

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case Nos. 83212 / 83756

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

Appellants.

v.

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

Respondent.

Appeal from judgment of the Second Judicial District Court of the State of Nevada
In and For the County of Washoe
District Court Case No.: CV19-00459
The Honorable David Hardy, District Judge

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

Respondent The Regional Transportation Commission of Washoe County (“RTC”) is a political subdivision of the State of Nevada and a special purpose unit of the government.

RTC has been represented throughout this case by Woodburn and Wedge. No other law firms are expected to appear in this Court on behalf of RTC.

These representations are made so the justices of the Supreme Court or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

Dated: March 2, 2022.

WOODBURN AND WEDGE

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INTRODUCTION

Iliescu¹ filed this action alleging RTC unlawfully used a *certain portion* of Iliescu's property on East 4th Street in Reno (the "Property") for the purpose of constructing the 4th Street/Prater Way Project (the "Project"). I JA 0202. Iliescu referred to this portion of that property as the "Remaining Property," the portion of the Iliescu's parking lot that was *not* subject to condemnation in an earlier eminent domain action RTC filed in 2016 to acquire limited easement interests in a very small area of the northeast corner of the Property's parking lot. *Id.* Essentially, Iliescu complained that RTC used the Remaining Property as a "parking lot" for heavy equipment during the construction of the Project without Iliescu's permission, causing physical damages to the parking lot. I JA 0176, 0229-230.

Unfortunately, rather than alleging a simple trespass claim, Iliescu asserted a slew of other claims unsupported by allegations, evidence, or law, accusing RTC of numerous atrocities causing damages not only to Iliescu's Remaining Property but also to Iliescu personally. I JA 0200-0218. As part of this misguided campaign, Iliescu argued they entered into a "contract" with RTC in the prior condemnation action that somehow was applicable to RTC's alleged use of the Remaining Property that was *not* a subject of that prior lawsuit and to Iliescu's

¹ RTC refers to Appellants collectively as "Iliescu."

alleged damages for cost of repairing the Remaining Property, which alleged damages are completely unrelated to that prior stipulation. I JA 0202, ¶ 8. As discussed below, that prior stipulation contained an agreement that RTC would facilitate *Iliescu's* use of the Remaining Property and did not address any use of the Remaining Property by RTC.

Iliescu's ambitious pleadings were not followed by ambitious prosecution. In fact, they failed to prosecute their case at all. Iliescu failed to comply with discovery disclosure requirements, failed to respond to written discovery requests, repeatedly failed to appear at depositions, failed to disclose an expert witness necessary to establish their damages, failed to present any admissible evidence in response to RTC's motion for summary judgment, and failed to oppose motions in limine, among other failures, some of which failures resulted in Iliescu being sanctioned approximately \$10,000 during the course of litigation and all of which resulted in the District Court entering pre-trial dispositive relief in favor of RTC. III JA 0603-0605.

Ultimately, the District Court awarded RTC an additional \$65,000 in fees and costs, finding that RTC was the prevailing party and that Iliescu's claims were groundless because Iliescu failed to present any evidence supporting their claims. VII JA 1208, 1366, 1368.

In short, Iliescu's lawsuit was over-pleaded and entirely unprosecuted. They asserted claims unsupported by the allegations of their complaint and, ultimately, presented no evidence at all to support their claims. Therefore, the District Court properly disposed of Iliescu's claims under NRCP 12(b)(5) and, NRCP 56.

STATEMENT OF ISSUES

(1) Did the District Court properly dismiss Iliescu's claim for injunctive relief under NRCP 12(b)(5) where Iliescu failed to allege facts sufficient for the injunctive relief they actually sought and also failed to plead or argue for a mandatory injunction requiring RTC to *restore* the Remaining Property to an unspecified "prior" status quo?

(2) Did the District Court properly dismiss Iliescu's claim for waste under NRCP 12(b)(5) where Iliescu repeatedly and specifically alleged that RTC had no legal right or title to use the Remaining Property?

(3) Did the District Court properly grant RTC summary judgment on Iliescu's breach of contract claims where Iliescu failed to demonstrate the existence of a valid and enforceable contract related to their claimed damages in this case and otherwise failed to present any admissible evidence supporting this claim, including evidence of damages?

(4) Did the District Court properly grant RTC summary judgment on Iliescu's trespass claims where Iliescu presented no admissible evidence to support their claims, where Iliescu waived any claim for damages other than compensatory damages specifically related to the parking lot, and where Iliescu failed to argue for nominal damages in opposing summary judgment (and likewise failed to plead them in the complaint)?

(5) Did the District Court properly grant RTC summary judgment on Iliescu's declaratory relief claim where the District Court properly concluded there was no enforceable contract between RTC and Iliescu related to RTC's use of the Remaining Property or compensation for repairs to the Remaining Property, which was Iliescu's only claim for compensatory damages?

(6) Did the District Court properly exercise its discretion in awarding RTC attorney fees and costs where RTC was clearly the prevailing party and had incurred substantial expense in defending the case, where Iliescu failed to present any admissible, credible evidence supporting its claims and the District Court found those claims to be groundless (a finding Iliescu does not challenge on appeal), and where Iliescu's dilatory conduct throughout the litigation dramatically increased costs?

STATEMENT OF FACTS/PROCEDURAL HISTORY²

Iliescu commenced this action on February 27, 2019, filing a complaint asserting twelve (12) claims ranging from tort to contract to equitable arising from RTC's alleged unlawful use of the "Remaining Property" on Iliescu's parcel located on East Fourth Street in Reno. I JA 0126-0147. Iliescu defined the Remaining Property as the portion of their parking lot that was *not* a subject of prior condemnation proceedings by which RTC obtained minor easement interests at the far northeast corner of the Property. I JA 0128. In other words, in this action Iliescu sought relief with respect to alleged damage to a portion of their property that was *not* at issue in the prior condemnation action and which was "**not** involved in whatsoever nature in the Project...." *Id.* (emphasis added). That prior condemnation action will be discussed further below.

Iliescu failed to timely serve RTC with process in this case and, on July 1, 2019, the District Court entered an order to show cause why service had not been made. I JA 0148-0149. In response, Iliescu filed a motion for extension of time to accomplish service on July 22, 2019, citing their counsel's ongoing medical issues as the primary reason for their failure to timely serve process. I JA 0151-0153. The District Court granted that request and ordered that service of process be made

² The facts giving rise to this appeal overlap to a large degree with the procedural history of this case, and therefore RTC combines the two.

within 10 days, noting that RTC as a government entity is an easy defendant to serve. I JA 0157-0158.

After Iliescu finally served RTC with process, RTC filed a motion to dismiss certain claims. I JA 0162-1070. Shortly thereafter, RTC and Iliescu entered into a stipulation by which *both* parties were allowed to conduct discovery prior to the NRCP 16.1 early case conference. I JA 0171-0172. Pursuant to that stipulation, RTC served written discovery requests on Iliescu probing, among other things Iliescu's allegations of damages. Rather than respond in full to these requests, which sought medical information related to Iliescu's alleged emotional distress,³ Iliescu elected to stipulate to the dismissal of certain claims and damages, specifically agreeing "to limit their compensatory damages claims in this case solely to the property damage to their parking lot as alleged in their Complaint." I JA 0192-0193.

Based on the parties' stipulation, the District Court dismissed with prejudice all of Iliescu's claims for compensatory damages except those "specifically related to their parking lot...." I JA 0196. The Court's order noted that "[t]his includes

³ As discussed below, Iliescu failed to timely respond to these requests, forcing RTC to file a motion to compel. This was the first Iliescu's many failures to comply with deadlines, ultimately leading to substantial sanctions against Iliescu.

but is not limited to any damages for emotional distress or personal injury.” I JA 0197 (emphasis added).

Thereafter, the District Court ordered Iliescu to file an amended complaint, which Iliescu did January 21, 2001, alleging eleven (11) claims for relief nearly identical to those in their original complaint. I JA 0198-0199, 0200-0218. In response, RTC filed a supplemental motion to dismiss, echoing many of the same arguments set forth in its original motion to dismiss. I JA 0219-0225.

With respect to Iliescu’s claim for injunctive relief, RTC argued that Iliescu requested injunctive relief to preserve the status quo but did not allege that RTC currently was currently attempting to enter upon or use their Remaining Property nor that such conduct was likely in the future. I JA 0221. Iliescu also did not argue that they were entitled to a mandatory injunction requiring RTC to restore the property to some prior status quo. With respect to Iliescu’s waste claim, RTC argued that Iliescu failed to allege that RTC was a guardian or tenant of the Property, and therefore could not be liable for committing waste under NRS 40.150. I JA 0222.⁴

⁴ As to the District Court’s order granting dismissal under NRCP 12(b)(5), Iliescu challenges on appeal only the dismissal of their claims for injunctive relief and waste. OB at 18-24 (“OB” refers to Appellants’ Opening Brief).

In response, Iliescu did not argue that RTC was currently, or likely in the future, to trespass on the Remaining Property, nor did they argue for a mandatory injunction to “restore” the property to a prior status quo. II JA 0228-0230. Further, in arguing their waste claim, Iliescu ignored the allegations in their First Amended Complaint that RTC had no legal right to use the Remaining Property and, therefore, that RTC’s use of that property was illegal. II JA 0231.

The District Court agreed with RTC’s arguments and entered an Order Granting Motion To Dismiss on March 20, 2019, dismissing under NRCP 12(b)(5) Iliescu’s claims for injunctive relief and waste, among other claims not challenged on appeal. II JA 0256-0257.

RTC then answered the First Amended Complaint and the litigation continued. II JA 0262-0267. However, throughout the case, Iliescu repeatedly failed to participate in discovery, including failing to timely hold an early case conference, failing to respond to written discovery, repeatedly failing to appear at depositions, failing to respond to discovery orders, failing to timely disclose an expert witness resulting in RTC filing several motions to compel and for discovery sanctions, as well as motions in limine seeking to preclude Iliescu from offering

certain evidence. II JA 0401-0405, 416-0420, 0445-0458; III JA 508-512, 0652-0657; IV JA 0709-0711; V JA 0831-0833.⁵

As a result of their repeated discovery failures, Iliescu was sanctioned in excess of \$10,000 in fees and costs. III JA 0623-0625. Additionally, and significantly, the District Court granted RTC's motion in limine to preclude Iliescu from offering documents not produced prior to June 30, 2020, noting that Iliescu failed to oppose the motion. III JA 0617-0618. This is significant because the documents Iliescu produced prior to June 30, 2020, were completely inadequate, from both an evidentiary and substantive perspective, to establish a genuine issue of material fact on any of Iliescu's claims.

RTC filed its Motion For Summary Judgment on March 9, 2021, arguing there is no admissible evidence supporting Iliescu's remaining claims. IV JA 0688-0695. Iliescu filed their opposition brief on April 2, 2021, but failed to present any affidavits, declarations, deposition testimony, or any other admissible evidence supporting their claims. IV JA 0723-814. Iliescu did not ask the District

⁵ Iliescu accuses RTC's counsel of "taking advantage" of their attorney's health issues and appear to criticize RTC's counsel for being a "zealous advocate." OB at 7. The District Court addressed these issues at the end of the case and found that the health issues of Iliescu's counsel could not be used as an excuse for their repeated failures throughout the entire case. V JA1040-1041; VII JA 1341, 1370.

Court to take judicial notice of any facts. *Id.* Iliescu simply attached their responses to requests for production served on June 30, 2020, none of which were authenticated, most of which were inadmissible hearsay and all of which did nothing to create a genuine issue of material fact as to their remaining claims. *Id.* With respect to their trespass claim, Iliescu did not argue they were entitled to nominal damages (nor did they plead such damages in their complaint). IV JA 0729.

The District Court scheduled oral argument on RTC's motion for summary judgment on May 12, 2021. V JA 1006. Iliescu's counsel did not appear due to technical difficulties so, despite the fact that RTC made a record on its motion at that hearing, the Court scheduled another oral argument for June 8, 2021. During that hearing, Iliescu's counsel acknowledged that the only damages Iliescu sought was the cost of repair to the pavement—he did not argue Iliescu was seeking nominal damages. VI JA 1126. RTC objected to Iliescu's belated attempt to present a contractor's bid to repave the parking lot and also argued that Iliescu failed to present evidence of the "status quo" prior to the alleged damage, as theirs was a 40-year-old parking lot that had never been resurfaced. VI JA 1129-1130, 1134, 1142-1144.

On June 9, 2021, the District Court entered its Order Granting Summary Judgment After Supplemental Arguments. VI JA 1148-1159. Among other things, the District Court found: (1) Iliescu had waived any claim for compensatory damages other than for physical damage to the parking lot, and therefore could not recover nominal or general damages; (2) Iliescu had failed to timely disclose an expert witness on any subject; (3) Iliescu had not conducted the discovery necessary to prosecute their case; (4) Iliescu had presented no declarations or any other admissible evidence to support their claims; (5) there was no admissible evidence supporting Iliescu's claims, including damages. VI JA 1154-1155, 1157.⁶

Following entry of summary judgment, RTC moved for and was awarded attorney fees pursuant to NRS 18.010(2)(b) on the grounds that there was no credible evidence supporting Iliescu's claims and therefore those claims were groundless. VI JA 1205-1213; VII JA 1365-1372.

Much of Iliescu's appeal relies on their argument that they had a "contract" with RTC by way of a stipulation entered in prior condemnation proceedings. However, that prior condemnation action dealt with RTC's need to acquire certain limited easements in the far northeast corner of Iliescu's property. I JA 0054. The

⁶ RTC's motions in limine to preclude Iliescu from calling an expert witness at trial and from presenting evidence of damages were denied as moot upon entry of summary judgment.

language on which Iliescu heavily relies is: “During construction of the Project, RTC and Real Parties in interest agree to cooperate so as to minimize interference between construction of the Project and [*Iliescu’s*] use of and access to the remaining land....” I JA 0055 (emphasis added). That stipulation did not deal with any proposed use by *RTC* of the Remaining Property, nor any damage that may result from such proposed use. Iliescu’s only claim for damage in this case was for the cost of repair to the pavement as a result of RTC’s alleged use, a subject complete unrelated to that prior stipulation. Further, any violation of that alleged “contract,” i.e., RTC was not cooperating to minimize interference with Iliescu’s access to and use of the property during construction, should have been addressed by way of a motion to enforce that order upon that stipulation in the prior proceeding “during construction.” Thus, Iliescu’s claims for breach of contract in this case based on that prior stipulation are misplaced.

SUMMARY OF ARGUMENT

The District Court properly dismissed Iliescu’s claims for injunctive relief and waste pursuant to NRCP 12(b)(5). Iliescu failed to alleged facts sufficient to sustain a claim for the injunctive relief they sought. They also failed to plead or otherwise argue for the “restorative” injunction they now raise for the first time as an issue on appeal. That issue has been waived and, in any event, Iliescu would

not have been entitled to that relief.

The District Court properly granted RTC's motion for summary judgment on Iliescu's remaining claims. Iliescu presented no admissible evidence supporting their claims, failed to request that the District Court take judicial notice of the pleadings in the prior condemnation action and, even if they had done so, those proceedings would not have established any genuine issue of material fact as to Iliescu's remaining claims.

Finally, the District Court properly exercised its discretion in awarding RTC attorney fees and costs as the prevailing party. The District Court properly found there was no admissible, credible evidence supporting Iliescu's claims and, therefore, those claims were groundless. Iliescu does not challenge that finding on appeal and, therefore, has waived their right to challenge it.

ARGUMENT

1. THE DISTRICT COURT PROPERLY DISMISSED ILIESCU'S CLAIMS FOR INJUNCTIVE RELIEF AND WASTE PURSUANT TO NRCP 12(b)(5).⁷

a. Standard of Review.

This Court reviews de novo a district court's order granting a motion to

⁷ Iliescu's use of the word "especially" with respect to these claims suggests they take issue with all claims dismissed pursuant to NRCP 12(b)(5). OB at 17. However, as they substantively address only injunctive relief and waste, RTC limits its response to those two claims. OB at 17.

dismiss, and the order will not be upheld unless it appears beyond a doubt that the plaintiff could prove no set of facts that would entitle plaintiff to relief. *Jesseph v. Digital Ally, Inc.*, 136 Nev. 531, 533, 472 P.3d 674, 676–77 (2020) (internal citations omitted).

When this Court reviews a district court's dismissal of an action pursuant to NRCP 12(b)(5) for failure to state a claim, it regards all factual allegations in the complaint as true and draws all inferences in favor of the nonmoving party. *Stockmeier v. Nevada Dep't of Corr. Psychological Rev. Panel*, 124 Nev. 313, 316, 183 P.3d 133, 135 (2008). Dismissal is proper where the allegations are insufficient to establish the elements of a claim for relief. *Id.* The standard of review for dismissal is rigorous, and dismissal is proper only if the allegations, even as presumed true, would not entitle the plaintiff to relief. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 323, 130 P.3d 1280, 1284 (2006).

On review of a motion to dismiss, this Court's task is to determine whether the challenged pleading sets forth allegations sufficient to make out the elements of a right to relief. *Edgar v. Wagner*, 101 Nev. 226, 227, 699 P.2d 110, 111 (1985). The test for determining whether the allegations of a complaint are sufficient to assert a claim for relief is whether the allegations give fair notice of the nature and

basis of a legally sufficient claim and the relief requested. *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 846, 858 P.2d 1258, 1260 (1993).

b. Injunctive Relief.

Iliescu argues the District Court erred in dismissing their claim for injunctive relief for two reasons: (1) although Iliescu failed to allege that RTC was, at the time of filing the First Amended Complaint (or the original Complaint for that matter), attempting to enter upon or otherwise use the Remaining Property, it was “possible” RTC may do so in the future; and (2) Iliescu was entitled to a mandatory injunction requiring RTC to “restore” the property to some unidentified earlier condition. OB at 18-19.

Both arguments lack merit. First, the United States Supreme Court has held that a party is not entitled to injunctive relief based on the mere “possibility” of future harm. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22, 129 S.Ct. 365, 375 (2008) (rejecting the Ninth’s Circuit’s “possibility” standard as too lenient and requiring a showing that irreparable injury is “likely” in the absence of an injunction). The *Winter* Court went on to state that issuing injunctive relief based on mere “possibility” of irreparable harm is inconsistent with the Supreme Court’s “characterization of injunctive relief as an extraordinary remedy that may

only be awarded based upon a clear showing that plaintiff is entitled to such relief.” *Id.*, 555 U.S. at 22, 129 S.Ct. at 375-376.

As argued by RTC in its briefing on the motion to dismiss, Iliescu’s First Amended Complaint is devoid of any allegations that, at the time the complaint was filed, RTC was engaging in any then-current or was going to engage in imminent future conduct “likely” to cause Iliescu irreparable harm, nor did Iliescu demonstrate any such “likely” prospect in opposition to RTC’s motion to dismiss or otherwise throughout the remainder of the litigation. I JA 0221, 0237. In the absence of these allegations, the District Court did not err in dismissing Iliescu’s claim for injunctive relief.

Iliescu’s argument that it was entitled to a mandatory, restorative injunction also lacks merit. OB at 19-23. Iliescu failed to make this argument below. Nothing in Iliescu’s First Amended Complaint or their responses to RTC’s motion to dismiss suggested they were seeking a mandatory injunction to restore some prior status quo. To the contrary, their pleadings and briefing clearly stated that, as to their request for injunctive relief, “all Plaintiffs want is to prohibit Defendants and the other Trespassers from continuing to unlawfully use Plaintiffs’ property as their personal and private parking lot....” I JA 0176, 0204-0205 (Iliescu seeks temporary and permanent injunctive relief that defendants be prohibited from using

or entering Iliescu's property and that the status quo be *preserved*); I JA 0229-0230 (Iliescu seeks an injunction prohibiting RTC from continuing to use Iliescu's property as a parking lot).

At no point in the District Court proceedings did Iliescu allege or argue that they were entitled to an injunction requiring RTC to *restore* the Remaining Property to some prior status quo, what that status quo previously was, or the alleged costs of doing so.⁸ Therefore, Iliescu has waived the right to make that argument on appeal. *Dolores v. State Emp. Sec. Div.*, 134 Nev. 258, 262, 416 P.3d 259, 261 (2018) (Issues not argued in the trial court are deemed to have been waived and will not be considered on appeal). Further, even accepting Iliescu's allegations as true, their First Amended Complaint gives no notice whatsoever that Iliescu is seeking a mandatory injunction requiring RTC to restore the property to a "prior status quo." Therefore, it does not give fair notice of the relief sought.

The cases Iliescu cites in support of this previously unasserted argument are factually inapposite and therefore inapplicable to the facts in this case, which involve, allegedly, easily reparable physical damage to a parking lot. OB at 21-22. However, those cases clearly instruct that mandatory injunctions are "particularly disfavored" [*Hellerstein v. Desert Lifestyles, LLC*, 2015 WL 6962862 at *13], that

⁸ The prior status quo certainly was not a newly paved parking lot, as Iliescu had owned the property for years and never resurfaced it during that time. VI JA 1142.

“courts do not favor mandatory injunctions” [*City of Reno v. Matley*, 79 Nev. 49, 60, 378 P.2d 256, 262 (1963)], that a mandatory injunction is a “stern remedy” and that courts “should exercise restraint and caution in providing this type of equitable relief” [*Leonard v. Stoebling*, 102 Nev. 543, 551, 728 P.2d 1358, 1363 (1986)].

Iliescu argues on appeal, for the first time, that they were entitled to the particularly disfavored, stern remedy of a mandatory injunction requiring RTC to “restore” the Remaining Property to some unknown “prior status quo” despite that monetary damages would have been adequate had Iliescu presented any admissible evidence to establish those facts. Iliescu should not be relieved of their failure to produce such evidence by relying on a previously unasserted, self-serving, meritless theory.

If the Court accepts Iliescu’s argument, it will essentially permit every person involved in a car accident not their fault to obtain a mandatory injunction requiring the party at fault to restore their car and their person to the “prior status quo.” This would render meaningless the above-referenced case law that mandatory injunctions are generally disfavored absent exceptional circumstances.

c. Waste.

Iliescu argues that, in dismissing their waste claim pursuant to NRCP 12(b)(5), the District Court invoked an overly narrow reading of NRS 40.150. OB

at pp. 2, 23. Iliescu argues RTC was their “tenant” because RTC had obtained rights to “certain portions” of Iliescu’s property in the prior condemnation action, and therefore RTC was capable of committing waste on “that Property” under NRS 40.150. OB at 24.

In support of their position, Iliescu cites Black’s Law Dictionary for the definition of “tenant” and *Worthington Motors v. Crouse*, 80 Nev. 147, 390 P.2d 229 (1964) for the suggestion that NRS 40.150 includes rights in property not specifically mentioned in the statute.⁹ OB at 24. Iliescu correctly points out that, to be a “tenant,” one must hold or possess land by some kind of “right or title.” OB at 24. *Worthington* involved a tenancy for life—Worthington, by way of foreclosure—acquired the life estate of Elizabeth Barndt and her children had the remainder interest. Thus, Worthington was a tenant *per autre vie*, or “for the life of another person,” i.e., Elizabeth Barndt. Thus, Worthington was a “tenant for life” as specifically referenced in NRS 40.150 and had the legal right to possess the property even though the words *per autre vie* are not specifically set forth in the statute.

⁹ *Worthington* involved the scope of the *remedy* for waste claims; the status of the alleged offending party in that case did not appear to be in dispute.

So, was RTC a “tenant” of the property at issue? Initially, it is important to recognize how Iliescu defined the property at issue in their pleadings. Iliescu’s alleged damages arise from what they defined as the “Remaining Property” portion of the property, i.e., the area of the parking lot “**not** subject to condemnation.” I JA 0202, ¶ 8 (emphasis added). Iliescu’s pleadings repeatedly made it clear RTC had no “right or title” to the Remaining Property and that its alleged use of the Remaining Property was without Iliescu’s permission. I JA 0128-0129, ¶ 9; I JA 0131, ¶ 19; I JA 0135, ¶ 45(c); I JA 0202-203, ¶ 10; I JA 209-210, ¶ 49(d) and (e).

Consistent with these allegations is the absence of any allegation in Iliescu’s complaint that RTC was a “tenant” of the Remaining Property, including any such allegation in Iliescu’s waste claim. I JA 0210-0211. At its core, this case involved RTC’s alleged *unlawful* use of Iliescu’s Remaining Property and physical damages to that portion of the parking lot.

NRS 40.150 provides: “If a guardian, tenant for life or years, joint tenant or tenant in common of real property commits waste thereon, any person aggrieved by the waste may bring an action against the guardian or tenant who committed the waste, in which action there may be judgment for treble damages.” All of those capacities have one thing in common—the legal right to possess and use the real property at issue in which others have a legal interest.

In this case, Iliescu sought damages and other relief arising from RTC's alleged *trespass* "on that portion of the Property not subject to the condemnation, and not involved in whatsoever nature in the Project...." I JA 0202, ¶ 8, i.e., the "Remaining Property." *Id.* Iliescu alleged RTC drove over and parked its vehicles on the Remaining Property "*without the permission* of [Iliescu]," and "in total disregard of [Iliescu's] respective frequent objections to such unauthorized and illegal use of the Remaining Property." *Id.* (emphasis added).

Iliescu clearly alleged that RTC did not have permission to use the Remaining Property. The allegations of the First Amended Complaint are entirely inconsistent with Iliescu's argument that RTC was a "tenant" of the Remaining Property. Even under the rigorous standard of review of a NRCP 12(b)(5) dismissal, when Iliescu's allegations are accepted as true and every fair intendment is drawn from those allegations and the "test" is whether the allegations give fair notice of a legally sufficient claim, the result is clear that Iliescu's facts as presented at trial would be that RTC had no right or title to the Remaining Property. *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 858 P.2d 1258, 1260 (1993); *Vacation Village, Inc. v. Hitachi America, Ltd.*, 110 Nev. 481, 4484, 874 P.2d 744, 746 (1994). Therefore, the District Court properly dismissed Iliescu's waste claim and its judgment should be affirmed.

2. THE DISTRICT COURT PROPERLY GRANTED RTC SUMMARY JUDGMENT ON ILIESCU’S REMAINING CLAIMS.

a. Standard of Review.

Summary judgment is an important procedural tool by which factually insufficient claims may be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources. *Boesiger v. Desert Appraisals, LLC*, 135 Nev. 192, 194, 444 P.3d 436, 438 (2019). A district court’s order granting summary judgment is reviewed de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence that is “properly before the court” on file demonstrate that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. *Id.*; *Boesiger*, 135 Nev. at 194, 433 P.3d at 439. In other words, “[e]vidence introduced in . . . opposition to a motion for summary judgment must be admissible evidence.” *Collins v. Union Fed. Savings & Loan*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983).

Here, Iliescu failed to present *any* admissible evidence supporting their claims. VI JA 1154-1155,01158. In response to RTC’s motion for summary judgment, Iliescu submitted no declarations or deposition testimony to support their claims. Moreover, at no time did Iliescu ask the District Court to take judicial notice of anything, nor did the District Court do so *sua sponte*. Thus, there was no

evidence properly before the District Court to establish a genuine issue of material fact as to any of Iliescu's claims or damages.

b. Contract claims.

As discussed above, Iliescu brought this action alleging RTC caused physical damage to the Remaining Property. By way of stipulation in this action, Iliescu waived all compensatory damages except those related to the cost of repairing the parking lot. I JA 0192-0197. Iliescu does not argue that there was any contract between them and RTC with respect to RTC's proposed use of the Remaining Property as a parking lot; clearly they have alleged that any such use was without Iliescu's permission and was illegal. Instead, they now argue that the stipulation entered in the prior condemnation action, by which the parties agreed to cooperate "during construction of the Project" so as to minimize interference with *Iliescu's* "use of and access to the remaining land" is somehow relevant to their current claims which, by their own stipulation, involve only the cost to repair the parking lot due to RTC's alleged unlawful use, and have nothing to do with *Iliescu's* use of and access to the parking lot "during construction" of a long-ago completed project.

By way of that prior stipulation, RTC did not agree to use the Remaining Property nor to pay for costs of repair due to any use; rather, RTC agreed only to

cooperate to allow *Iliescu* to access their property, an issue not relevant to this action in light of *Iliescu*'s stipulation to waive all compensatory damages except cost to repair the parking lot. Stipulations should generally be read according to their plain words....” *DeChambeau v. Balkenbush*, 134 Nev. 625, 628, 134 P.3d 359, 362-363 (2018).

Further, as discussed above, *Iliescu* failed to provide admissible evidence of damages. *Iliescu* contends they did have evidence of damages but cite only to a belatedly-submitted bid and a declaration of their attorney, neither of which are admissible evidence of *Iliescu*'s damages. VI JA 1069, 1082. The District Court properly found *Iliescu* had failed to submit admissible evidence supporting its damages.

Alternatively, *Iliescu* argues evidence of damages was unnecessary because the District Court could have simply “enjoined” RTC to repair the “damaged portions” of the *Iliescu* property. OB at 30. As discussed above, however, *Iliescu* never pleaded nor argued for a mandatory injunction and therefore has waived this argument on appeal. Nor is this an exceptional case warranting such relief. Further, there is no admissible evidence of what the “damaged portions” are or what the “prior status quo” was before RTC’s alleged use of the Remaining Property. The District Court recognized it would be unfair to require RTC to

construct a brand-new parking lot where Iliescu previously had a 40-year-old parking lot that had never been resurfaced. VI JA 1142.

Further, the Nevada Supreme Court has held that “the adoption of an agreement by the trial court effectuates a merger of the agreement into the decree entered.” *Day v. Day*, 80 Nev. 386, 389, 395 P.2d 321, 322 (1964). Here, the stipulation upon which Iliescu relies was adopted by the district court in the condemnation action in its Order For Immediate Occupancy Pending Entry Of Judgment. I JA 0068, ¶ 4. As such, the alleged “contract” was merged into the court’s order in that case. Any alleged violation of that order by RTC, i.e., interfering with Iliescu’s access to the property during construction, should have been addressed by a motion to enforce that order in the condemnation action.

The stipulation upon which Iliescu relies has nothing to do with RTC’s alleged use of the Remaining Property. The District Court properly granted summary judgment on this claim, especially in light of Iliescu’s failure to present any admissible evidence of damages.

c. Trespass.

Iliescu claims the District Court erred in granting summary judgment on their trespass claims because, despite their abject failure to produce any admissible evidence, Iliescu “could have pursued” nominal damages. OB at 31. However,

nothing in Iliescu's pleadings gives any notice that they seek "nominal" damages for their trespass claim. I JA 0212, 0217. Moreover, in opposing summary judgment, Iliescu did not argue that they were pursuing nominal damages. IV JA 0729. Having failed to affirmatively raise this argument to the District Court, Iliescu has waived that argument on appeal. *Dolores, supra*.

Additionally, Iliescu expressly waived nominal damages by way of a stipulation pursuant to which they agreed to dismiss certain claims and damages. I JA 0192. Amongst other things, Iliescu "decided to limit their compensatory damages in this case **solely to the property damage to their parking lot** as alleged in their Complaint." I JA 0192-0193 (emphasis added). In doing so, Iliescu expressly agreed to dismiss with prejudice any other form of compensatory damages. I JA 0193. Iliescu argues that "nominal damages are a species of compensatory damages" and thus acknowledge they have waived nominal damages by way of stipulation even though they now claim they did not, by way of that stipulation, "expressly exclude nominal damages". OB at 31.

Further, Black's Law Dictionary defines nominal damages as "[a] trifling sum awarded when a legal injury is suffered but there is no substantial loss or injury to be compensated." *Black's Law Dictionary (West Publishing Co. 11th Ed. 2019)*. Here, Iliescu alleged in their pleadings and maintained throughout the

lawsuit that RTC had caused substantial damage to the Remaining Property for which Iliescu sought compensation. Thus, by their own admission and the definition upon which they rely, nominal damages were not available. Iliescu's complete failure to present any evidence of the alleged substantial loss they alleged renders their previously unasserted claim for nominal damages—even if not waived on appeal—meritless.

The District Court's entry of summary judgment in favor RTC on Iliescu's trespass claim should be affirmed.

d. Declaratory relief.

Iliescu argues the District Court should not have granted RTC summary judgment on Iliescu's declaratory relief claims because the court erroneously concluded no contract existed between RTC and Iliescu with respect to the Remaining Property. OB at 32. Iliescu alleges RTC failed to “abide by the agreement” allegedly entered into between RTC and Iliescu in the prior condemnation suit. *Id.* As discussed above, there was no contract between RTC and Iliescu with respect to RTC's alleged use of the Remaining Property or the repair damages at issue, only an agreement to cooperate to facilitate Iliescu's access to the property. The referenced stipulation addressed a temporary agreement between RTC and Iliescu with respect to Iliescu's access to their

Property *during construction* of the Project. As discussed above, that alleged “contract” was merged into a court order in that case, and therefore any effort to enforce an alleged violation should have been a motion to enforce that order *during construction*. In any event, as discussed above, the agreement to facilitate Iliescu’s access during construction has nothing to do with the alleged damage to the Remaining Property in this case.

Iliescu challenges the District Court’s entry of summary judgment on their declaratory relief claim solely on the basis that there was an enforceable contract between RTC and Iliescu regarding the Remaining Property arising from the 2016 condemnation action. OB at 32. As the District Court properly found, there is no admissible evidence supporting this contention. As such, the District Court properly entered summary judgment on this claim.

3. THE DISTRICT COURT PROPERLY AWARDED RTC ATTORNEY FEES AND COSTS.

This Court reviews a district court’s award of attorney fees for a “manifest abuse of discretion.” *In re 12067 Oakland Hills, Las Vegas, Nevada 89141*, 134 Nev. 799, 801, 435 P.3d 672, 675 (2018).

The District Court awarded RTC approximately \$65,000 in attorney fees and costs pursuant to NRS 18.010(2)(b) and NRS 18.110, respectively. The fee award was based on the District Court’s finding that Iliescu failed to provide any

admissible evidence to support their claims and, therefore, that their claims were “groundless.” VII JA 1366, 1368. Implicit in this finding is that there was “no credible evidence” to support Iliescu’s claims, which is the standard for determining whether a claim is frivolous or groundless. VII JA 1367, citing *Rodriguez v. Primadonna Co., LLC*, 125 Nev. 578, 588, 216 P.3d 793, 800 (2009).

Iliescu does not challenge this finding on appeal. OB at 34. Iliescu does not argue that they presented any admissible, credible evidence supporting their claims. *Id.* Instead, Iliescu simply argues that RTC should not be considered the prevailing party because the District Court improperly dismissed Iliescu’s claims for injunctive relief and waste, and improperly granted RTC summary judgment on Iliescu’s remaining claims. RTC has shown those arguments to be without merit. If the Court agrees with RTC, Iliescu has waived any right to challenge the validity of the District Court’s award of attorney fees and costs.

NRS 18.010(2)(b) requires courts to liberally construe its provisions in favor of awarding attorney fees in all appropriate situations. Here, the District Court was well within its discretion in awarding RTC attorney fees and costs, and that award should be affirmed.

CONCLUSION

The District Court properly dismissed Iliescu's claims for injunctive relief and waste pursuant to NRCP 12(b)(5) and properly granted RTC summary judgment on Iliescu's remaining claims. The District Court also properly awarded RTC attorney fees. Therefore, the District Court's decisions on these issues should be affirmed in their entirety.

Dated: March 2, 2022

WOODBURN AND WEDGE

By: /s/ Dane W. Anderson
DANE W. ANDERSON

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word, 14- point font, Times New Roman style. I further certify that this brief complies with the type-volume limitation in NRAP 32(a)(7) because, using the computation guidelines in NRAP 32(a)(7)(C), it contains 7,426 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page 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 to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Affirmation pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED: March 2, 2022.

WOODBURN AND WEDGE

By: /s/ Dane W. Anderson
DANE W. ANDERSON, ESQ.

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the law offices of Woodburn and Wedge, 6100 Neil Road, Suite 500, Reno, Nevada 89511, and that I caused to be served the foregoing **RESPONDENT'S ANSWERING BRIEF** to be electronically filed with the Nevada Supreme Court on **March 2, 2022**. Electronic Service of the foregoing document shall be made as follows:

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An Employee of Woodburn and Wedge