IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN ILIESCU, JR., AND SONNIA ILIESCU, TRUSTEES OF THE JOHN ILIESCU JR. AND SONNIA ILIESCU 1992 FAMILY TRUST; JOHN ILIESCU, JR., an individual; and SONNIA ILIESCU, an individual,

Appellants,

vs.

THE REGIONAL TRANSPORTATION COMMISSION OF WASHOE COUNTY; ROE CORPORATIONS 1-20; and DOES 1 through 40 inclusive,

Respondent.

Supreme Court No. 83212

APPELLANTS' OPENING BRIEF

Appeal from the Second Judicial District Court of the State of Nevada
in and for the County of Washoe County
Case No. CV19-00459

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RULE 26.1 DISCLOSURE STATEMENT

I certify that the following are persons and entities described in NRAP 26.1, that must be disclosed:

The Appellants are JOHN ILIESCU, JR., AND SONNIA ILIESCU, TRUSTEES OF THE JOHN ILIESCU JR. AND SONNIA ILIESCU 1992 FAMILY TRUST; JOHN ILIESCU, JR., an individual; and SONNIA ILIESCU, an individual.

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These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

DATED this 30th day of December, 2021.

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JURISDICTIONAL STATEMENT

This is an appeal from a final Summary Judgment, and from an award of costs and fees entered thereon. VI JA1148-1159; VI JA1252-1253; VII JA1365-1373; JA1387-1389. The basis for appellate jurisdiction herein is NRAP 3A(b)(1). Notice of Entry of the final Summary Judgment was served on June 10, 2021. VI JA1160-1176. Notice of Appeal was filed within thirty (30) days of that Judgment on July 9, 2021. VI JA1252-1255. Subsequently, an Order and Judgment Awarding Costs and Attorneys' Fees was entered on October 18, 2021. VII JA1365-1373. An Amended Notice of Appeal, also appealing from said Judgment regarding costs and attorneys' fees was then entered herein on October 21, 2021. VII JA1387-1389. The two appeals were then consolidated into this Case No. 83212 by Order of this Court dated December 2, 2021.

ROUTING STATEMENT

This case is presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(12), as the Plaintiffs' case below sought injunctive relief.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the district court erred in dismissing the Appellants' Injunction Claim for Relief under NRCP 12(b)(5), on the grounds that any damage to their real Property had already occurred and thus could not be remedied by an injunction to *preserve* the status quo, whereas Nevada law allows injunctive relief to be available to *restore* the status quo.

II. Whether the district court erred in dismissing the Appellant's Waste Claim for Relief under NRCP 12(b)(5), by invoking an overly narrow reading of NRS 40.150.

III. Whether the district court erred in dismissing the Appellants' breach of contract and related claims under NRCP 56, by ruling that no contract existed between Appellants and the RTC, when in fact a stipulation agreeing to certain conduct did exist between said parties, and a stipulation is a species of contract under Nevada law.

IV. Whether the district court erred in dismissing the Appellants' breach of contract and related claims under NRCP 56 by ruling that they could not demonstrate their damages, whereas this ruling ignored that damages would not be necessary for an injunctive or declaratory remedy and also prevented a ruling on the merits of the case, despite legitimate grounds existing for discovery delays.

V. Whether the district court erred in dismissing the Appellants' Trespass claim under NRCP 56, as the Appellants had not waived Trespass damages.

VI. Whether the district court erred in dismissing the Appellants' declaratory relief claim under NRCP 56, as the court's ruling misconstrued the facts.

VII. Whether the district court erred in its award of costs and fees.

STATEMENT OF THE CASE

Appellants (sometimes hereinafter, the "Iliescus") own real property located at 642 East Fourth Street, at the intersection of East 4th Street and Park in Reno, Nevada (the "Property"). I JA0002; I JA0127. The Washoe County Regional Transportation Commission ("RTC" or the "Respondent") condemned a small portion of the Property and received related access easements for the placement of a power transformer, via an earlier condemnation lawsuit, known as Washoe

County Court Case No. CV16-02182 (the "2016 Condemnation Suit"). I JA0001-0011; I JA0053-0065; I JA0098-0108. More particularly, in that earlier suit, the RTC was granted: (i) a permanent easement on which to locate a transformer in a small corner of the Iliescus' Property, only approximately 68 square feet large (I JA0099, ll. 5-9) as shown by a legal description and surveyor's sketch thereof located at I JA0103-0104; (ii) an overlapping public utility access easement, on the same corner, also relatively small as comprising only approximately 288 square feet (I JA0099, ll. 5-9) as shown by a legal description and surveyor's sketch thereof located at I JA0105-0106; and, (iii) finally, a *temporary* construction easement, adjacent to the permanent easement, which was only approximately 88 square feet in size (I JA0099, ll. 5-9), as shown by a legal description and surveyor's sketch thereof located at I JA0107-0108. This permanently condemned area in question was so small that the Iliescus were initially to be paid only $2,030.00 for the condemnation. I JA0067-0068.

A November 29, 2016 Stipulation (I JA0053-0065) entered in that earlier 2016 Condemnation Suit, and the Order thereon (I JA0066-75) (which was later referenced in the final stipulation for the entry of a Final Order of Condemnation therein,[1] and which led to that "Final Order of Condemnation and Judgment"[2]) contemplated and agreed that, "[d]uring construction of the Project, RTC and Real

[1] I JA0078, ll. 5-7.
[2] I JA0098-0108.

Parties in Interest agree to cooperate so as to minimize interference between construction of the Project and Real Parties in Interests' use of and access to the remaining land on APN 008-244-15." I JA0055, ¶ 11; ll. 13-15. Because this Order was entered into via stipulation, and because it indicated what the parties to said stipulation were "agree[ing]" to do, it was a contract. *See, e.g.*, *Red Rock Valley Ranch, LLC v. Washoe County*, 127 Nev. 451, 460, 254 P.3d 641, 647 (2011) ("A written stipulation is a species of contract."); *Lehrer McGovern Bovis, Inc., v. Bullock Insulation*, 124 Nev. 1102, 1118, 197 P.3d 1042, 1042 (2008) ("In construing a stipulation, a reviewing court may look to the language of the agreement along with the surrounding circumstances. . . . [S]tipulations are of an inestimable value in the administration of justice, and valid stipulations are controlling and conclusive.") (quoting *Taylor v. State Indus. Ins. Sys.*, 107 Nev. 595, 598, 816 P.2d 1086, 1088 (1991)).

But the RTC (or its vendors) did not comply with this contractual agreement, and did not, during construction, limit themselves and their vendors' access to the relatively small portion of the Iliescus' Property on which a temporary construction easement had been granted; and did not cooperate with the Iliescus to minimize their impact on the remaining portions of the Property which were not subject to the three small condemned areas. Instead, they parked heavy equipment all over the Iliescus' Property, including in areas far beyond the temporary construction

easement site, and informed the Iliescus that they could not use or access their Property due to the dangers posed by this equipment, for several months at a time, off-again, on-again, for approximately two years, thus preventing the Iliescus' use of the non-condemned portions of their Property, during this time period, without any of the cooperation or minimized interference the RTC had promised. I JA0128-0129; IV JA0754-0756; IV JA0792-0794. The Iliescus claim that RTC's (or its vendors') equipment, also permanently damaged the site, creating cavities and non-level areas of pavement at the site, including in areas of the Property which were far outside the areas condemned in favor of the RTC, even temporarily. *Id*.

Based thereon, the Iliescus brought this lawsuit for breach on February 27, 2019 (I JA0126-0147). A Motion to Dismiss certain of the claims in the suit was filed on September 25, 2019. I JA0162-0170, with an Opposition (I JA0174-0182) and Reply brief (II A0183-0190) being filed with respect thereto. The parties then entered into a Stipulation for Plaintiffs to withdraw certain of their claims. I JA0192-0195. After an Order accepting this Stipulation was entered (I JA0196-0197), the Plaintiffs filed a "First Amended Complaint" on January 21, 2020 (I JA0200-0218), which included causes of action seeking injunctive relief (I JA0203-0205) including "Such other and further relief as this Court deems just and equitable" (I JA0217, at l. 27); and causes of action for breach of contract,

contractual and tortious breach of the covenant of good faith and fair dealing; fiduciary duty/trust; declaratory relief; waste; conversion; trespass; civil conspiracy; and negligence. I JA0205-0216.

After the filing of said Amended Complaint, a Supplemental Motion to Dismiss was then filed, as to certain of these still extant claims. I JA0219-0225. An Opposition and Reply were then filed with respect thereto (II JA02267-0242). An order then entered granting the Motion to Dismiss, and dismissing the Plaintiffs' claims for injunctive relief; breach of fiduciary duty/trust; waste; conversion; and tortious breach of the covenant of good faith and fair dealing. II JA0256-0257. This left in place only the Iliescus' claims for breach of contract; contractual breach of the covenant of good faith and fair dealing; declaratory relief; trespass; civil conspiracy; and negligence.

Discovery commenced early, before pleadings were finalized (I JA0171-173) and the Iliescus and their trial counsel (who is not their appellate counsel) found it difficult to meet certain of the discovery deadlines, based on severe health concerns which their counsel was suffering from during the litigation, including "serious neurological and spinal injuries he sustained soon after the case was filed" (II JA0432 at ll. 7-11). These issues were exacerbated by the elderly Iliescus' own health concerns and the dangers of meeting to discuss the case during Covid-19 lockdowns (II JA0433).

The Defendant's counsel took full advantage of these delays, filing motions in limine or for summary judgment on the basis of missed discovery deadlines. II JA0508 *et seq.*; IV JA0688 *et seq.*; IV JA0709 *et seq.* This zealous advocacy (V JA0969) proved effective, as summary judgment was obtained due to a lack of Plaintiff's discovery, even though a month still remained to complete discovery. V JA0971 at ll. 1-2.

This was after a variety of discovery motions had been filed, asserting that the Iliescus and their counsel were not timely responding to various discovery requests which had been served upon them. *See, e.g.*, II JA0243 *et seq.*; II JA0401 *et seq.*; II JA0416 *et seq.*; etc. The Iliescus are not certain why their trial counsel failed to timely provide certain discovery responses, but believe and aver, upon information and belief, that the neurological nature of his health concerns may have affected his judgment.

The remainder of the Iliescus' claims, which had survived the motion to dismiss, including claims for breach of contract, were then dismissed via a Summary Judgment Order which was based in large part on the Iliescus having failed to provide expert testimony as to the amount of their damages. (VI JA1148-1139). The Iliescus now appeal the dismissal of their injunctive relief and waste claim under NRCP 12(b)(5), and of their breach of contract and related claims, and of their trespass and declaratory relief claims under NRCP 56.

SUMMARY OF THE ARGUMENT

The district court erred in dismissing the Iliescus' injunctive relief claims, given that an injunction may issue to restore the status quo, not just to preserve it. The district court also erred in dismissing the Iliescus' contract claims, where a contract did exist between the Iliescus and the RTC, which the court failed to recognize, and where an injunctive remedy existed to enforce that contract. The district court also erred in certain of its other rulings, as described herein.

STATEMENT OF FACTS

A. The Iliescus Real Property Is Subjected to Eminent Domain Proceedings in an Earlier Case.

On October 21, 2016, a Verified Complaint In Eminent Domain was filed against the Iliescus' property as Washoe County District Court Case No. CV16-02182. I JA0001-0037. Said 2016 Condemnation Suit is *not* the lawsuit from which an appeal is sought in this matter. Nevertheless, the facts on which the present suit were based arise out of said earlier 2016 Condemnation Suit proceeding, and the district court judge's summary judgment ruling, appealed in the present case, explicitly referenced the outcome of that earlier eminent domain proceeding as dispositive herein (VI JA1158, ll. 7-10), such that, in order to evaluate the appeal from said Summary Judgment Order, it is necessary and appropriate for this Court to take judicial notice of certain of the filings and orders in said earlier suit, which are therefore included as part of the Joint Appendix in

this case, namely as Joint Appendix I JA0001-JA0125. (A Joint Appendix, rather than an Appellant's Appendix, is submitted herewith, as Appellants' counsel, prior to filing, obtained Respondent's counsel's input on the index to the Appendix, and then added certain documents thereto, pursuant to Respondent's counsel's request, such that Respondent's counsel had no objection to the inclusion of materials from the earlier 2016 Condemnation Suit proceeding in the Joint Appendix.)

B. <u>This Court Should Take Judicial Notice of the Earlier 2016 Condemnation Suit</u>.

This Court may take judicial notice of proceedings which are integrally related to the present appeal, such as facts stemming from or established in an earlier action which is not the subject of this appeal. For example, in *Mack v. the Estate of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009), this Nevada Supreme Court determined, in the appeal from certain rulings in a divorce proceeding, during which proceeding the husband had shot his wife, leading to a separate criminal proceeding, that this Nevada Supreme Court would review and would take judicial notice of facts arising from that earlier criminal proceeding, noting as follows: "[W]e may take judicial notice of facts generally known or capable of verification from a reliable source, whether we are requested to or not. NRS 47.150(1). Further, we may take judicial notice of facts that are '[c]apable of accurate and ready determination by resort to sources whose accuracy cannot

reasonably be questioned, so that the fact is not subject to reasonable dispute.' *See*, NRS 47.130(2)(b)." *Id*.

This Court in its *Mack* decision went on to state that, "under some circumstances, we will invoke judicial notice to take cognizance of the record in another case" and to determine "if a particular circumstance" warrants this position, "we examine the closeness of the relationship between the two cases" such that this Court has taken judicial notice of other state court and administrative proceedings "when a valid reason presented itself." *Id*. 125 Nev. at 91-92, 206 P.3d at 106. Based thereon, this Court in its *Mack* decision determined that it would take judicial notice, in the divorce proceeding appeal, of the outcome of the related murder trial in which the deceased stood to gain financially from the killer, because of the close relationship between the murder case, to the divorce proceeding then before it. *Id*.

Likewise, in the present case, the Summary Judgment appealed from herein was based, in part, on what the Judge believed, and stated in his Summary Judgment Order, had occurred in the earlier condemnation proceeding. For example, the Court's Summary Judgment Order repeatedly indicated that no contract existed between the RTC and the Iliescus (VI JA1156, ll. 10-19; VI JA1158, ll. 5-8), even though, in the earlier 2016 Condemnation Suit proceedings, the Iliescus and the RTC entered into a stipulation specifically

"agree[ing]" to certain measures (I JA0055, ll. 13-15), thus in fact forming a contract. *Red Rock Valley Ranch, LLC v. Washoe County*, 127 Nev. 451, 460, 254 P.3d 641, 647 ("A written stipulation is a species of contract."). Moreover, the Summary Judgment appealed from herein asserted that "any issue involving RTC's 'condemnation activities' was already adjudicated in the previous condemnation action between the parties." VI JA1158, ll. 6-10. The accuracy of this district court statement is contested in this appeal.

Thus, the original 2016 Condemnation Suit proceedings involving the Iliescus' real Property, which gave rise to the instant proceedings, in which the Iliescus took issue with how their real Property had been damaged during the RTC's installation and undergrounding of various public utilities as a result of those prior proceedings, are so closely related to the instant appeal, that it is appropriate for this Court to take judicial notice of those earlier proceedings. For this Court to do so, it is appropriate to allow the records from those proceedings to be included as part of the Joint Appendix in this matter.

The closeness of this relationship is demonstrated by the fact that the judicial determination appealed from in this action specifically references the earlier 2016 Condemnation Suit proceeding outcome as grounds for the Summary Judgment entered in this action. VI JA1158, ll. 6-10. In order to determine whether the district court's determination that said earlier proceeding supported summary

judgment in this case, this Court must be able to be aware of and take judicial notice of what occurred in that earlier case, just as the district court apparently did, based on the summary judgment order's references to said earlier proceeding. *See also*, *Cannon v. Taylor*, 88 Nev. 89, 92, 493 P.2d 1313, 1314-15 (1972) (Supreme Court would take judicial notice of an attorney general's opinion in reviewing a request for rehearing of the Supreme Court's original opinion); *Occhiuto v. Occhiuto*, 97 Nev. 143, 145, 625 P.2d 568, 569 (1981) (the Nevada Supreme Court in reviewing a case involving a divorced couple who subsequently reconciled, after which a new lawsuit was filed arising out of the prior settlement agreement, and on certain loan transactions relating thereto, upheld the lower court's taking judicial notice of the original divorce proceedings); *State Farm Mut. v. Comm'r of Ins. Co.*, 114 Nev. 535, 539, 958 P.2d 733, 735 (1998) (during administrative agency proceedings involving the correct interpretation of a Nevada statute regulating insurance rate hikes, which led to a district court restraining order against the insurance commissioner enforcing its ruling on this topic, the Supreme Court took judicial notice of a summary judgment which had issued in a separate declaratory relief case, which had been filed as a separate proceeding, for declaratory relief as to the meaning of the involved statutes.).

C. Three Small Easements, One of them Temporary, Are Granted the RTC.

During the course of said prior 2016 Condemnation Suit case, the following salient events occurred: Following the filing of the Verified Complaint (I JA0001-0037) and the Defendants' filing of an Answer thereto (I JA0050-0052), the parties entered into a Stipulation, on November 29, 2016, for the entry of an Order for Immediate Occupancy pending entry of Judgment (I JA0053-0065). Said Stipulation acknowledged that the Iliescus were the current fee simple owners of the subject real property at issue in the eminent domain litigation; that the RTC was exercising its power of eminent domain for the purposes of acquiring a permanent easement, a public utility easement, and a temporary construction easement related to the RTC's construction of the 4th Street/Prater Way Complete Street and BRT Project (the "Project"), which included undergrounding existing (previously above-ground) utilities within the Project area and other improvements. I JA0054, ll. 2-6. The Stipulation further indicated that the areas involved in the permanent easement, the right of way, and the temporary construction easement sought in said case were attached as Exhibit 1 to the Stipulation (I JA0054, ll. 7-12), which Exhibit 1 (I JA0059-65) described and showed a small right-of-way permanent easement area of only approximately 68 square feet (I JA0060-61); a right-of-way of only approximately 288 square feet (I JA0062-0063); and a temporary construction easement of only approximately 88

square feet large (I JA0064-0065). This was such a small area that the initial appraised value of the property to be condemned was only $2,030.00 (I JA0056, ll. 1-4).

In the Stipulation, the Iliescus and RTC agreed on certain conduct which would govern the relationship between the RTC and the Iliescus moving forward, on the "remaining land" outside the easement areas, which agreement included a stipulation that: "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 Real Parties in Interests' use of and access to the remaining land on APN 008-244-15." I JA0055 at ¶11, ll. 13-16. This agreement between the RTC and the Iliescus stipulated that an order could issue, directing the "RTC and Real Parties in Interest and their agents to cooperate so as to minimize interference between use of the Property in the construction of the Project and Real Parties in Interests' use of and access to the remaining portions of APN 008-244-15." (I JA0055, ¶2; ll. 20-22). Subsequently, and based on said prior Stipulation, an Order for Immediate Occupancy Pending Entry of Judgment was in fact issued on December 1, 2016. I JA0066-0075, which reiterated this same requirement on the part of the RTC. I JA0068 at ll. 12-15.

Thereafter, the parties to the 2016 Condemnation Suit, who are now the parties to this appeal, executed a Stipulation for an Entry of a final Order of

Condemnation and Judgment, which was entered on April 18, 2018 (I JA0076-0097), which led to a Final Order of Condemnation and Judgment (I JA0098-0108) which Final Order of Condemnation and Judgment indicated that the Property being acquired by the RTC through its power of eminent domain included "a permanent easement, a public utility easement, and temporary construction easement located upon portions of Washoe County Assessor's Parcel No. ('APN') 008-244-15" (I JA0099, ll. 5-8), which permanent easement, public utility easement, and temporary construction easement, are more fully set forth on Exhibit 1 to the Final Order (I JA0099, ll. 7-9), and continued to match that described above.

Thus, said Exhibit 1 to the Condemnation Order then set forth certain legal descriptions and drawings which demonstrated that the right-of-way permanent easement was in a corner of the Iliescus' Property at the intersection of East 4th Street and Park Street which continued to be only 68 square feet plus or minus large; that the area of the right-of-way was located on the same corner of the Iliescus' property in an area which continued to be only 288 square feet plus or minus large; and that the area of the temporary construction easement was adjacent to the permanent easement, and was in an area which continued to be only 88 square feet plus or minus large. I JA0102-0108.

The Iliescus were ultimately awarded $11,065.00 as compensation for these condemnations. I JA0100 at ll. 1-6; 17-20.

As the undergrounding work, and construction of the electrical transformer to be located within the permanent easement area then commenced, however, the RTC did not limit its access and use of the Iliescus' property solely to the tiny area of the temporary construction easement, nor did the RTC comply with its agreement to "cooperate so as to minimize interference between construction on the Project and Real Parties in Interests' use of the remaining land" within APN 008-244-15 (I JA0055 at ll. 13-16; I JA0068 at ll. 12-15). Rather, as the photographs of the vehicle traffic at the site during construction demonstrate (I JA0146-0147; I JA0754-0756; I JA0792-0794) the RTC "surcharged, abused and far exceeded any reasonable use of any temporary easement," and acted in such a manner as to "intentionally and without the permission of Plaintiffs [the Iliescus], on virtually every workday during the term of the Project, drove over and parked their respective vehicles, including personal vehicles, ranging from approximately 20 ton trucks, down to pick-up trucks, SUVs and automobiles on their Remaining Property, sometimes precluding Plaintiffs from using any portion of the Remaining Property" which "conduct occurred without the consent of [the Iliescus], and in fact, in total disregard of Plaintiffs' frequent objections to such an unauthorized and illegal use of the Remaining Property," notwithstanding that the

Iliescus "requested on many occasions the Defendant cease and desist in their respective use, abuse and damaging conduct on their Remaining Property," but the RTC "ignored [the Iliescus'] request." I JA0128-0129. This led to the filing of the February 27, 2019 Complaint initiating the instant lawsuit (I JA0126-0147), and of the subsequent Amended Complaint, reasserting these same allegations. I JA0200-0218.

ARGUMENT

A. The District Court Erred in Granting an Early Motion to Dismiss, Especially as to the Iliescus' Claims for Injunctive Relief and for Waste.

(i) Standard of Review.

A Motion to Dismiss should not be granted unless it appears beyond all doubt that a plaintiff could prove no set of facts which, if true, would entitle it to relief. *See*, *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). As this Court has explained: The standard of review for a dismissal under NRCP 12(b)(5) is "rigorous" as this Court "must construe the pleading liberally and draw every fair intendment in favor of the [non-moving party]. All factual allegations of the complaint must be accepted as true." *Vacation Village, Inc. v. Hitachi America, Ltd.*, 110 Nev. 481, 874 P.2d 744, 746 (1994) [citations and internal quotations omitted].

In reviewing a motion to dismiss, the court's "task is to determine whether or not 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 this question, "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, 858 P.2d 1258, 1260 (1993). *See also*, *Western States Constr. v. Michoff*, 108 Nev. 931, 840 P.2d 1220, 1223 (1992). The herein Amended Complaint easily met these standards, and the injunctions and waste claims set forth therein should not have been dismissed.

(ii) The Iliescus' Injunction Claims Should Not Have Been Dismissed Under NRCP 12(b)(5).

The district court dismissed the Iliescus' injunctive relief claims (II JA0256, l. 28), on the basis of the argument that the RTC had completed its work, and was not *currently*, entering, on, or still improperly accessing the Iliescus' Property, at the time the Motion to Dismiss was presented, such that there was no status quo in need of preserving or protecting, at that time. I JA0221. This dismissal was premature and unjust.

The Iliescus' injunction claim clearly set forth facts upon which injunctive relief could have been granted. It is entirely possible and even plausible that the RTC, during some future repair of the elements of the "Project" could again overstep their boundaries in accessing and damaging the remaining portions of the Iliescus' Property not subject to the granted easements, were they not permanently

enjoined from doing so, after a trial on the merits in the present suit. The Iliescus should have been allowed to present evidence in support of being granted such permanent injunctive relief.

Moreover, an injunction is not merely and solely appropriate in cases where an injunction will *preserve* an existing status quo, which has already been disrupted. Rather, injunctive relief may also be granted in order to *restore* an earlier status quo. This is especially true in cases involving damage to real property, or to the rights of real property owners, such as existed in the present case.

For example, in *Memory Gardens of Las Vegas Inc. v. Pet Ponderosa*, 88 Nev. 1, 492 P.2d 123 (1972), a defendant landlord cut off the water supply to a plaintiff tenant's pet cemetery, causing all of the cemetery's landscaping to die. The plaintiff sought injunctive relief, and the defendant made the same argument asserted by the RTC in the present case, namely, that the damage had already been done and, thus, it was too late for an injunction, "because the drying up of the grass and shrubbery had been accomplished and there remained no status quo to be maintained, and that the [claimant] had failed to show, at the time of the hearing" any then existing "irreparable injury." *Id*. 88 Nev. at 3, 492 P.2d at 124. This is the same exact argument successfully raised by the RTC in this case. I JA0221.

However, in the *Memory Gardens* case, this argument was rejected, by both the district court and on appeal to this Court, which reasoned as follows:

> Status quo in this case was the growing lawn, plants and trees and that could only have been accomplished by restoring the water to the land. Unless the water was restored to the land it would lie barren and the injury to the respondent and its lessees would continue. **Even if the act causing the injury has been completed before the action is instituted, a mandatory injunction may be granted to restore the status quo**. *City of Reno v. Matley*, 79 Nev. 49, 378 P.2d 256 (1963). . . .
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> . . . .
>
> **Any act which destroys or results in a substantial change in property, either physically or in the character in which it has been held or enjoyed, does irreparable injury which justifies injunctive relief**. [Citations omitted.] Rendering the pet cemetery barren and devoid of grass and shrubbery **and keeping it in that condition** was **an irreparable physical change**.

Id. 88 Nev. at 4, 492 P.2d at 124-25 [emphasis added].

Similarly, in the present case, the Iliescus contended below that the heavy equipment brought on to their Property resulted in "damages to the Property, both before, during and after the work" at issue, causing the need for restorative repairs (I JA0202), including in areas of their Property outside the areas which were condemned, leading to "permanent damage" thereto, and "physical damages to and destruction" of their real Property, for which they sought injunctive relief. I JA0203. Under a motion to dismiss standard, the Iliescus were entitled to have all of these factual allegations treated as true. Had the Iliescus been allowed to

present evidence on this question at trial, it is their contention they would have been able to demonstrate the veracity of these claims (and under the applicable standard of review, the motion to dismiss should not have been granted without assuming that the Iliescus could prove the necessary set of facts, entitling them to such relief).

Moreover, the Iliescus would have been entitled, under the *Memory Gardens* decision, to an order of permanent injunction, after trial, compelling and enjoining the RTC to *restore* their property to the state in which it had existed *before* the RTC's breach of the stipulated agreement it had entered into, in the earlier condemnation proceedings. Whether or not the RTC had in fact caused such permanent damage, needing to be repaired to restore the status quo, was a question of fact which a trier of fact should have been allowed to assess, after listening to the Iliescus' testimony, and seeing other evidence, as to the state of their parking area before and after the RTC's conduct. Such evidence would have included pre-construction photos of the site (IV JA0756), which could have been compared to the Iliescus' testimony of what the site looked like later; or to a jury's site visit, or to assessments of necessary post construction repair costs. VI JA1082.

Other examples of cases in which a mandatory injunction has issued in order to restore a real property owner's rights, notwithstanding that the suit seeking an injunction was brought after the damage to the property owner had been

accomplished, in full or in part, include *Leonard v. Stoebling*, 102 Nev. 543, 550-51, 728 P.2d 1358, 1363 (1986) (reversing district court failure to grant an injunction, and remanding with instructions to issue mandatory injunctive relief, in favor of homeowner whose view had been obstructed by architectural review committee's granting of a variance from restrictive covenant for house addition, and noting that the mandatory injunction to remove the new construction which blocked the claimant's view was appropriate even if the "offending structure must be removed in its entirety" given that mandatory injunctions may properly be "used to restore the status quo to undo wrongful conditions."). *See also, City of Reno v. Matley*, 79 Nev. 49, 378 P.2d 256 (1963) (mandatory injunction compelling City to construct road on easement in the manner required by agreement entered into with City upheld on appeal, notwithstanding that construction of road, in a manner which did not comply with agreement, had already commenced); *Hellerstein v. Desert Life Styles, LLC*, 2015 WL 6962862, *10 (U.S. Dist. Ct., Dist. Nev. 2015) (issuing an injunction compelling enforcement of reciprocal easement agreement which required maintenance of golf course, after golf course had been damaged by being fenced in and having water thereto turned off, under authority of "Nevada law" which indicates that "any act which destroys or results in a substantial change in property, either physically or in

the character in which it has been held or enjoyed, does irreparable injury which justifies injunctive relief.").

The Iliescus' injunction claims should not have been dismissed under NRCP 12(b)(5), as they had clearly stated a set of facts under which relief could have been legally afforded to them, and the fact that the damage had already been done was no bar to such restorative relief, under Nevada law.

(iii) The District Court Erred in Dismissing the Iliescus' Waste Cause of Action Under NRCP 12(b)(5).

The Iliescus' Amended Complaint included a cause of action for "Waste" under NRS 40.150 (I JA0210-0211), which the district court also dismissed under NRCP 12(b)(5). II JA0256-0257.

NRS 40.150 provides in pertinent part as follows: "If a guardian, tenant for life or years, joint tenant or tenant in common of real property commit 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." This cause of action was dismissed by the district court (II JA0257), on the basis of an argument that the RTC was not a guardian, tenant for life or years, joint tenant, or otherwise a tenant in common of the real property, and that NRS 40.150 therefore does not apply. I JA0222, at ll. 13-22.

It is respectfully submitted that this reading of the statute was overly narrow. Black's Law Dictionary defines "Tenant" as follows: "In the broadest sense, one

who holds or possesses lands or tenements *by any kind of right or title*, whether in fee, for life, for years, at will, or otherwise." *Black's Law Dictionary* (West Publishing Co. 6th Ed. 1990) [emphasis added]. Under this definition of a tenant, it is clear that the Defendant, who had been granted entry rights onto certain portions of the Iliescus' Property, both by Stipulation executed by an attorney representative of the Iliescus, and by an Order of the Court, was a tenant of said Property who was capable of committing waste on that Property under the language of the subject statute. For example, in the case of *Worthington Motors v. Crouse*, 89 Nev. 147, 390 P.2d 229 (1964), this Court applied NRS 40.150 to the conduct of a party whose interest in the property was that of a tenant *per autre vie*, or in other words a tenant for the life of another person, even though the statute does not specifically indicate that it applies to a tenant *per autre vie*.

Under the standard that a cause of action should not be dismissed unless the plaintiff can prove no set of facts which would entitle it to relief, it was premature for the district court to dismiss the Iliescus' waste cause of action on a Motion to Dismiss, before allowing the same to be tested through the discovery process and subsequent motion or trial. The district court's ruling in that regard should therefore be reversed.

B. The District Court's Summary Judgment Dismissal of the Iliescus' Breach of Contract and Related Claims must be Reversed Based on the Applicable Standards of Review.

(i) The Standard of Review.

This Court reviews summary judgment rulings *de novo*. *MB America Inc. v. Alaska Pacific Leasing Co.*, 132 Nev. Adv. Op. 8, 367 P.3d 1286, 1287 (2016) (the district court's order granting summary judgment is reviewed by the Nevada Supreme Court *de novo*).

In the present case, numerous genuine issues of material fact existed which should have prevented the summary judgment from being granted and should have allowed the Iliescus to have their day in court before a jury, as they had demanded, for purposes of adjudicating these questions of fact. VI JA1159 at ll. 4-5; III JA0626. Indeed, as demonstrated below, to the extent the district court based its rulings on certain findings of fact, it got those facts wrong.

(ii) The District Court Erred in Ruling on a Summary Judgment Basis, That No Contract Existed and Therefore Ruling Against the Iliescus' Breach of Contract Claims.

The district court's Summary Judgment ruling indicated that the Iliescus "have failed to prove the existence of a contract with RTC and have provided no evidence of damages." VI JA1156, at ll. 17-18. This included a ruling that the Iliescus had not shown "any of [the] elements" of a contract, meaning that there had been no showing of an "offer and acceptance, meeting of the minds and consideration," and that the Iliescus and the RTC had not been shown to have

"agreed upon the contract's essential terms." VI JA1156 at ll. 10-13, citing *Certified Fire Prot. Inc. v. Precision Construction, Inc.*, 128 Nev. 371, 378, 283 P.3d 250, 255 (2012). The court also ruled that "there is no evidence of any contract between RTC and Plaintiffs." VI JA1158 at ll. 5-7.

On that basis, the district court entered summary judgment dismissal of the Iliescus' breach of contract claim and related breach of the implied covenant of good faith and fair dealing claim. VI JA1156 at ll. 8-20.

The district court erred in these rulings, because a contract did in fact exist between the Iliescus and the RTC, who had entered into a stipulation in which they agreed to certain terms (I JA0055 at ¶11, ll. 13-15), which thereby became a contract between them. *Red Rock Valley Ranch, LLC v. Washoe County*, 127 Nev. 451, 460, 254 P.3d 641, 647 (2011) ("A written stipulation is a species of contract."). More particularly, in the earlier 2016 Condemnation Suit proceedings, the Iliescus and the RTC stipulated as follows: "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 Real Parties in Interests' use of and access to the remaining land on APN 008-244-15." I JA0055 at ¶11, ll. 13-16. This statement of what the Iliescus and the RTC were agreeing to do led to a Stipulated Order indicating and directing that the "RTC and Real Parties in Interest and their respective agents shall cooperate so as to minimize interference between

construction of the Project and Real Parties in Interest's use of the remaining land of Real Parties in Interest on APN 008-244-15" not affected by the easements granted under the order. I JA0068, Order ¶4; ll. 12-14. This was an enforceable contract. *DeChambeau v. Balkenbush*, 134 Nev. 625, 628, 431 P.3d 359, 361 (Ct. App. 2018) (ruling that a "written stipulation is a species of contract" and enforcing stipulation, as a contract, pursuant to general legal principles applicable to contracts). At the very least, there was a question of fact as to whether this stipulation created a contract, which should have prevented summary judgment from entering.

It cannot be said that this agreement lacked any offer and acceptance, as counsel for the parties to the eminent domain case obviously would have negotiated the terms of this stipulation before they entered into the same. Evidence that such negotiations had commenced long before that stipulation was entered was attached to the opposition to the motion for summary judgment. IV JA0811 (2016 letter from RTC noting that the "RTC's preference is to continue the negotiation process with you . . . .")

Nor can it be said that the stipulation lacked consideration. By entering into the subject stipulation, the Iliescus and the RTC were both able to avoid the costs and fees which a protracted court hearing would have necessitated, in which the RTC would have been required to put on evidence in support of the public

necessity of the easements being sought, and the other legal rulings which were instead stipulated to, which avoided great expense to the RTC. In lieu thereof, the RTC was able to obtain "An Order for Immediate Occupancy" (I JA0066) *early* and *immediately*, before the eminent domain proceedings were completed and without a hearing and before a final judgment later entered therein, all without the need of placing their surveyor witness on the stand. Indeed, that was the name of the stipulation: "Stipulation for the Entry of an Order for Immediate Occupancy Pending Entry of Judgment." I JA0053 at ll. 19-21. This was valid consideration in favor of the RTC.

For their part, the Iliescus were able to procure a promise that the initial condemnation value for those portions of their property which were being condemned could be further contested during subsequent court proceedings (I JA0055 at ll. 1-7), together with the promises as to the RTC's reasonable cooperation and "minimize[d] interference" with those "remaining portions" of their property not subject to the condemnation rulings. (I JA0055 at ll. 13-15 and ll. 20-22). This was also valid consideration, which is why the RTC should have been held liable when it then breached those promises.

Nor can it be said that there was no meeting of the minds as to the essential terms. The RTC got exactly what it wanted by way of those terms, including "immediate" access to the Property where work would be performed, and an

immediate order delineating the scope of its temporary and permanent easements and right of way (I JA0066-0075); and the Iliescus received the promise which they wanted (although that promise was later breached), namely, that the portions of their property which were not being condemned would be subject to only "minimize[d] interference" and the RTC would "cooperate" with them to ensure that occurred. I JA0068 at ll. 12-14.

The terms of this agreement were, moreover, included in the exhibits to the Opposition to the Motion for Summary Judgment. IV JA0808. The district court judge which granted Summary Judgment in the present case had apparently also himself reviewed the earlier 2016 Condemnation Suit proceedings, and believed himself to be aware of what had been "already adjudicated" therein. VI JA1158 at ll. 7-9. This reliance now gives this Court the right to review those district court rulings, which were incorrect: the court in the earlier 2016 Condemnation Suit proceedings had not in fact, ever already previously adjudicated whether or not the RTC abided by its promises.

(iii) The District Court Erred in Granting Summary Judgment Dismissal Ruling that the Iliescus' Contract Claims Must Be Dismissed due to their Counsel's Failure to Timely Produce a Damages Expert Witness.

RTC will no doubt argue that, even if the district court erred in failing to find the existence of the other elements of a contract, the Iliescus' contract claims were properly dismissed because their trial court counsel had failed to timely

produce evidence of damages from the breach of this contract, on which the district court ruled that expert testimony was necessary.

However, no warning was given to the Iliescus that expert testimony would be necessary on this point, and the Iliescus did have evidence of damages, in the form of non-expert testimony. VI JA1082; VI JA1069. In light of the Iliescus' and their counsel's ongoing health obstacles during the litigation, taking place in the context of an unprecedented pandemic, the Court's entry of Summary Judgment due to the Iliescus' counsel's misapprehensions about discovery deadlines (*see, e.g.*, VI JA1153 at ll. 21-24) violated the spirit of this Court's many rulings that cases should be adjudicated on the merits, where necessary.

More importantly, evidence of the amount of monetary damages would not have been necessary in any event, if the district court had, as noted above, allowed the Iliescus to retain their claim for injunctive relief. The RTC could simply have been enjoined to repair the damaged portions of the Iliescus' property under an injunction analysis, without the necessity of the Iliescus demonstrating the monetary losses they had suffered. This is what the City of Reno was enjoined to do in the *Matley* case, referenced above. Likewise, in the *Leonard* case, referenced above, there was no determination necessary as to how much money it would cost to remove the offending second story of the neighbor's home, as said neighbor was simply enjoined to tear it down.

(iv) The District Court Erred in Dismissing the Iliescus' Trespass Claims.

Furthermore, nominal damages could have been pursued on the Iliescus' trespass claim. The district court ruled that the Iliescus had waived the right to pursue nominal damages, in order to issue summary judgment against their trespass claim. VI JA1157 at ll. 13-15. But the stipulation referenced by the Court in that regard (which is found at I JA0192-0194) did not include a dismissal of the Iliescus' trespass claim, and did not expressly exclude nominal damages. Rather, the stipulation dismissed the Iliescus' claims for emotional distress and personal injury, such that they could not seek any medical expense claims, but would "limit their compensatory damages claims in this case solely to the property damage to their parking lot." I JA0192 at l. 27 through JA0193 at l. 3.

Nominal damages for "the property damage to their parking lot" should not have been treated as excluded under this stipulation, however, as nominal damages are a species of compensatory damages, which are allowable even in the absence of the type of personal injuries which the Iliescus had waived. For example the court in *Droge v. AAAA Two Star Towing Inc.*, 136 Nev. 291, 312, 468 P.3d 862, 880 (Ct. App. 2020) at fn. 17, explained as follows with respect to the nature of nominal damages: "While Romans and Shupp vociferously defend the summary judgment in their favor by asserting that the Droges did not suffer physical injury damages, it is notable that the Droges have tort claims for which physical injury

damages are not a requirement. For example, by way of their trespass claim, the Droges can pursue nominal damages or even damages for annoyance and discomfort. *See . . .*; *Parkinson v. Winniman,* 75 Nev. 405, 408, 344 P.2d 677, 678 (1959) (concluding that a nominal damages award was appropriate in the context of a trespass claim)."

In the present case, a nominal damages award would, at the very least, have put the RTC on notice that it is required to comply with Court Orders and Stipulations in the future, and might have allowed the Iliescus to seek costs and fees, at the end of trial, rather than being burdened with an award against them.

(v) The District Court Erred in Dismissing the Iliescus' Declaratory Relief Claims.

For the reasons stated above, the district court also should not have dismissed the Iliescus' declaratory relief claims. In dismissing those claims, the district court (again, erroneously), ruled that no contract existed between the Iliescus and RTC (VI JA1158 at ll. 5-7); asserted that the RTC's "condemnation activities" had already been adjudicated in the earlier condemnation suit (*id.* at ll. 7-9) when in fact, the RTC's failure to abide by the agreement made in that suit had never been adjudicated in that earlier suit; and averred that the Iliescus' ownership of their Property was subject to the RTC's easements for which the Iliescus had already received just compensation (*id*. at ll. 9-12), which completely

ignored that the instant suit had to do with the RTC's trespass on "remaining" areas of the Iliescus' Property on which *no* easement was awarded the RTC.

The district court also ruled against the Iliescus' Declaratory Relief Claim on the basis that no damages had been shown (*id*. at ll. 12-15) even though declaratory relief, by definition, does not require a showing of damages; and also ruled that the Iliescus had not shown the RTC "callously disregarded" the law (*id.* at ll. 13-15), even though the RTC had callously disregarded its agreement and a legal court order to cooperate with the Iliescus and minimize interference with their Property, especially those areas of their Property not subject to the condemnation award.

In short, the district court's ruling on the declaratory relief action was based entirely on the district court's understanding of and application of the earlier court's decisions in the earlier 2016 Condemnation Suit proceedings, but in fact got everything that actually happened (or did not happen) in those earlier proceedings precisely backwards, and should on those grounds be reversed. At the very least, questions of fact existed as to those earlier proceedings which should have prevented summary judgment dismissal of the Iliescus' declaratory relief claims.

C. The District Court Erred in Awarding Costs and Attorneys' Fees to the RTC.

The district court's substantive errors, set forth above, led that court to treat the RTC as the prevailing party in the action, and to award costs and fees to the RTC. VII JA1365-1373. But if the foregoing errors are corrected, the district court's award of costs and fees would also be set aside, and should therefore be set aside on that basis, at this time.

CONCLUSION

Based on the foregoing, the district court's pretrial Order of Dismissal, and its Summary Judgment Order should both be reversed, and its Judgment for costs and attorneys' fees based thereon, entered after Summary Judgment dismissal, should also be reversed. This case should be remanded to allow the Iliescus to bring their wrongfully and prematurely dismissed claims to jury trial.

DATED this 30th day of December, 2021.

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ATTORNEYS' RULE 28.2 CERTIFICATE

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2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 8,160 words.

3. Finally, I certify that I have read this Appellate 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 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 the

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DATED this 30th day of December, 2021.

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CERTIFICATE OF SERVICE

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