

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.

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

THE HONORABLE KATHLEEN DRAKULICH

APPELLANTS' REPLY BRIEF

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I. ARGUMENT

- a. **The district court abused its discretion by entering the Order Granting Plaintiff's Motion in Limine to Preclude Evidence or Argument Regarding Unasserted Claims ("Order on Unasserted Claims").**

Iliescu concedes it did not assert an inverse condemnation claim and did not seek leave of the district court to do so. Iliescu would note the deadline to amend the pleadings was the same as the deadline to disclose an initial expert: February 7, 2020. Mr. Morrison's health issues were ongoing for this deadline as well. The district court abused its discretion entering the Order on Unasserted Claims because it improperly limited the evidence it could consider in the context of an eminent domain action.

The Nevada Constitution defines just compensation as follows: "[T]hat sum of money, necessary to place the property owner back in the same position, monetarily, without any governmental offsets, as if the property had never been taken. Just compensation shall include, but is not limited to, compounded interest and all reasonable costs and expenses actually incurred." NEV. CONST. art. I § 22 cl. 4. The Nevada Constitution goes on to say the following: "In all eminent domain actions where fair market value is applied, it shall be defined as the highest price the property would bring on the open market." NEV. CONST. art. I § 22 cl. 5. "In determining what constitutes just compensation for the taking for public use of

private property, *every factor* which affects the value of the property and which would influence a prudent purchaser should be considered” *Clark Cty. v. Alper*, 100 Nev. 382, 386-87, 685 P.2d 943, 946 (1984) (emphasis added).

Pursuant to the Nevada Constitution, the district court should have considered the absence of the driveway as part of the fair market value of the property. Mr. Wren would have opined that the absence of the driveway substantially reduced the value of the property because of exclusive access via the alley. [JA 171-172]. The district court should have, but ultimately did not, consider this factor during the pendency of the below proceedings. By sharply curtailing the evidence Iliescu was permitted to present, the district court abused its discretion in a manner which caused a constitutional violation.

The *Alper* Court’s analysis is instructive. While *Alper* dealt with a zoning ordinance and its impact on the property, and the *Alper* Court explicitly authorized consideration of “those zoning ordinances that would be taken into account by a prudent and willing buyer.” *Id.* at 390, 685 P.2d at 948. Just as a zoning ordinance impacts permissible uses of a property and would influence a prudent purchaser, so too does the absence of a driveway and limited access to the property. The district court should have considered Mr. Wren’s opinion that the absence of a driveway entitled Iliescu to additional compensation pursuant to *Alper*. A property owner has a constitutional right to *just* compensation, not merely *some* compensation. By

entering the Order on Unasserted Claims, the district court foreclosed the consideration of all factors relating to just compensation and consequently abused its discretion.

b. The district court abused its discretion entering the Order Granting in Part and Denying in Part Motion in Limine to Exclude Evidence Pursuant to NRS 50.275, 50.285 and 50.305 (“Order on Experts”).

Iliescu concedes it failed to raise the issue of RTC’s misrepresentation of its requested extension before the district court; however, Iliescu has not waived the consideration of this issue because of its constitutional dimensions. While this Court generally refuses to consider arguments raised for the first time on appeal, it is permissible to consider a constitutional argument raised for the first time on appeal. *See Desert Chrysler-Plymouth, Inc. v. Chrysler Corp.*, 95 Nev. 640, 643-44, 600 P.2d 1189, 1191 (1979). At first blush, the expert disclosure deadline and the requested extension may seem like a mere procedural issue; however, the district court’s abuse of its discretion has constitutional ramifications because of the constitutional nature of takings claims and the fact the property owner bears the burden of proving just compensation.

The premise of this case is a constitutional issue: the taking of private property. It is firmly enshrined in both the Nevada Constitution and United States Constitution that the taking of private property may not be effectuated without just compensation. NEV. CONST. art. I, § 8 cl. 3; U.S. CONST. amend. V. Additionally,

the property owner bears the burden of proving just compensation. *See generally State v. Pinson*, 66 Nev. 227, 236-37, 207 P.2d 1105, 1109-10 (1949). In Iliescu’s case, strict enforcement of a discovery deadline and the misrepresentation of the requested extension created a constitutional deprivation, giving this Court the ability to consider the misrepresentation of the extension during this appeal.

The initial expert disclosure deadline in this matter was February 7, 2020. On February 11, 2020, RTC filed the *Motion in Limine to Exclude Evidence Pursuant to NRS 50.275, 50.285 and 50.305* (“Feb. 11 MIL”). [JA089-JA093]. Iliescu filed its first *Opposition to Motion in Limine to Exclude Evidence Pursuant to NRS 50.275, 50.285, and 50.305*, requesting a twenty-one day extension. [JA094-JA099]. Iliescu filed the *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* (“Opp’n to Feb. 11 MIL”), requesting a forty-five day extension. [JA100-JA104].

RTC contends that the only reasonable argument regarding the requested extension for expert disclosures is that the forty-five extension ran from February 7, 2020. While Iliescu acknowledges that its request was not a paragon of clarity, RTC is incorrect that the only reasonable interpretation is that the deadline began to run from the initial deadline of February 7, 2020. Nowhere in the Opp’n to Feb. 11 MIL does Iliescu state the date from which the forty-five day period should run. It is

reasonable that the forty-five day period ran from the filing of the first opposition on February 25, 2020, especially since the disclosure was made on April 8, 2020, forty-two days after the first opposition was filed. It is nonsensical to argue that Iliescu would have requested a twenty-one day extension only three days before that extension was going to expire. It is more reasonable to conclude that the request for extension began to run on the date Iliescu first requested it, not before.

The district court's finding of excusable neglect followed by its refusal to grant the extension is problematic when the constitutional nature of a takings claim is considered. RTC conveniently glosses over the constitutional nature of this case and instead chooses to emphasize the procedural issues. However, a procedural error should not be permitted to effectuate a constitutional deprivation. While procedural rules certainly serve an important purpose of efficiently administering justice, strict application of the rules should yield where constitutional deprivations are at stake. Because of the constitutional issues implicated by the missed expert disclosure deadline, the Court can properly consider RTC's misrepresentation of the requested extension, even though Iliescu did not raise the issue below, and find that the district court abused its discretion in entering the Order on Experts.

c. The district court erred by entering the *Order Granting Summary Judgment* (“Order on MSJ”).

The district court erred by entering the Order on MSJ because it was premised mainly on the absence of an expert to establish just compensation. The district

court's finding of excusable neglect for the belated disclosure of an initial expert and the ultimate entry of summary judgment are inconsistent. Additionally, the Order on MSJ imposed an unnecessarily harsh sanction, especially given the constitutional nature of this claim and the burden Iliescu bore in proving just compensation. The Order on MSJ essentially operated as a default judgment, an especially harsh sanction for a missed discovery deadline which the district court had already found was due to excusable neglect. [JA140 at 5:5-6].

RTC does not contest that one of the central underpinnings of the Order On MSJ was Iliescu's failure to timely disclose an expert. As the district court stated, "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 expert." [JA459 at 7:20-22]. As RTC and Iliescu jointly acknowledge, the failure to timely disclose an initial expert on just compensation was fatal to Iliescu's burden of proof and production on that issue. Without an initial expert, Iliescu was unable to carry its burden of proof and establish just compensation. Despite the previous finding of excusable neglect relating to a constitutional claim, the district court entered summary judgment for RTC. Iliescu was denied the opportunity to present evidence of just compensation, an error of constitutional magnitude.

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II. CONCLUSION

For the reasons set forth above and in Appellants' Opening Brief, the district court's decisions precluding Ilescu from disclosing an initial expert, precluding evidence regarding access to the property and the district court's ultimate entry of summary judgment were made in error and should be reversed. Ilescu respectfully requests that this Court enter its order of reversal and remand the matter to the district court for further proceedings.

Dated this 29th day of July, 2021.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that I have read this **APPELLANTS' REPLY 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 1,526 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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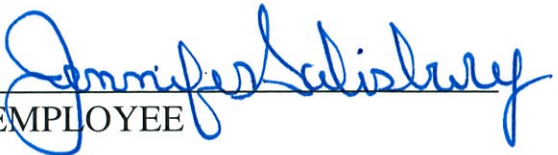
CERTIFICATE OF SERVICE

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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Dated this 29th day of July, 2021.


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