall.[53] The jury ultimately found that the Olsens had not violated that duty.[54] Now that the shoe is on the

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[50] *See* Restatement of Torts, 2d. §817. If Plaintiff were asking the Court to determine which duty applied (and if claim and issue preclusion did not apply) there would perhaps be a question of fact to preserve the case. However, because the requested relief is that *no* duty exists between the parties, the Court may issue summary judgment. Further, because there is no allegation that the duty has been breached (only that Plaintiff is planning to breach it) there would also be a question as to whether such a case is ripe for review, even in the context of declaratory relief.

[51] Exhibit E, Plaintiff's Opposition to Summary Judgment Motion, Case #1, at p. 14: 2-3; 13-14 (exhibits omitted).

[52] Opposition at 12:16-18.

[53] *See* Exhibit E, Plaintiff's Opposition to Summary Judgment Motion, at p. 13:27-14: 1-9.

[54] Exhibit G, Jury Verdict.

other foot, i.e. Plaintiff desires to take an action with Plaintiff *knows* will cause harm to the Raridans, Plaintiff attempts to convince the Court that there is no duty from Plaintiff—as an adjacent land owner—to the Raridans at all.[55] Courts take a very narrow view of parties who "blow hot and cold" and this Court should do so with Plaintiff here.[56] When Plaintiff was seeking damages from the Olsens, the existence of an adjacent landowner duty was—according to Plaintiff—undisputed; now that Plaintiff is seeking to exculpate itself from the future damages it plans to cause the Raridans, the existence of the duty is just as undisputed.

The *Zivot* case relied on by Plaintiff in its Opposition and in its rejected jury instruction in the prior case does not mean that Nevada does not impose, at minimum, a duty of due care on adjacent property owners to provide each other lateral support.[57] The court in *Zivot* denied relief because a party, who by its own actions causes a party wall to fail, cannot hold the other party responsible for the failure.[58] If there was some question as to whether the Olsens or the Raridans were the cause of the failure of Plaintiff's retaining walls, the *Zivot* case might be tangentially relevant here. However, the jury in the prior case ruled against Plaintiff on precisely that issue: the Olsens did *not* cause Plaintiff's wall to fail; full stop, end of discussion.[59] Accordingly, *Zivot* is not applicable and should be disregarded by the Court, just as the jury instruction based on *Zivot* was rejected by Judge Cory in the previous case.[60]

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[55] Opposition at 12:16-18.

[56] *See e.g. St. Paul Mercury v. Frontier Pacific*, 4 Cal. Rptr.3d 416, 429 (Cal. Ct. App. 2003).

[57] *Carlson v. Zivot*, 90 Nev. 361, 526 P.2d 1177 (1974). It should be noted that, since its issuance almost fifty years ago, the *Zivot* case has not been cited a single time by any court for any reason, likely because of the uniqueness of its facts.

[58] *Id.*, at 363.

[59] Exhibit G, Jury Verdict.

[60] The only other case cited by Plaintiff in support of its position is *Paila Lodge v. Bank of Knob Noster*, 176 S.W.2d 511, 5-11-12 (Mo. Ct. App. 1943). The case, decided in Missouri almost eighty years ago and only cited in three subsequent Missouri decisions (and nowhere else) dealt with the failure of a building wall in the first story of a building owned by the defendant and the

4. Plaintiff is Asking the Court to Substitute Its Own Judgment for that of the Mesquite Planning Department.

Plaintiff admits that one of the primary purposes behind its request for declaratory relief is its desire to convince the City of Mesquite that Plaintiff need not provide lateral support to the Raridans as a condition for issuance of permits for the removal Plaintiff's retaining walls.[61] This the Court should not allow. As set forth at length in the Motion, the Mesquite Building Code and the advisory letter issued by the Mesquite planning department is clear that it must approve any plans to remove, rebuild, or repair the walls and that in so doing, adjacent land must be supported.[62]

It is possible, perhaps even likely, that regardless of what this Court does regarding this case, the City of Mesquite will require Plaintiff to provide lateral support to the Raridans' property throughout and following any repair, removal, or replacement of Plaintiff's retaining walls.[63] Even if not, since Plaintiff will still have to go through the permitting process and obtain permissions from the City of Mesquite prior to taking any action on its walls, the result of any verdict of judgment in this case is likely to be merely advisory, which is not permitted in Nevada jurisprudence.[64] Thus, declaratory relief from this Court in favor of Plaintiff would not fully resolve the controversy since the City of Mesquite could, in exercise of its administrative discretion, require Plaintiff to provide lateral support regardless of the Court's ruling.

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plaintiff's (who owned the top story) efforts to get an order that the defendant repair the bottom portion of the building. The case has nothing to do with adjacent landowner liability and has no bearing on the decision in this case.

[61] Opposition at p. 13.

[62] Exhibit I, Letter from City of Mesquite; IBC §1806 (Exhibit G to Motion).

[63] Exhibit I, Letter from City of Mesquite.

[64] *See* NRS 30.080 (West 2017) (Court may decline to issue declaratory relief that does not fully resolve the uncertainty giving rise to the proceeding); *see also Applebaum v. Applebaum*, 97 Nev. 11, 12, 621 P.2d 1110, 1110 (1981) (courts do not issue advisory opinions).

Accordingly, the Court should exercise its discretion and decline to issue declaratory relief in the present case.

CONCLUSION

For the reasons set forth herein, the Court should dismiss the complaint or, in the alternative, issue summary judgment in the Raridans' favor.

Respectfully submitted this 29th day of June, 2018,

BINGHAM SNOW & CALDWELL

Clifford Gravett, Nevada Bar No. 12586
Jedediah Bo Bingham, Nevada Bar No. 9511
Attorneys for the Raridans

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) I certify that I am an employee of Bingham Snow & Caldwell, and that on this day; I caused a true and correct copy of the foregoing document to be served, to the following:

ATTORNEYS OF RECORD	PARTIES REPRESENTED	METHOD OF SERVICE
Edward D. Boyack Christopher Anthony 7432 W. Sahara Ave. Las Vegas, NV 89117	Rock Springs II HOA	☐ Personal Service ☒ Email / E-File ☐ Facsimile ☐ Mail

DATED this 2 of ~~June~~ July, 2018.

An employee of Bingham Snow & Caldwell

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Steven D. Grierson
CLERK OF THE COURT

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BINGHAM SNOW & CALDWELL
Clifford Gravett, Nevada Bar No. 12586
Jedediah Bo Bingham, Nevada Bar No. 9511
840 Pinnacle Court, Suite 202
Mesquite, Nevada 89027
(702) 346-7300 phone
(702) 346-7313 fax
mesquite@binghamsnow.com
Attorneys for the Raridans

DISTRICT COURT

CLARK COUNTY

ROCK SPRINGS MESQUITE 2 OWNERS' ASSOCIATION, a Nevada domestic non-profit corporation, Plaintiff, v. STEPHEN J. RARIDAN and JUDITH A. RARIDAN, husband and wife, and DOES I through X, inclusive, Defendants.	**NOTICE OF ENTRY OF ORDER** CASE NO. A-18-772425-C DEPT. NO. XVI

PLEASE TAKE NOTCE THAT AN ORDER OF DISMISSAL was entered into the above-captioned matter on the 27th day of August, 2018, a copy of which is attached hereto.

DATED this 27th day of August, 2018

BINGHAM SNOW & CALDWELL

An employee of Bingham Snow & Caldwell

Case Number: A-18-772425-C

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) I certify that I am an employee of Bingham Snow & Caldwell, and that on this day; I caused a true and correct copy of the foregoing document to be served, to the following:

ATTORNEYS OF RECORD	PARTIES REPRESENTED	METHOD OF SERVICE
Edward D. Boyack Christopher Anthony 7432 W. Sahara Ave. Las Vegas, NV 89117	Rock Springs II HOA	☐ Personal Service ☒ Email / E-File ☐ Facsimile ☐ Mail

DATED this 27th of August, 2018.

An employee of Bingham Snow & Caldwell

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Steven D. Grierson
CLERK OF THE COURT

ORDR
BINGHAM SNOW & CALDWELL
Clifford Gravett, Nevada Bar No. 12586
Jedediah Bo Bingham, Nevada Bar No. 9511
840 Pinnacle Court, Suite 202
Mesquite, Nevada 89027
(702) 346-7300 phone
(702) 346-7313 fax
mesquite@binghamsnow.com
Attorneys for the Raridans

DISTRICT COURT

CLARK COUNTY

ROCK SPRINGS MESQUITE 2 OWNERS' ASSOCIATION, a Nevada domestic non-profit corporation, Plaintiff, v. STEPHEN J. RARIDAN and JUDITH A. RARIDAN, husband and wife, and DOES I through X, inclusive, Defendants.	**ORDER OF DISMISSAL** Case No. A-18-772425-C Dept. No. XVI

THE COURT, having received Defendants' Motion to Dismiss, Plaintiff's Opposition thereto, and Defendants' Reply in Support and oral arguments having been held, does now find, conclude, and order as follows:

FINDINGS OF FACT

1. As stated in the Complaint, Plaintiff and Defendants are adjacent property owners located in Mesquite, Nevada.

2. As also stated in the Complaint, Plaintiff has a series of retaining walls in between it and Defendants' property which are failing are at risking of collapse.

3. As also stated in the Complaint, Plaintiff previously carried out litigation against the previous owners of Defendants' real property, Floyd and Gayle Olsen in the Eighth District

☐ Summary Judgment ☐ Stipulated Judgment ☐ Default Judgment ☐ Judgment of Arbitration
☐ Voluntary Dismissal ☐☐ Involuntary Dismissal ☐☒ Stipulated Dismissal Motion to Dismiss by Def(s)

AUG 13 2018

Case Number: A-18-772425-C

Court (Case No. A-11-64068-C) ("Case #1") wherein Plaintiff alleged various causes of action against the Olsens related to the failure of Plaintiff's retaining wall. Ultimately, Case #1 was resolved in favor of the Olsens by way of a jury verdict in favor of the Olsens.

4. As also stated in the Complaint, subsequent to the jury's verdict in Case #1, the Olsens sold their property to the Raridans, Defendants in this case.

5. In Case #1, Plaintiff submitted a jury instruction to the trial court which stated, "Plaintiff is under no duty or obligation to provide lateral support for Defendants' property to counteract the force resulting from Defendants' actions." The trial court declined to read the requested instruction to the jury. The trial court's refusal was appealed by Plaintiff to the Nevada Supreme Court but the appeal was voluntarily withdrawn by Plaintiff pursuant to the terms of settlement prior to a decision being issued.

6. The rejected jury instruction in Case #1 cited the Nevada Supreme Court case of *Carlson v. Zivot*, 90 Nev. 361, 526 P.2d 1177 (1977) as legal authority, which is the same authority relied on by Plaintiff in its present case.

7. As set forth in the Complaint, Plaintiff's current case against Defendants is based on Plaintiff's assertion that Plaintiff does not owe any duty to Defendants to provide support to Defendants' property or any walls located on Defendants' property and that, accordingly Plaintiff may remove its retaining walls without any liability to Defendants for harms to Defendants' property or walls arising thereby.

8. Following service of the Complaint, Defendants sought dismissal of the Complaint on the basis that the resolution of Case #1 against Plaintiff precluded Plaintiff from bringing the present litigation against Defendants under the doctrines of issue and claim preclusion.

CONCLUSIONS OF LAW

9. When reviewing a motion to dismiss pursuant to NRCP 12(b)(5), the Court is to accept all allegations in the complaint as true and resolve every inference to be drawn therefrom in favor of the non-moving party.[1] If, after applying this standard of review to the complaint, the Court determines that the non-moving party cannot prove any set of facts which would entitle it to relief, dismissal with prejudice is appropriate.[2]

10. Although the Court generally limits its review in a NRCP 12(b)(5) motion to dismiss to the averments and allegations set forth in the Complaint, it may take judicial notice of certain matters, including pleadings and papers filed in prior cases in which the parties participated, and therefore includes consideration of pleadings and papers from Case #1 in its decision herein.[3]

11. Claim preclusion is, "...a policy driven doctrine, designed to promote the 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."[4] In order for claim preclusion to apply to a case, the following three factors must be satisfied: "...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 or any part of them that were or could have been brought in the first case."[5]

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[1] *Buzz Stew v. City of Las Vegas,* 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).
[2] NRCP 12(b)(5) (West 2017); *Buzz Stew,* 124 Nev. at 228.
[3] *Occhiuto v. Occhiuto*, 97 Nev. 143, 145, 625 P.2d 568, 569 (1981).
[4] *Boca Park Marketplace v. Higco*, --- Nev. ---, 407 P.3d 761, 763 (2017).
[5] *Five Star Capital v. Ruby*, 124 Nev. 1048, 1052, 194 P.3d 709, 711 (2008).

12. Plaintiff admits in its Complaint that Defendants purchased the real property that is at issue in this litigation from the Olsens, the Court therefore concludes that Defendants are the Olsens' privities, satisfying the first requirement for claim preclusion.[6]

13. Additionally, because the jury in Case #1 has given its verdict, judgment has issued, and an appeal made and withdrawn pursuant to settlement, the Court concludes that the judgment in Case #1 is final for purposes of claim preclusion.

14. The Court further concludes that when Plaintiff submitted a jury instruction to the trial judge in Case #1 requesting that the jury be instructed that Plaintiff did not owe the Olsens' property (now Defendants' property) any duty of support, Plaintiff raised essentially the same claim it is raising now, i.e. an assertion that it has no obligation to provide support to Defendants' property, thus satisfying the third requirement for claim preclusion, the subsequent action (i.e. this litigation) is based on the same claims which were or could have been raised in the prior litigation (Case #1 here).

15. the Court further concludes that alternatively, even if Plaintiff's rejected jury instruction did not "raise" the issue of whether Plaintiff is obligated to provide support to Defendants' property, the fact that Plaintiff submitted the jury instruction and that it was considered and rejected by the trial court demonstrates that the issue could have been raised in Case #1, which is sufficient for the application of claim preclusion to bar the present litigation.

16. Based on the rejected jury instruction in Case #1, of which the Court is permitted to and does take judicial notice, the Court concludes that the sole claim raised by Plaintiff in the present case, a request for judicial declaration that it does not owe a duty of support to

[6] *Weddell v. Sharp*, 131 Nev. Adv. Op. 28, 350 P.3d 80, 82-83 (2015).

Defendants' property, was or could have been raised in Case #1. Plaintiff is therefore barred under the doctrine of claim preclusion from litigating that claim in the present case.

17. Accordingly, the Court concludes there is no set of facts demonstrable by Plaintiff which could entitle to relief in the present case and dismissal under 12(b)(5) is appropriate.

18. The Court further concludes that the oral request from Plaintiff to amend its complaint to add a claim for quiet title is denied because such an amendment would be moot and the Court would still grant Defendants' Motion to Dismiss on the basis of claim preclusion.

ORDER

Having so found and concluded, the court does hereby ORDER, ADJUDGE AND DECREE AS FOLLOWS:

1. Pursuant to the provisions of NRCP 12(b)(5), Defendant's Motion to Dismiss is granted and the Complaint is hereby DISMISSED WITH PREJUDICE.

By the Court this 10th day of August, 2018,

District Court Judge

Submitted By:

BINGHAM SNOW & CALDWELL

Clifford Gravett, Nev. Bar No. 12586
Jedediah Bo Bingham, Nev. Bar No. 9511
840 Pinnacle Court, Suite 202
Mesquite, Nevada 89027

Approved as to form:

BOYACK ORME & ANTHONY

Edward D. Boyack, Nev. Bar No. 5229
Christopher B. Anthony, Nev. Bar No. 9748
7432 W. Sahara Ave., Ste. #101
Las Vegas, NV 89117