IN THE SUPREME COURT OF THE STATE OF NEVADA

JEROME MORETTO, TRUSTEE OF THE JEROME F. MORETTO 2006 TRUST,

Appellant,

vs.

ELK POINT COUNTRY CLUB HOMEOWNERS ASSOCIATION, INC,

Respondent.
_____/

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Supreme Court Case Number 82565

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APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Rules

Other

ARGUMENT

This case arises out of EPCC's unilateral enactment of what it referred to as "Architectural and Design Control Standards and Guidelines" ("ADCSG"), which amount to new restrictive covenants on the use and enjoyment of the individually owned properties in the Elk Point subdivision.

In the Opening Brief, Moretto explained that EPCC's unilateral enactment of the ADCSG conflicts with fundamental principles of real property ownership. Those applicable principles are embodied in the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) (hereafter the "Restatement"). Although Moretto repeatedly cited and quoted those principles in briefing to the district court, both EPCC and the district court simply ignored them.

In Respondent's Answering Brief ("RAB"), EPCC never actually gets around to tackling the fundamental question presented in this appeal: whether a common interest community in Nevada, with no recorded CC&Rs and with only a generally worded rulemaking power contained in its bylaws, has the ability to impose restrictive covenants on the individually owned properties within the community.

The answer to that question throughout the United States is a resounding "no." As explained in the Opening Brief, Moretto has found no case from any jurisdiction in which, when given the opportunity, a court has declined to adopt and apply the Restatement sections at issue here. There is simply no reason they should not be

adopted. The applicable Restatement provisions protect "the traditional expectations of property owners that they are free to use their property for uses that are not prohibited and do not unreasonably interfere with the neighbors' use and enjoyment of their property." RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 6.7 cmt. b (2000).

Instead of tackling the actual issue presented in this appeal, EPCC sets forth three arguments that either miss the point entirely or are without merit. First, EPCC argues, unpersuasively, that the District Court did not "ignore" the applicable Restatement sections because the district judge told the parties at a hearing that he had read all the briefing. This obviously misses the point. Whether the district judge actually read Moretto's summary judgment briefing, in which the applicable Restatement provisions were repeatedly cited and quoted, is not the issue. The issue is that, despite those repeated cites to the Restatement, the district court never once addressed or analyzed them, which resulted in its erroneous failure to apply them.

EPCC next argues that the district court's summary judgment order was correct because EPCC's bylaws do not "explicitly prohibit" the Board from unilaterally enacting new restrictive covenants that apply to the individually owned properties, and the cited Restatement provisions are not binding law in Nevada. The notion that a common interest community, without a declaration of CC&Rs, can enact whatever restrictive covenants it chooses as long as it is not "explicitly

prohibited" from doing so is directly contrary to the fundamental principles of real property ownership embodied in the applicable Restatement provisions. EPCC does not argue that these principles are wrong; it argues only that they have not yet been adopted in Nevada. Moreover, EPCC offers no legitimate reason why they should not now be adopted by this Court.

Finally, EPCC argues that Moretto is precluded from arguing that the applicable Restatement provisions should now be adopted in Nevada because he "failed to raise this issue in the district court proceedings." (RAB 12). After recognizing that Moretto had repeatedly cited and quoted the applicable Restatement provisions in summary judgment briefing to the district court, it is truly bizarre that EPCC now contends that this issue is improperly raised for the first time on appeal. By repeatedly citing to the applicable Restatement principles in the case below, Moretto properly preserved this issue for appeal.

Each of EPCC's arguments is addressed in greater detail below.

1. Whether the district judge read the applicable Restatement provisions is beside the point. The court declined to analyze or even address them, and it did so without explanation.

EPCC first argues that the district court did not necessarily "ignore" Moretto's citations to the Restatement because the district judge indicated at a hearing that he had read all the briefing. (RAB 7-8). Based on this, EPCC concludes that "Appellant's claim on appeal that the district court ignored these suggested

authorities is simply without merit." (RAB 8). EPCC's argument completely misses the point.

Moretto's summary judgment briefing repeatedly cited and quoted the applicable Restatement provisions. EPCC never once addressed them, nor did the district court. It is as though EPCC's strategy was to ignore important and directly applicable legal principles, hoping the district court would so the same. Amazingly, it worked. Despite Moretto's repeated citations to, and quotations of, the Restatement, EPCC never even attempted to argue that sections 6.7 and 6.9 of the Restatement should not be recognized and adopted in Nevada. The district court followed EPCC's example and similarly failed to analyze and apply those provisions. It is in this sense that the district court erroneously "ignored" the applicable provisions of the Restatement.

2. The district court's failure to apply sections 6.7 and 6.9 of the Restatement constitutes reversible error.

EPCC next argues that the district court's summary judgment decision was correct because (1) Nevada law does recognize a claim for "violation of property rights," (2) EPCC's bylaws do not "explicitly prohibit" it from imposing new restrictive covenants on the individually owned properties in the subdivision, and (3) a Restatement provision is "not primary, binding authority, unless it has been specifically adopted by the appropriate court." (RAB 9-11).

By continuing to argue that Nevada law does not recognize a claim for

"violation of property rights," it is unclear what point EPCC is trying to make. Is it that an individual who is wrongfully stripped of her right to the use and enjoyment of her individually owned property has no legal recourse in Nevada? Or is it that an individual must first figure out the technically correct legal terminology before she can sue to protect her property rights? In any event, EPCC's argument is without merit.

Moretto's Complaint asserted five claims for relief, only one of which was entitled "Violation of Plaintiff's Property Rights." Notably, another was entitled "Declaratory Relief." (1 AA 1-10). The title given to Moretto's claims should not have mattered. This Court has declared that a claim is to be analyzed "according to its substance, rather than its label." *Otak Nev., LLC v. Eighth Judicial Dist. Ct.*, 129 Nev. 799, 809, 312 P.3d 491, 489-99 (2013). This Court has also recognized that "real property and its attributes are considered unique and loss of real property rights generally results in irreparable harm." *Dixon v. Thatcher*, 103 Nev. 414, 416, 742 P.2d 1029, 1030 (1987). Furthermore, Nevada has adopted the Uniform Declaratory Judgments Act (NRS Chapter 30). Under NRS 30.040(1):

> Any person interested under a deed, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Even if Moretto's Complaint was read in its totality as asserting a single claim for declaratory relief that the ADCSG were invalid, it would have been a viable claim for relief under Nevada law. It simply does not matter that a Nevada appellate court has not explicitly endorsed a claim entitled "violation of property rights."

EPCC's contention that its bylaws do not "explicitly prohibit" it from imposing new restrictive covenants on the individually owned properties in the subdivision is indicative of EPCC's ongoing choice to ignore the substance of Sections 6.7 and 6.9 of the Restatement. EPCC's argument takes an approach directly opposite from the principles embodied in the Restatement.

Under sections 6.7 and 6.9 of the Restatement, a *specific authorization* set forth in a recorded declaration of CC&Rs is necessary for a common interest community to adopt restrictions on individually owned properties. It is entirely insufficient that such restrictions may not be "explicitly prohibited." EPCC has specifically admitted that "there is no specific grant of authority to the Executive Board to enact the manner of ADCSG architectural restrictions complained about by Plaintiff." (2 AA 303) (emphasis added). As explained in Comment b. to Section 6.7 of the Restatement, a common interest community with only a generally worded rulemaking power contained in its bylaws, such as EPCC, is limited to governance of the common property and prevention of nuisance-like activities on the individually owned properties.

By ignoring the applicable Restatement provisions, EPCC appears to be under the mistaken assumption that it may enact any manner of restrictive covenant against the individually owned properties in the community as long as such restrictions are not "explicitly prohibited." This is precisely what Sections 6.7 and 6.9 of the Restatement guard against.

EPCC's next argument, that legal principles embodied in the Restatement are not binding law unless they are adopted by the appropriate court, may be technically accurate but it stops short of getting to the real question at issue in this appeal. The real issue is whether the district court should have properly recognized and anticipated this Court's likely adoption of the applicable Restatement provisions. In other words, was it error for the district court not to address, analyze and ultimately apply the applicable Restatement provisions? The answer to this question is an unqualified "yes" because EPCC did not present the district court (and has not presented this Court) with any legitimate reason why those provisions should not be adopted.

As shown in the Opening Brief, this Court has routinely adopted and applied other sections of the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES). *See*, *e.g.*, *St. James Village, Inc. v. Cunningham*, 125 Nev. 211, 212-13, 210 P.3d 190, 191 (2009) (adopting and applying Section 4.8); *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 125 Nev. 449, 457, 215 P.3d 697, 703 (2009) (adopting and applying

Section 6.11); *Artemis Exploration Company v. Ruby Lake Estates Homeowner's Ass'n*, 135 Nev. 366, 372, 449 P.3d 1256, 1260 (2019) (adopting and applying Section 6.2).

For this Court to now diverge from the legal principles embodied in the Restatement in this particular case, it should, at the very least, have good reason to do so. EPCC has not presented any such legitimate reason. Moretto, on the other hand, has shown that to diverge from the applicable legal principles would be to embrace the notion that a common interest community, without a recorded declaration of CC&Rs and with only a generally worded rulemaking power contained in its bylaws, has the ability to unilaterally adopt new restrictive covenants applicable to individually owned properties in the subdivision—restrictive covenants that did not encumber the properties when they were purchased. As explained in the Opening Brief, this should not be the law in Nevada because "[p]eople purchasing property in a common-interest community, which is usually subject to specific use restrictions set forth in the declaration [of CC&Rs], are not likely to expect that the association would be able, under a generally worded rulemaking power, to impose additional use restrictions on their property." (AOB 11-12; 1 AA 168 (quoting RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 6.7 cmt. b (2000)).

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3. This Court's prospective adoption of the applicable Restatement provisions was properly preserved for appeal.

EPCC next argues that Moretto is precluded from arguing for adoption of the applicable sections of the Restatement because he did not argue for their adoption at the district court level. (RAB 12-13). EPCC agrees that Moretto repeatedly cited and quoted the applicable Restatement provisions in summary judgment briefing to the district court. It is EPCC's apparent contention, however, that citing and quoting certain legal authority to a district court, in an effort to have that legal authority applied and followed, is not adequate to preserve for appeal the issue of whether the district court should have applied and followed that authority.

"A point not urged in the trial court, unless it goes to the jurisdiction of the court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). "Parties may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below." *Schuck v. Signature Flight Support of Nevada, Inc.*, 126 Nev. 434, 437, 245 P.3d 542, 544 (2010).

Moretto repeatedly cited and quoted the applicable Restatement provisions to the district court. (1 AA 168-169; 3 AA 668-669). Although Moretto did not use the words "urged to adopt," the fact that Moretto was asking the district court to apply the Restatement approach goes without question. Thus, Moretto's appeal to

the Restatement can hardly be characterized as a new theory raised for the first time on appeal.

4. The cases cited in the Opening Brief are not materially distinguishable from this case.

EPCC next attempts to distinguish its adoption of the ADCSG from the several persuasive cases cited in the Opening Brief. (RAB 13-16). Starting with *Estates at Desert Ridge Trails Homeowners' Ass'n v. Vasquez*, 300 P.3d 736 (N.M. App. 2013) and *Wilson v. Playa de Serrano*, 123 P.3d 1148 (Ariz. App. 2005), EPCC argues that those cases "dealt with the rules in place regarding the use (i.e. activity) taking place on the property, not the rules regarding the architectural structures on the property." (RAB 14). As this Court will recall, *Vasquez* dealt with short-term rental restrictions and *Wilson* dealt with age restrictions.

EPCC's attempt to distinguish these cases on the ground that they pertain only to use restrictions as opposed to architectural restrictions is incoherent. There is no logical reason a common interest community, applying only a generally worded rulemaking power, would be prohibited from restricting an individually owned property's use but would still be permitted to restrict the architectural elements on the property.

With specific reference to Section 6.7 of the Restatement, the *Vasquez* court specifically held that "under a general grant of rule-making authority, the HOA's authority to restrict individually owned property pursuant to the HOA Rules was

limited to protecting common property and individually owned lots from any unreasonable interference by another lot owner's use of his or her property." *Vasquez*, 300 P.3d at 744 (emphasis added). The holdings in *Vasquez* and *Wilson* are not limited to use restrictions as opposed to architectural restrictions, nor is the Restatement.

EPCC next moves on to *Sainani v. Belmont Glen Homeowners Ass'n, Inc.*, 831 S.E.2d 662 (Va. 2019), which dealt with an HOA's "seasonal guidelines" purporting to regulate individual owners' displays of holiday lighting and decorations. EPCC attempts to distinguish *Sainani* from this case on the ground that *Sainani* only pertains to temporary restrictions (i.e., holiday decorations) as opposed to restrictions on permanent fixtures. (RAB 16). As EPCC puts it, "the ADCSG at issue generally contain recommendations for new construction and/or modifications on lots within the Elk Point community which are permanent fixtures by nature. Thus, there is no allegation that Respondent enacted temporary regulations outside of its scope of authority." (RAB 16). Once again, this purported distinction is incoherent.

The holding in *Sainani* had very little, if anything, to do with the temporary or permanent nature of the aesthetic elements being restricted. Rather, the holding was that, even where an HOA has a recorded declaration of CC&Rs, those CC&Rs must be strictly construed and, absent *specific* authorization, an HOA does not have

the implied power to regulate the aesthetics of individually owned lots. *Sainani*, 831 S.E.2d at 668-69.

As explained in the Opening Brief, EPCC is unlike the HOA in *Sainani* in that EPCC does not have a recorded declaration of restrictive covenants that would even arguably permit it to impose the ADCSG on the individually owned properties in the community. Accordingly, under Sections 6.7 and 6.9 of the Restatement, EPCC is limited to governing the common property and preventing nuisance-like activity on the individually owned properties.

5. The applicable Restatement provisions are entirely consistent with NRS Chapter 116.

EPCC's final argument is that an adoption of Sections 6.7 and 6.9 of the Restatement would somehow contradict certain portions of NRS Chapter 116. (RAB 16-17). EPCC devotes only one paragraph to this argument, and it does not explain how the applicable Restatement provisions would purportedly contradict NRS Chapter 116. Contrary to EPCC's contention, the pertinent Restatement provisions are entirely consistent with NRS Chapter 116.

EPCC points specifically to NRS 116.31065, which contains general requirements for "rules" adopted by an association. In the statutory requirements for an HOA's adoption of rules, there is nothing that states that the HOA can unilaterally implement new restrictive covenants against the individually owned

properties in the subdivision without an already recorded declaration of CC&Rs. *See*, *generally*, NRS 116.31065.

EPCC also points to NRS 116.2111, which sets forth various requirements for alterations and access to units in an association. EPCC's reference to NRS 116.2111 only further highlights the impropriety of its unilateral adoption of the ADCSG. NRS 116.2111 is contained in the section of statutes with which EPCC, having been created long before January 1, 1992, is not required to comply. NRS 116.1201(3)(b) (stating that a common interest community created before January 1, 1992 is not required to comply with the provisions of NRS 116.2101 through 116.2122). Although it is not required to comply with this section of statutes, the ADCSG makes specific reference to NRS 116.2111 as EPCC's authority for its ability to impose the restriction of requiring Executive Board approval for any construction or landscaping project on individually owned lots. (1 AA 231).

Within that same section of Chapter 116 are the statutory provisions that protect property owners against an HOA's unilateral imposition of new restrictive covenants that are not already set forth in a recorded declaration of CC&Rs when the owner purchases her property. For example, under NRS 116.2105(l)(1), restrictions on use of property must be contained in a recorded declaration of CC&Rs. Under NRS 116.2117(6), a recorded declaration of CC&Rs or an amendment thereto may not be enforced against an owner who owned on the date of

the recording. Under NRS 116.21175, to amend an already recorded declaration of CC&Rs, the HOA must obtain a supermajority of votes of unit owners. Sections 6.7 and 6.9 of the Restatement are, in many ways, common law expressions of the protections that have since been codified in the Uniform Common Interest Ownership Act ("UCIOA")

By making specific reference to NRS 116.2111 in the ADCSG, EPCC is improperly attempting to use the UCIOA as both a shield and a sword. In other words, EPCC is attempting to implement and impose new restrictive covenants without adhering to the statutory procedure it would be required to follow if it was an HOA created after January 1, 1992. And, it is attempting to impose those new restrictive covenants without adhering to the common law principles embodied in the Restatement, which apply regardless of when EPCC came into existence.

EPCC cannot simply adopt the equivalent of CC&Rs unilaterally and without the consent of the owners of the individually owned lots. It certainly cannot make those restrictions applicable retroactively to owners who purchased their properties long before the restrictions were adopted. That is precisely what EPCC has done in this case.

Ignoring the applicable Restatement principles, the district court failed to appreciate the distinction between a common interest community's broad, general rulemaking power to regulate the use of its *common property*, as opposed to the far

more limited power to regulate the use of *individually owned property*. This was error.

Under Sections 6.7 and 6.9 of the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES), EPCC does not have the power or authority to impose such restrictions on the individually owned lots. The district court erred by concluding otherwise. The decision of the district court should be reversed, and this matter should be remanded with instructions for the entry of judgment in Moretto's favor.

CONCLUSION

By unilaterally adopting the ADCSG, EPCC has imposed new restrictive covenants on the individually owned properties in the subdivision. The ADCSG contain new building height restrictions, new building envelope restrictions, new restrictions on the location of fences and walls, new restrictions for preserving views, new restrictions on exterior lighting, new restrictions on types of materials that may be used for exterior walls and trims, and new restrictions on approval and location of proposed landscaping elements.

As expressed in the Opening Brief, this Court is urged to expressly adopt Sections 6.7 and 6.9 of the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES). Without those legal principles in place, a common interest community without any CC&Rs in place and without the individual owners' consent, could simply decide it wants to unilaterally enact restrictive covenants on the individual owners' property,

even though the individual owners took title unencumbered by such restrictions.

Contrary to EPCC's argument, Moretto's citations to the Restatement were in fact ignored. Although Moretto repeatedly cited and relied upon the applicable sections of the Restatement, neither EPCC nor the district court ever addressed them. This oversight resulted in reversible error.

Moretto's argument that the Restatement approach be followed was repeatedly raised in summary judgment briefing in the case below and, as such, it is not improperly raised for the first time on appeal.

The district court's summary judgment order, which upheld EPCC's adoption of the ADCSG, should be reversed and this matter should be remanded with instructions for the district court to enter judgment in Moretto's favor.

Dated: October 12, 2021.

Lemons, Grundy & Eisenberg

By: *_/s/ Todd R. Alexander_*

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CERTIFICATE OF COMPLIANCE

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

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, using the computation guidelines in NRAP 32(a)(7)(C), it contains 3,574 words.

3. Finally, I hereby certify that I have read this Answering Brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject

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to sanctions in the event the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: October 12, 2021.

Lemons, Grundy & Eisenberg

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CERTIFICATE OF SERVICE

I hereby certify that the within **APPELLANT'S REPLY BRIEF** was filed electronically with the Nevada Supreme Court on October 12, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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