

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN ILIESCU, JR; AND SONNIA
ILIESCU, TRUSTEES OF THE JOHN
ILIESCU, JR. AND SONNIA ILIESCU
1992 FAMILY TRUST AGREEMENT,
DATED JANUARY 24, 1992,

Appellants,

vs.

THE REGIONAL TRANSPORTATION
COMMISSION OF WASHOE COUNTY, A
SPECIAL PURPOSE UNIT OF THE
GOVERNMENT,

Respondent.

Electronically Filed
May 19 2021 02:17 p.m.
Supreme Court No. 81753
Elizabeth A. Brown
Dist. Court Clerk of Supreme Court

APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE KATHLEEN DRAKULICH

APPELLANTS' OPENING BRIEF

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RULE 26.1 DISCLOSURE

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

Appellants Dr. John Iliescu, Jr. and Sonnia Iliescu are Trustees of The John Iliescu, Jr. and Sonnia Iliescu 1992 Family Trust Agreement, Dated January 24, 1992. They were represented in the district court by Michael J. Morrison and Brett Maupin. On appeal, appellants are represented by Donald A. Lattin, Carolyn K. Renner, and Michelle C. Mowry-Willems of Maupin, Cox & LeGoy.

Dated this 19th day of May, 2021.

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JURISDICTIONAL STATEMENT

The Court has jurisdiction over this appeal under NRAP 3A(b)(1), which allows an appeal to be taken from a “final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered.” The Orders entered by the Second Judicial District Court subject to this appeal are: (1) Order Granting in Part and Denying in Part Motion in Limine to Exclude Evidence Pursuant to NRS 50.275, 50.285 and 500.305, entered on May 14, 2020; and (2) Order Granting Motion for Summary Judgment, entered on August 3, 2020. The Notice of Entry of Order for the Order Granting Motion for Summary Judgment was filed on August 4, 2020. Appellants filed their Notice of Appeal on September 3, 2020, which was timely filed within the thirty (30) day time limit imposed by NRAP 4(a)(1).

ROUTING STATEMENT

The Nevada Supreme Court has the discretion to retain this appeal, as it has neither specifically retained jurisdiction under NRAP 17(a), nor assigned jurisdiction of this appeal to the Court of Appeals under NRAP 17(b).

ISSUES PRESENTED

1. Whether the court abused its discretion by granting in part and denying in part the Motion in Limine to Exclude Evidence Pursuant to NRS 50.275, 50.285, and 50.305 filed by the Regional Transportation

Commission of Washoe County (the “RTC”); and

2. Whether the court erred by granting the RTC’s Motion for Summary Judgment.
3. Whether the court abused its discretion by granting the Motion in Limine to Preclude Evidence or Argument Regarding Unasserted Claims.

I. STATEMENT OF THE CASE

a. Nature of the Case

This case commenced as a condemnation action brought by Respondents, the RTC. Specifically, the RTC filed a Verified Complaint in Eminent Domain seeking one (1) permanent easement and one (1) temporary construction easement located upon Washoe County Assessor Parcel Number (“APN”) 014-063-11, commonly known as 961 S. Virginia Street, Reno, Nevada; and one (1) temporary construction easement located upon APN 014-063-07, commonly known as 999 S. Virginia Street, Reno, Nevada. [JA001-JA043]. The John Iliescu, Jr. and Sonnia Iliescu 1922 Family Trust dated January 24, 1992 (the “Trust”) owns the property subject to the condemnation action. John Iliescu, Jr. and Sonnia Iliescu, as trustees of the Trust, are the named defendants in the action. *See id.* The Appellants are referred to collectively herein as “Iliescu”.

The NOTICE attached as Exhibit 3 to the Complaint identified the taking as:

APN 014-063-07: Temporary Construction Easement –

309 square feet;

APN 014-063-11: Permanent Easement – 2 square feet;

and Temporary Construction Easement – 698 square feet.

See id.

Iliescu filed an answer on its own behalf, as at the time the answer was filed in this case, Iliescu was acting *in pro per*. [JA044-JA049].

There is no dispute that the district court found that the use for which the property is being condemned is a public use authorized by law and that the RTC's taking of that property is necessary to that public use. It is also undisputed that the only remaining issue in this case is the amount of just compensation due to Iliescu as a result of the RTC's taking of the property.

b. Course of the proceedings and disposition below.

On February 11, 2020, the RTC filed its *Motion in Limine to Exclude Evidence Pursuant to NRS 50.275, 50.285 and 50.305* (hereinafter the "Feb. 11 MIL"). [JA089-JA093].

On February 25, 2020, Iliescu filed an *Opposition to Motion in Limine to Exclude Evidence Pursuant to NRS 50.275, 50.285 and 50.305; Motion for Extension of Time to Disclose Expert*. [JA094-JA099]. On March 2, 2020, second *Opposition to Motion in Limine to Exclude Evidence Pursuant to NRS 50.275, 50.285 and 50.305; Motion for Extension of Time to Disclose Expert* (hereinafter the "Opp'n to Feb. 11 MIL"). [JA100-JA104]. The only difference between the two oppositions is that the first opposition requested a 21- day extension and the second opposition requested a 45-day extension.

On March 16, 2020, the RTC filed its *Reply in Support of Motion in Limine*

to Exclude Evidence Pursuant to NRS 50.275, 50.285, and 50.305 (hereinafter “Reply to Feb. 11 MIL”). [JA105-JA111].

Thereafter, on March 27, 2020, the RTC filed a *Supplemental Reply in Support of Motion in Limine to Exclude Evidence Pursuant to NRS 50.275, 50.285, and 50.305* (hereinafter “Supp. Reply to Feb. 11 MIL”). [JA112-JA114].

On May 14, 2020, the district court filed its *Order Granting in Part and Denying in Part Motion in Limine to Exclude Evidence Pursuant to NRS 50.275, 50.285 and 50.305* [JA135-JA142]. This Order is one subject of this appeal.

On March 31, 2020, while the Feb. 11 MIL was pending, the RTC filed its *Motion for Summary Judgment* [JA115-JA125] (hereinafter “MSJ”) and *Declaration of Scott Q. Griffin in Support of Motion for Summary Judgment* [JA126-JA135].

In response, Iliescu filed *Defendants’ Opposition to Plaintiff’s Motion for Summary Judgment* (hereinafter referred to as “Opp’n to MSJ”). [JA148-JA374].

The RTC filed its *Reply in Support of Motion for Summary Judgment* (hereinafter “Reply to MSJ”) on May 28, 2020. [JA383-JA388].

On August 3, 2020, the district court issued its *Order Granting Motion for Summary Judgment*. [JA453-JA462]. This Order is one subject of this appeal.

On June 4, 2020, after the district court had already entered its Order on Feb 11 MIL, the RTC filed its *Motion in Limine to Preclude Evidence or Argument*

Regarding Unasserted Claims (hereinafter “MIL on Unasserted Claims”). [JA394-JA403]. No opposition was filed and the district court entered its Order Granting Plaintiff’s *Motion in Limine to Preclude Evidence or Argument Regarding Unasserted Claims* on June 26, 2020. [JA450-JA452]. This Order is one subject of this appeal.

II. STATEMENT OF RELEVANT FACTS

As set forth above, this case commenced as a condemnation action brought by the RTC for acquisition of property owned by Iliescu. There is no dispute that the district court found that the use for which the property is being condemned is a public use authorized by law and that RTC’s taking of that property is necessary to that public use. It is also undisputed that the only remaining issue in this case is the amount of just compensation due to Iliescu as a result of RTC’s taking of the property identified in its complaint.

a. The district court’s decision on the *Motion in Limine to Exclude Evidence Pursuant to NRS 50.275, 50.285 and 50.305*

On February 11, 2020, the RTC filed the Feb. 11 MIL. [JA089-JA093]. The basis for the RTC’s Feb. 11 MIL was that Iliescu had failed to disclose an initial expert witness by the deadline set in the Joint Case Conference Report [JA068-JA082] and the corresponding Scheduling Order [JA083-JA088]. [JA089-JA093 at 2:19-23].

On March 2, 2020, Iliescu filed the Opp’n to Feb. 11 MIL. [JA100-JA104].

In the Opp’n to Feb. 11 MIL, Iliescu argued that the failure to timely disclose the expert witness was due to a calendaring error resulting from an unexpected and unforeseen medical event suffered by counsel for Iliescu for which he underwent “acute and ongoing treatment.” [JA100-JA104 at 2:11-14]. Specifically, counsel for Iliescu “suffered significant neurological and spinal injuries in an accidental fall, for which extensive acute and ongoing care, testing, treatment and rehabilitation were and have been required, and are continuing.” [JA100-JA104 at 3:22 – 4:6]. The Opp’n to Feb. 11 MIL concluded that the scheduling error resulted from “excusable neglect due to an unforeseen medical event and, therefore, constitutes good cause to grant Iliescu an extension of time in which to disclose their expert witness.” [JA100-JA104 at 4:4-7]. The Opp’n to the Feb. 11 MIL requested an extension of time for 45 days within which to disclose the expert witness. [JA100-JA104 at 4:26-27 – 5:1]. Notably, the request for an extension does not designate from which date the extension of 45 days was requested, i.e., 45 days from the date of the filing of the Opp’n to Feb. 11 MIL; 45 days from the future date of the district court’s order on the Feb. 11 MIL; or 45 days from some other unspecified event.
See id.

On March 16, 2020, the RTC filed its Reply to Feb. 11 MIL. [JA105-JA111]. The Reply to Feb. 11 MIL consisted of general arguments that counsel for Iliescu never mentioned any medical problems during the course of the case, that counsel

for Iliescu did not provide any detail about the calendaring failure, and that if the Feb. 11 MIL is denied, then the RTC is entitled to an award of fees and costs incurred as a result of the failure to timely disclose an expert witness. [JA105-JA111 at 2:1-25].

Thereafter, on March 27, 2020, the RTC filed a Supp. Reply to Feb. 11 MIL. [JA112-JA114]. In its Supp. Reply to Feb. 11 MIL, the RTC incorrectly asserts that Iliescu requested “an extension of 45 days from the prior deadline of February 7, 2020, or **March 23, 2020.**” [JA112-JA114 at 2:5-6]. (emphasis in original). The RTC then asserts the date has passed and Iliescu did not serve a disclosure of expert witnesses. *Id.* As noted previously, however, Iliescu requested an extension of 45 days from some unspecified event. There was no request for an “extension of 45 days from the prior deadline of February 7, 2020.” This misrepresentation to the district court, however, played a significant role in the reasoning of the district court’s subsequent order which resulted in a preclusion of Iliescu’s ability to disclose an expert witness, and thus eliminated his ability to prove just compensation resulting from the condemnation of his property, which is the property owner’s burden.

The district court did not issue an order on the Feb. 11 MIL until May 14, 2020. In its *Order Granting in Part and Denying in Part Motion in Limine to Exclude Evidence Pursuant to NRS 50.275, 50.285 and 50.305*. [JA136-JA142].

(hereinafter the “Order”), the district court found that counsel for Iliescu’s “injuries and care are a sufficient basis for this Court to find that the scheduling error was a result of excusable neglect.” [JA136-JA142 at 5:5-7].

The district court, however, goes on to find incorrectly that Iliescu failed to “disclose an expert witness within the forty-five day extension that they proposed in the Opposition.” [JA136-JA142 at 5:9-12]. (emphasis added). As stated previously, however, the Iliescus requested a forty-five (45) day extension from some unspecified event. The district court found that this failure to disclose was a “continued and prolonged delay” and could not find that such a delay was the result of excusable neglect. [JA136-JA142 at 5:12-15]. Indeed, the district court assumes that at the time the Order was filed on May 14, 2020, that Iliescu had “nonetheless failed to disclose said expert.” [JA136-JA142 at 5:12-13]. In fact, Iliescu had served their expert report on April 8, 2020.

The error in the district court’s reasoning is compounded by its further finding as follows:

Even if this Court were to construe Defendants’ Opposition as a Motion for Extension of Time, *it specifically requested a forty-five day extension.* This Court *has reviewed the docket* in this case and notes Defendants have not filed anything in this case since March 2, 2020. Based upon the Supplement, *Defendants failed to disclose their expert within that forty-five day extension.* As such, *the request to extend the expert disclosure deadline is denied* as moot.

[JA136-JA142 at 5:16-20]. (emphasis added).

The district court expressly states that it is relying on the incorrect information provided by the RTC in its “Supplement” to conclude that Iliescu failed to disclose their expert within the timeframe requested in the Opp’n to Feb. 11 MIL. As noted above, Iliescu did not request a 45-day extension from the original deadline as asserted in the RTC’s Supp. Reply to Feb. 11 MIL. Yet, the district court used that deadline as the basis to deny the request for an extension of the expert disclosure deadline, even though it had already found a sufficient basis to conclude that the missed deadline was the result of excusable neglect. The result of the district court’s order was the equivalent of a default judgment, as it was Iliescu’s burden to prove just compensation.

Further, the district court’s statement that it had “reviewed the docket” and Iliescu had “not filed anything in this case since March 2, 2020” appears to indicate that the district court was under the mistaken belief that the Rules require that discovery disclosures be filed. That is not the case. Rule 16.1 of the Nevada Rules of Civil Procedure requires only that the expert disclosures be *served* on all parties. *See* NRCP 16.1(a)(2)(A). Iliescu would not have filed his expert disclosures.

Notably, at the time the district court issued this order on May 14, 2020, Iliescu had already served their expert witness disclosure on the RTC. [JA375-JA382]. Iliescu served their expert disclosures on the RTC on **April 8, 2020**, or 42

days following the filing of their first Opp'n to Feb. 11 MIL on February 25, 2020, and well before the district court issued its Order on Feb. 11 MIL.

The district court's reliance on the misrepresented deadline by the RTC in its Supp. Reply to Feb. 11 MIL resulted in faulty and erroneous reasoning and the denial of Iliescu's ability to present an initial expert witness in this case. The resulting order of the district court limited Iliescu to a rebuttal expert only and precluded their ability to prove just compensation, which is their burden and which cannot properly be proven in rebuttal. Unfortunately, the Order on the Feb. 11 MIL also formed the basis upon which the district court granted RTC's Motion for Summary Judgment.

b. The district court's decision on the RTC's *Motion for Summary Judgment*.

On March 31, 2020, while the Feb. 11 MIL was pending, the RTC filed its *Motion for Summary Judgment*. [JA115-JA125]. The MSJ consisted of one page of argument essentially identical to the argument made in the Feb. 11 MIL. *See id.* That is, that the burden was on Iliescu to prove damages, the RTC timely disclosed its expert, and Iliescu failed to timely disclose an expert. *See id.* The MSJ concluded that without an expert, Iliescu would be unable to prove its damages resulting from the taking of the property.

In response, Iliescu filed *Defendants' Opposition to Plaintiff's Motion for Summary Judgment*. [JA148-JA374]. In the Opp'n to MSJ, Iliescu argued that an expert witness had been disclosed and would be used to contest Plaintiff's valuation

of the damage award. [JA148-JA374 at 6:26 – 7:10].

The RTC filed its Reply to MSJ on May 28, 2020. [JA382-JA388]. In it, the RTC argues that the expert report offered does not constitute a rebuttal report and that the disclosure is untimely under NRCP 16.1(a)(2)(E)(ii). The RTC argues that the Iliescu expert report should have been disclosed as an expert report, rather than a rebuttal report. However, as set forth above, the district court abused its discretion when it precluded Iliescu from disclosing an expert report after a finding that the late disclosure was due to excusable neglect. The Order on the Feb. 11 MIL improperly precluded Iliescu from disclosing an expert report based on misrepresented information supplied by the RTC and imposed harsh discovery sanctions that essentially amounted to a default judgment.

On August 3, 2020, the district court issued its *Order Granting Motion for Summary Judgment*. [JA453-JA462]. In its Order on MSJ, the district court relied on its faulty analysis of the timing deadlines set forth in its Order on the Feb. 11 MIL. [JA453-JA462 at 2:8-20]. Thus, the abuse of discretion of the district court in its Order on the Feb. 11 MIL also improperly impacted its decision on the RTC's MSJ.

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c. The district court's decision on the RTC's *Motion in Limine to Preclude Evidence or Argument Regarding Unasserted Claims*.

In the Order on MSJ, the district court addressed the issue of inverse condemnation, noting that the counterclaim was not made and the time for doing so had passed. [JA453-JA462 at 8:10-14]. Notably, at the time the answer was filed in this matter, Iliescu appeared in *pro per*. The deadline for amending the pleadings was the same as the deadline for disclosing initial expert reports, and arguably the same excusable neglect occurred with counsel for Iliescu having significant medical issues at the time. While Iliescu acknowledges that the *Motion in Limine to Preclude Evidence or Argument Regarding Unasserted Claims* was not opposed, it is important to note that this Motion in Limine was not filed until June 4, 2020, well after the Order on Feb. 11 MIL was filed. It would have been futile to oppose this motion as at this time Iliescu was already precluded from disclosing an initial expert witness, which was fatal to his case.

d. Additional Motions in Limine addressed in the Order on MSJ.

i. Motion in Limine to Preclude Defendants from Calling Witnesses and Presenting Documentary Evidence

The Order on MSJ also made reference to the RTC's *Motion in Limine to Preclude Defendants from Calling Witnesses and Presenting Documentary Evidence* [JA143-JA147] (hereinafter the "MIL to Preclude") filed on May 15, 2020. [JA453-JA462 at 2:21 – 3:6]. The MIL to Preclude argued that because Iliescu did

not make initial disclosures under NRCP 16.1(a)(1), then they should be precluded from calling any witnesses and presenting any documentary evidence, save and except for the rebuttal expert. [JA143-JA147 at 3:1-3]. Thus, the RTC recognized and acknowledged that initial disclosures required under NRCP 16.1 (a)(1) do not impact, affect, or limit disclosure of expert witnesses pursuant to NRCP 16.1(a)(2), which is a separate disclosure.

Iliescu did not file an opposition to this MIL to Preclude; however, the granting of the MIL to Preclude would not have affected Iliescu's ability to present expert witness testimony, had the district court not already abused its discretion in prohibiting Iliescu from using initial expert testimony.

The district court, however, in its Order on MSJ seemed to interpret NRCP 16.1(a)(1) as applying to all witnesses, including expert witnesses. The disclosures are separate, the Rules for initial disclosures and expert disclosures are separate and Iliescu's failure to provide initial disclosures does not preclude him from calling an expert witness. Any reliance on this Rule to preclude use of an expert witness is misplaced. [JA453-JA462 at 8:15-24].

ii. *Motion in Limine to Preclude Defendants from Presenting a Rebuttal Expert Witness*

Finally, the Order on MSJ addresses the RTC's *Motion in Limine to Preclude Defendants from Presenting a Rebuttal Expert Witness*, which the RTC filed on June 1, 2020. [JA389-JA393]. The arguments in this Motion are redundant and again

focus on the failure of Iliescu to timely file an expert disclosure. The RTC again argues that the expert report filed by Iliescu cannot be construed as a rebuttal expert report, but that it is an initial expert report and Iliescu is precluded from filing an initial expert report based on the district court's Order on the Feb. 11 MIL. The opposition and reply to this Motion are included in the Joint Appendix as JA407-JA449. In its ruling on RTC's MSJ, the district court declined to rule on this motion, declaring it moot.

III. SUMMARY OF ARGUMENT

The district court abused its discretion by precluding Iliescu from disclosing an initial expert witness. Multiple errors contributed to this abuse of discretion. First, the district court improperly considered the Supp. Reply to Feb. 11 MIL, which is not a permissible filing pursuant to WDCR 12. RTC never sought leave to file a supplemental reply, so it amounted to a rogue filing which should have been disregarded by the district court. Second, the district court relied on the misrepresentation contained in the Supp. Reply to Feb. 11 MIL that Iliescu requested a forty-five day extension from the original deadline for expert disclosures. These errors led the district court to impose the unnecessarily punitive sanction of prohibiting Iliescu from disclosing an expert on an issue for which it bore the burden of proof. The Order on Feb. 11 MIL essentially amounted to a default judgment. It was an abuse of discretion to have imposed such a sanction after a finding of

excusable neglect.

Despite finding that the missed disclosure deadline was due to excusable neglect, the district court found that it was unreasonable for Iliescu to have failed to disclose an expert within a forty-five day extension. However, Iliescu disclosed his expert within 42 days of filing his first opposition on February 25, 2020. The district court acknowledges that Iliescu requested a “twenty-one day extension of time in which to disclose their expert.” [JA136-JA142 at 4:14-15]. The district court also seemed to be unaware that expert disclosures are not required to be filed with the court under NRCP 16.1. The basis for the district court’s decision on this issue was a misrepresentation of facts presented by the RTC in its Supplement to Reply. The district court’s reliance on the misrepresented facts constituted an abuse of discretion.

The aforementioned errors resulted in the imposition of an unnecessarily harsh sanction. The district court’s decision in the Order on the Feb. 11 MIL acted as a de facto default judgment against Iliescu, as the property owner has the burden of proving just compensation in condemnation proceedings. The district court apparently failed to realize the impact of its Order on the Feb. 11 MIL because it extended the deadline to disclose rebuttal expert testimony. However, because the property owner bears the burden of proving just compensation, this extension was futile. The district court acknowledged the futility of its relief in the Order on

Summary Judgment, reasoning that an issue on which a party bears the burden of proof cannot be established in rebuttal. Further, the late disclosure of an initial expert formed the basis of the district court's decision on summary judgment. The district court erred and its decisions should be reversed.

IV. ARGUMENT

a. The district court abused its discretion by precluding Iliescu from disclosing an expert witness.

A district court's ruling on a motion in limine is reviewed for an abuse of discretion. *Whisler v. State*, 121 Nev. 401, 406, 116 P.3d 59, 62 (2005). "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Bayerische Motoren Werke Aktiengesellschaft v. Roth*, 127 Nev. 122, 133, 252 P.3d 649, 657 (2011)(citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S. Ct. 2447, 2461, 110 L. Ed. 2d 359 (1990)). *See also Leavitt v. Sims*, 130 Nev. 503, 509 330 P.3d 1, 5 (2014) ("An abuse of discretion occurs when no reasonable judge could reach a similar conclusion under the same circumstances.").

Here, after the district court found that the scheduling error and resulting missed deadline for Iliescu's disclosure of an initial expert witness was a result of excusable neglect; however, it relied on erroneous information provided by the RTC to refuse to allow Iliescu to disclose an initial expert, despite its finding of excusable neglect. The district court engaged in a clearly erroneous assessment of the

evidence. As such, it necessarily abused its discretion.

In the Order on Feb. 11 MIL entered on May 14, 2020, the district court relied on clearly erroneous information and refused to allow Iliescu to designate an expert on the issue of just compensation, an issue on which Iliescu bore the burden of proof. The Court's extension of the rebuttal expert deadline demonstrates its failure to recognize the significance of its refusal to allow Iliescu to designate an initial expert. This resulted in extreme prejudice to Iliescu because of Nevada's requirement that the owner of the property demonstrate just compensation. *See State ex rel Dep't of Highways v. Pinson*, 66 Nev. 227, 236-37, 207 P.2d 1105, 1109-10 (1949). In fact, the lack of an expert witness to establish just compensation was the central justification in RTC's MSJ filed on March 31, 2020. The district court entered the Order on MSJ on August 3, 2020, reasoning that "Defendants bear the burden to prove the value of the land taken and any severance damages . . . Defendants are unable to satisfy this burden relying upon a rebuttal report." [JA453-JA462 at 7:20-22].

Because the Order on Feb. 11 MIL and the Order on MSJ are premised upon a missed discovery deadline, which was found to be due to excusable neglect, the district court abused its discretion by refusing to grant the extension to designate an initial expert. The district court essentially entered a default judgment against Iliescu, preventing it from establishing just compensation. *Cf. Clark Cty. Sch. Dist.*

v. Richardson Constr., Inc., 123 Nev. 382, 392, 168 P.3d 87, 94 (2007) (finding abuse of discretion where district court refused to permit evidence related to defendant's affirmative defenses, explaining discovery sanction was "akin to a dismissal with prejudice."). Such a sanction was extreme, given the relative simplicity of the case and the opportunity to continue the trial to accommodate Iliescu's expert witness. Such a sanction also runs afoul of the purpose of discovery rules which is to "prevent trial by ambush or unfair surprise." *Sanders v. Sears-Page*, 131 Nev. 500, 517, 354 P.3d 201, 212 (Nev. Ct. App. 2015). The Court's decision also contradicts the well-established policy in Nevada of resolving cases on the merits. *See Stoecklein v. Johnson Elec., Inc.*, 109 Nev. 268, 271, 849 P.2d 305, 307 (1993). The principal reason this matter was not resolved on the merits was the district court's refusal to allow Iliescu to disclose an initial expert.

Indeed, every motion filed by RTC following the Order on Feb. 11 MIL was premised upon Iliescu's failure to timely disclose an initial expert. The Order on Feb. 11 MIL was the poisonous tree, and its fruit tainted all of the subsequent decisions of the district court.

Further, in its Order on Feb 11 MIL, the district court states, *sua sponte* without any evidence, that "[t]o allow defendants to untimely disclose an initial expert witness after [RTC's] expert has already produced his initial report would result in substantial prejudice to [RTC]." [JA136-JA142 at 5:21-23]. There could

not have been any prejudice to RTC.

First, the Order on Feb. 11 MIL was filed on May 14, 2020. At that time, the COVID-19 pandemic wreaked havoc on the courts and delayed all of the trials in the Second Judicial District Court. Indeed, the Second Judicial District Court did not resume civil jury trials until last month, April 2021. At the time the district court issued the Order on Feb. 11 MIL, the district court was closed to all in-person proceedings, and jury trials were not being held by alternate means such as Zoom or Blue Jeans. There would be no rush to trial on this case.

Additionally, the RTC would not have been prejudiced by allowing Iliescu to disclose an initial expert witness because they had already retained an expert witness who would be able to review and rebut any disclosed expert. The RTC was set to handle any such disclosure.

Finally, the RTC never even argued that the delay in producing an initial expert witness would be prejudicial to their case. The district court raised this issue *sua sponte* in its Order without any evidence or analysis. There was no prejudice; indeed the failure of Iliescu to timely disclose an expert witness was harmless and due to excusable neglect.

The prejudice to Iliescu, by contrast, was extreme. It was Iliescu's burden to prove just compensation. The district court found just cause to extend the initial expert disclosure deadline as a result of counsel for Iliescu's excusable neglect in

missing the deadline due to medical issues. The district court then relied on RTC's misrepresentation in its Supp. Reply to Feb. 11 MIL in which it erroneously reported to the district court that Iliescu had missed the self-imposed deadline. The district court's denial of Iliescu's ability to disclose an initial expert resulted in the equivalent of a default judgment, and no reasonable judge would have imposed a similar sanction. *See Leavitt*, 130 Nev. at 509, 330 P.3d at 5. That is an extreme and unwarranted sanction, given the district court's finding of excusable neglect, which constitutes an abuse of the district court's discretion. *Cf. Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 787 P.2d 777 (1990)("[F]undamental notions of due process require that the discovery sanctions for discovery abuses be just . . .").

Based on the above, the district court's Order on Feb. 11 MIL which denied Iliescu the ability to disclose an initial expert should be reversed.

b. The district court erred in granting summary judgment

The Nevada Supreme Court reviews an order granting summary judgment *de novo*. *Wood v. Safeway, Inc.*, 121 Nev. 714, 729, 121 P.3d 1026, 1029 (2005). In evaluating the propriety of a summary judgment, the evidence is reviewed in the light most favorable to the party against whom judgment was rendered. *Epperson v. Roloff*, 102 Nev. 206, 208, 719 P.2d 799, 801 (1986) (citing *Servaites v. Lowden*, 99 Nev. 240, 660 P.2d 1008 (1983)).

As set forth above, the district court based its decision in the Order on Feb. 11

MIL on a clearly erroneous assessment of the evidence. As such, it was an abuse of discretion to preclude Iliescu from disclosing an initial expert witness. The Order on Feb. 11 MIL also imposed the unnecessarily punitive sanction of prohibiting Iliescu from disclosing an initial expert, which essentially amounted to a default judgment. The Order on Feb. 11 MIL formed the basis on which the district court granted summary judgment in favor of RTC. Accordingly, the Order on MSJ should likewise be reversed.

In the Order on Feb. 11 MIL, the district court found that Iliescu's failure to disclose an initial expert within the timeframe outlined by the JCCR and Scheduling Order was due to excusable neglect. However, the district court refused to extend the deadline, finding that Iliescu had missed the self-imposed extended deadline which was erroneous. The district court refused to extend the deadline for initial experts, but extended the deadline to disclose a rebuttal expert. This amounted to an empty remedy, as Iliescu bore the burden of demonstrating just compensation. The district court acknowledged Iliescu's inability to establish just compensation in rebuttal in the Order on MSJ and granted summary judgment in RTC's favor.

The Order on Feb. 11 MIL and the Order on MSJ are premised upon a missed discovery deadline, and the district court abused its discretion by refusing to grant the extension to designate an initial expert. The district court essentially entered a default judgment, contradicting the well-established policy of resolving cases on the

merits. Such a sanction was extreme, given the relative simplicity of the case and the opportunity to continue the trial to accommodate Iliescu's expert witness.

Based on the analysis above, reversal of the district court's Order on MSJ is warranted.

c. Iliescu should be allowed to assert the inverse condemnation claim.

In the Order on MSJ, the district court addressed the issue of inverse condemnation, noting that the counterclaim was not made and the time for doing so had passed. [JA453-JA462 at 8:10-14]. Notably, at the time the answer was filed in this matter, Iliescu appeared *pro per*. The deadline for amending the pleadings was the same as the deadline for disclosing initial expert reports, and arguably the same excusable neglect occurred with counsel for Iliescu having significant medical issues at the time. While Iliescu acknowledges that the *Motion in Limine to Preclude Evidence or Argument Regarding Unasserted Claims* was not opposed, it is important to note that this Motion in Limine was not filed until June 4, 2020, well after the Order on Feb. 11 MIL was filed. It would have been futile to oppose this motion as at this time Iliescu was already precluded from disclosing an initial expert witness, which was fatal to his case.

V. CONCLUSION

For the reasons set forth above, the district court's decision to preclude the disclosure of its initial expert witness was an abuse of discretion and should be

reversed; the district court's decision granting summary judgment was made in error and should be reversed; and Iliescu should be allowed to assert the inverse condemnation claim.

Iliescu respectfully requests that this Court enter its order of reversal and remand the matter to the district court for further proceedings.

Dated this 19th day of May, 2021.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that I have read this **APPELLANTS' OPENING BRIEF**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

2. I also certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14-point font and contains 5,187 words.

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3. Finally, I certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every section of the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied is to be found.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of MAUPIN, COX & LeGOY, Attorneys at Law, and in such capacity and on the date indicated below I served the foregoing document(s) as follows:

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