

IN THE COURT OF APPEALS 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.

No. 81753-COA

FILED

OCT 21 2021

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY *E. Brown*  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

John Iliescu, Jr. and Sonnia Iliescu appeal a district court order granting summary judgment. Second Judicial District Court, Washoe County; Kathleen M. Drakulich, Judge.

This appeal arises from a condemnation action initiated by the Regional Transportation Commission of Washoe County (RTC).<sup>1</sup> The RTC sought to acquire one permanent easement and one temporary construction easement at 961 South Virginia Street, Reno, Nevada and one temporary construction easement at 999 South Virginia Street, Reno, Nevada. Both commercial parcels were owned by the John Iliescu, Jr. and Sonnia Iliescu 1992 Family Trust, of which John and Sonnia (hereinafter, collectively, Iliescus) are trustees. The RTC sought the easements in furtherance of the Virginia Street Bus RAPID Transit Extension Project, which was intended to, among other things, connect the RTC's RAPID transit line to the University of Nevada, correct ADA sidewalk deficiencies, and improve traffic

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<sup>1</sup>We recount the facts only as necessary for our disposition.

flow. The project also included the elimination of an existing driveway cut, which therefore eliminated access from Virginia Street to the 999 South Virginia Street parcel.

The district court found that the RTC sought to condemn the property for a public use authorized by law and that the RTC's taking of the property was necessary for that public use. It therefore granted the RTC immediate possession and occupancy of the property in exchange for a cash deposit to be held by the court during the pendency of the litigation. Thereafter, the only issue remaining was the just compensation due to the Iliescus as a result of the RTC's acquisition of the easements.

The parties participated in a case conference and submitted a joint case conference report. Per the report, the final date to amend pleadings would be February 7, 2020. The final date for initial disclosures of expert witnesses would also be February 7, 2020. The final date for disclosures of rebuttal expert witnesses would be March 9, 2020. Finally, the parties agreed that discovery would close on May 8, 2020. The district court incorporated the agreed-upon dates into its scheduling order.

The RTC timely disclosed its expert witness, Scott Griffin. However, the Iliescus failed to disclose their expert witness by the February 7, 2020 deadline. After the deadline for initial expert witness disclosure had passed, the RTC brought a motion in limine seeking to preclude the Iliescus from calling an expert witness at trial (hereinafter motion in limine re expert witness). The Iliescus opposed the RTC's motion. They admitted that they had missed the expert disclosure deadline but argued that their failure should be excused for good cause. They explained that their counsel had suffered an accidental fall and the resulting treatments had caused an unintended scheduling error whereby they missed the expert disclosure

deadline. The Iliescus' opposition was not supported by an affidavit or declaration supporting that their attorney's injury or treatments had hindered their ability to disclose an initial expert. In their opposition, the Iliescus requested a 21-day extension in which to disclose an expert. Six days later, the Iliescus filed a second opposition to the motion in limine re expert witness, identical to the first but requesting a 45-day extension instead of the original 21-day request. Neither of the Iliescus' oppositions specified the date on which the requested extension would expire. In their oppositions, the Iliescus stated that they had already retained an expert witness by the time they filed their opposition but they did not identify the expert.

The RTC filed a reply to the Iliescus' oppositions explaining that their counsel never mentioned any medical issues and in fact had participated in preparing the joint case conference report, setting trial, and conducted numerous conversations with the RTC about the case with no issues regarding his inability to participate. Ten days later, the RTC filed a "supplemental reply" in support of its motion in limine re expert witness. The RTC informed the court that 45 days from the original February 7 deadline had passed without the Iliescus disclosing an expert. As such, the RTC argued that even if the district court granted the Iliescus' extension request, it should still find that they had failed to timely disclose an expert witness based on their own proposed deadline. The Iliescus did not object to the RTC's supplemental filing. They also did not make an attempt to clarify from what date they intended their extension request to begin to run.

The district court granted the RTC's motion in limine re expert witness in part and denied it in part. It explained that counsel's accidental fall and resulting treatments were a sufficient basis for a finding that the



scheduling error was the result of excusable neglect. However, the court noted that the Iliescus had failed to disclose their expert witness even within their proposed 45-day extension. It therefore denied their extension request as moot. As a result, the Iliescus were barred from disclosing and presenting an initial expert witness in the case. The district court did extend the close of discovery to May 22, 2020. Curiously, it also extended the deadline for disclosing rebuttal experts to May 22, 2020. The Iliescus never requested that the district court reconsider its ruling to deny them an initial expert.

Before the district court ruled on the RTC's motion in limine re expert witness, the RTC moved the district court for summary judgment. It explained that the Iliescus had the burden of proving the value of the land taken and any severance damages pursuant to NRS 37.110. Because the Iliescus had failed to disclose their initial expert witness, the RTC argued, they could not meet their burden of proof. Therefore, it continued, the RTC's evidence of value—Mr. Griffin's appraisal that the property taken was worth \$15,955—was uncontroverted and the RTC was entitled to judgment as a matter of law.

The Iliescus opposed the RTC's motion for summary judgment. They argued that the district court had permitted them to present rebuttal expert testimony and that they had timely disclosed a rebuttal expert, Anthony Wren. They argued that Mr. Wren's appraisal report directly rebutted the RTC's expert's report, creating an issue of material fact.

During the pendency of its motion for summary judgment, the RTC brought three additional motions in limine. First, it filed a motion in limine requesting that the district court preclude the Iliescus from calling any witnesses or presenting any other evidence at trial (hereinafter motion in limine re evidence). The basis for its motion in limine re evidence was the

Iliescus' failure to make any disclosure whatsoever under NRCP 16.1(a)(1). The Iliescus did not oppose the motion and the district court therefore granted it. As a result, the Iliescus were precluded "from calling any witnesses in their case in chief and from presenting any other evidence at trial."

Next, the RTC filed a motion in limine to preclude the Iliescus from offering any rebuttal experts in the case (hereinafter motion in limine re rebuttal). The RTC argued that the Iliescus had belatedly disclosed their initial expert witness rather than properly disclosing a rebuttal witness. Because the Iliescus were merely trying to repackaging their expert witness as a rebuttal expert, the RTC argued, they should be precluded from using Mr. Wren to rebut the RTC's appraisal of their property. The Iliescus opposed the motion, but did not do so in a timely manner. When it eventually granted the RTC's motion for summary judgment, the district court "vacated" the still pending motion in limine re rebuttal as moot.

Finally, the RTC filed a motion in limine to preclude the Iliescus from presenting any testimony or argument related to inverse condemnation, a claim they never asserted (hereinafter motion in limine re inverse condemnation). The RTC explained that Mr. Wren acknowledged in his report that there was no permanent taking as to 999 South Virginia Street, but that he estimated damages related to the elimination of access to that property at \$162,500. Because such damages would have to be asserted as part of an inverse condemnation counterclaim that the Iliescus never asserted, the RTC argued, any evidence related to the elimination of access to 999 South Virginia Street would be irrelevant, would confuse the jury, and would therefore cause prejudice to the RTC. The Iliescus failed to

oppose this final motion in limine, and the district court therefore granted it.

In August 2020, the district court granted the RTC's motion for summary judgment. It ruled that the Iliescus would be unable to satisfy their burden of proving the value of the property taken or any severance damages by relying upon a rebuttal expert alone. Further, the district court found that the Iliescus had altogether failed to disclose a rebuttal expert but had rather tried to pass their initial expert as a rebuttal expert. In granting summary judgment, the district court ordered the RTC to pay the Iliescus \$15,955 as just compensation for the taking. The Iliescus now raise multiple issues on appeal. We address each in turn.

*The district court did not abuse its discretion in granting the RTC's motion in limine re expert witness*

The Iliescus argue that in granting the motion in limine re expert witness the district court prevented them from establishing just compensation for the RTC's taking.<sup>2</sup> As such, they contend the district court's order essentially functioned as an order of default judgment against them. They argue that this sanction was unduly harsh such that no reasonable judge would have imposed a similar sanction, and therefore constituted an abuse of discretion. We disagree.

We review a district court's ruling on a motion in limine for an abuse of discretion. *Whisler v. State*, 121 Nev. 401, 406, 116 P.3d 59, 62 (2005). Similarly, we review a district court's ruling to exclude expert testimony for an abuse of discretion. *Leavitt v. Siems*, 130 Nev. 503, 509,

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<sup>2</sup>It is undisputed that the property owners bear the burden of proving the value of just compensation for their property in a condemnation action. *See State ex rel Dep't of Highways v. Pinson*, 66 Nev. 227, 236-38, 207 P.2d 1105, 1109-10 (1949).



330 P.3d 1, 5 (2014). Absent a showing of “palpable abuse,” we do not interfere with a district court’s exercise of its discretion. *M.C. Multi-Family Dev., LLC v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008). A palpable abuse of discretion occurs only if “no reasonable judge could reach a similar conclusion under the same circumstances.” *Leavitt*, 130 Nev. at 509, 330 P.3d at 5.

Under the Nevada Rules of Civil Procedure, parties must disclose expert witnesses in accordance with the district court’s scheduling order. See NRCP 16.1(a)(2)(E)(i). Failure to do so may result in the district court imposing sanctions upon the noncomplying party. NRCP 16.1(e)(3); NRCP 37(b). Specifically, if a party fails to disclose its expert witness pursuant to Rule 16.1(a), the district court may issue an order prohibiting that party from using that expert witness. NRCP 16.1(e)(3)(B); NRCP 37(b).

Here, the Iliescus failed to timely disclose their expert witness pursuant to the district court’s scheduling order. In their opposition to the RTC’s motion in limine re expert witness, the Iliescus argued that their failure to disclose their expert witness was due to excusable neglect and requested a 45-day extension to make that disclosure. Notably, the Iliescus did not specify from what date the requested 45-day extension should run, if granted. Additionally, the Iliescus stated that they had already retained their expert witness by the time they filed their opposition but they did not identify the expert.

In granting the motion in limine re expert witness, the district court found that the Iliescus’ counsel’s accidental fall and resulting treatments were a sufficient basis for a finding that excusable neglect caused the missed disclosure deadline. However, the district court noted that the Iliescus had failed to disclose their expert witness even within their proposed

45-day extension.<sup>3</sup> It therefore denied their extension request as moot. NRCP 16.1(e)(3)(B) and NRCP 37(b) specifically provide for the sanction that the district court ordered in this case. The district court's scheduling order was issued over six months before the initial expert disclosure deadline. After missing that deadline, the Iliescus subsequently failed to disclose their expert within their initial 21-day extension request or their subsequent 45-day extension request, from the initial deadline, the date used by the district court.<sup>4</sup> As such, a reasonable judge could have concluded

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<sup>3</sup>It is undisputed that the Iliescus did not finally disclose their expert witness until April 8, 2020, well after filing their opposition to the motion in limine re expert witness.

<sup>4</sup>The Iliescus argue that the RTC's supplemental reply in support of its motion in limine re expert witness was a "rogue filing" that the district court should never have considered and that the RTC misrepresented the Iliescus' extension request to the district court by stating that it should run from the initial deadline date. However, they never requested that the district court reconsider its order granting the motion in limine re expert witness. And they concede that they did not argue below that the RTC's supplemental reply was a rogue filing nor that the RTC misrepresented their extension request to the district court.

Issues not argued below are "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). Despite their failure to preserve these issues, the Iliescus would nevertheless have us reach their merits based on the constitutional nature of takings claims. While it is true that the general waiver rule may be relaxed to review constitutional issues, see *Desert Chrysler-Plymouth, Inc. v. Chrysler Corp.*, 95 Nev. 640, 643, 600 P.2d 1189, 1190-91 (1979), the Iliescus did not argue an infringement of their constitutional rights until their reply brief. Their opening brief addresses only the alleged procedural deficiencies below. Therefore, we decline to consider the arguments they did not preserve for appeal. See *Weaver v. State, Dep't of Motor Vehicles*, 121 Nev. 494, 502, 117 P.3d 193, 198-99 (2005)



that excluding the Iliescus from presenting expert testimony at trial was an appropriate sanction for their failure to disclose an expert witness in accordance with the district court's order. See *Leavitt*, 130 Nev. at 509, 330 P.3d at 5. The district court therefore did not abuse its discretion in granting the RTC's motion in limine precluding the Iliescus from presenting expert testimony.<sup>5</sup>

The Iliescus point to Nevada's preference for resolving cases on the merits and argue that the district court's refusal to allow them to disclose their expert witness was the primary reason this case was not resolved on the merits. However, in granting the RTC's motion for summary judgment, the district court expressly relied on its order granting the RTC's unopposed motion in limine re evidence—which precluded the Iliescus from calling any witnesses or presenting any evidence at trial—to reach its conclusion that the Iliescus would be unable to meet their burden of proving just

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(explaining that this court need not consider issues raised for the first time on appeal in appellant's reply brief).

<sup>5</sup>The Iliescus take umbrage with the fact that the district court found, sua sponte, that extending the deadline for disclosing their expert witness beyond 45 days would result in substantial prejudice to the RTC. However, neither NRCP 16.1(e)(3) or NRCP 37(b) requires a finding that the noncompliant party's excusable neglect was not harmless before imposing an exclusionary sanction. In this manner, NRCP 16.1(e)(3) and NRCP 37(b) are dissimilar to NRCP 37(c)(1), which provides for a mandatory sanction unless the noncompliant party's failure to disclose a non-expert witness was substantially justified or harmless. Therefore, the district court was within its discretion to issue the sanction to exclude the ability to retain an initial expert without considering whether the Iliescus' failure to do so was substantially justified or harmless.

compensation.<sup>6</sup> The Iliescus' actions, or lack thereof, and the resulting orders are the reasons this case was not resolved on the merits. Those orders were based on the Iliescus' failure to make any disclosures whatsoever pursuant to NRCP 16.1(a)(1) and NRCP 16.1(a)(2). Nevada's policy in favor of resolving cases on the merits, while favoring the Iliescus, does not permit litigants to "disregard process or procedural rules with impunity." *Lentz v. Boles*, 84 Nev. 197, 200, 438 P.2d 254, 256-57 (1968). Therefore, we cannot conclude that the district court acted outside the broad range of discretion it could exercise in granting the RTC's motion in limine re expert witness.

*The district court did not abuse its discretion in granting the RTC's motion in limine re inverse condemnation*

The Iliescus argue that they should be allowed to assert a claim for inverse condemnation. They contend that because the deadline for amending pleadings and the deadline for initial disclosure of experts were the same, arguably the same excusable neglect applied to their failure to bring an inverse condemnation claim that applied to their failure to disclose their expert witness. The Iliescus acknowledge that they did not oppose the RTC's motion in limine re inverse condemnation. They argue that opposing the motion would have been futile considering the district court had already precluded them from disclosing an expert witness—a ruling which they argue was fatal to their case. The Iliescus concede that they did not make these arguments below. Therefore, we need not consider their arguments on appeal. *See Old Aztec Mine, Inc.*, 97 Nev. at 52, 623 P.2d at 983. Even if we were to consider the Iliescus' arguments, the district court did not abuse

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<sup>6</sup>The Iliescus do not challenge the district court's order granting the RTC's motion in limine re evidence on appeal.

its discretion in granting the RTC's unopposed motion in limine re inverse condemnation.<sup>7</sup> See DCR 13(3) ("Failure of the opposing party to serve and file his written opposition may be construed as an admission that the motion is meritorious and a consent to granting the same.").

*The district court did not err in granting the RTC's motion for summary judgment*

The Iliescus argue that the district court's order granting the RTC's motion in limine re expert witness formed the basis on which the district court granted summary judgment in favor of the RTC. Because they argue that that order should be reversed as an abuse of discretion, they argue that the district court's order granting summary judgment should likewise be reversed. The RTC counters that the motion in limine re expert witness was properly granted and that granting summary judgment was proper.

We review a district court's order granting summary judgment 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 on file demonstrate that there exists no genuine dispute of material fact and that the moving party is entitled to judgment as a matter of law. *Id.*; see also NRCF 56(a). In rendering a decision on a motion for summary judgment, all evidence must be viewed in the light most favorable to the

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<sup>7</sup>In light of our disposition we do not reach the merits of the RTC's assertion that the Iliescus could only seek damages for the elimination of access to 999 South Virginia Street by pursuing a claim for inverse condemnation. See *Greenlaw v. United States*, 554 U.S. 237, 243 (2008) ("[I]n both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decisions and assign to courts the role of neutral arbiter of matters the parties present.").



nonmoving party. *Wood*, 121 Nev. at 729, 121 P.3d at 1029. The party moving for summary judgment must meet its initial burden of production to show there exists no genuine dispute of material fact. *Cuzze v. Univ. & Cmty. College Sys. of Nev.*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007). Where the nonmoving party would bear the burden of persuasion at trial, the movant can satisfy its burden of production by “pointing out . . . that there is an absence of evidence to support the nonmoving party’s case.” *Id.* at 602-03, 172 P.3d at 134 (internal quotation marks omitted). The nonmoving party must then “transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact.” *Id.* at 603, 172 P.3d at 134.

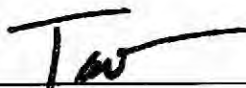
In Nevada, the landowner bears the burden of proving the market value of the property that the State acquired by a preponderance of the evidence. *Pappas v. State, Dep’t of Transp.*, 104 Nev. 572, 575, 763 P.2d 348, 350 (1988). To constitute “just compensation,” that market value should be determined by reference to the highest and best use for which the land is available and for which it is plainly adaptable. *Clark County v. Alper*, 100 Nev. 382, 386-87, 685 P.2d 943, 946 (1984).

As we have explained, the district court acted within its discretion when it precluded the Iliescus from calling any witnesses or presenting any evidence at trial. Because the Iliescus bore the burden of proving just compensation, the RTC satisfied its burden of production by pointing out an absence of evidence to support the Iliescus’ case, and by presenting its own valuation as to just compensation for the Iliescus’ property. *See Cuzze*, 123 Nev. at 602-03, 172 P.3d at 134. The Iliescus were limited to presenting rebuttal expert testimony alone. They concede they could not meet their burden of proof on damages to be presented in their

case in chief based on rebuttal expert testimony. As such, the RTC's evidence of the value of the Iliescus' property was uncontroverted. Therefore, the district court did not err in granting summary judgment in favor of the RTC. Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>8</sup>

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Kathleen M. Drakulich, District Judge  
Hon. Jonathan L. Andrews, Settlement Judge  
Maupin, Cox & LeGoy  
Gezelin & Associates  
Woodburn & Wedge  
Washoe District Court Clerk

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<sup>8</sup>To the extent the parties raise arguments we have not specifically addressed, we need not consider them in light of our disposition or we find them unpersuasive.