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 / 83756

APPELLANTS' REPLY 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

D. CHRIS ALBRIGHT, ESQ.
Nevada Bar No. 004904
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
801 South Rancho Drive, Suite D-4
Las Vegas, Nevada 89106
Tel: (702) 384-7111 / Fax: (702) 384-0605
dca@albrightstoddard.com
Counsel for Appellants

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I. RESPONSE TO RTC'S FACTUAL SUMMARY: RTC'S MISCHARACTERIZATION OF THE CONTRACT BETWEEN THE ILIESCUS AND THE RTC MUST BE REJECTED

A. Factual Summary and Review.

As demonstrated in Appellants' Opening Brief ("AOB"), the facts of this matter include the following events.

On October 21, 2016, a Verified Complaint in Eminent Domain was filed by Respondent (the "RTC") against Appellants (the "Iliescus"), as to certain of their real property, as Washoe County District Court Case No. CV16-02182. I JA0001-0037. The parties to that case entered into a stipulation and order for the RTC's immediate occupancy pending a final judgment. I JA0053-0065. Said stipulation acknowledged that the Iliescus were the current fee simple owners of the subject real property at issue in that litigation, and that RTC was exercising its power of eminent domain for the purpose of acquiring a permanent easement, a public utility easement (sometimes referred to as a right of way), and a temporary construction easement related to the RTC's construction of the 4th Street/Prater Way Complete Street and BRT Project (the "Project"). I JA0054, ll. 2-6. The stipulation further defined the extent and location of the easements to be granted the RTC, via drawings and legal descriptions attached as Exhibit 1 to the stipulation (I JA0054, ll. 7-12), which Exhibit 1 (I JA0059-65) described and showed a permanent

easement area of only approximately 68 square feet (I JA0060-61); a public utility easement of only approximately 288 square feet (I JA0062-0063); and a temporary construction easement of only approximately 88 square feet in size (I JA0064-0065). Thus, the vast majority of the Iliescus' subject parcel should have been unaffected by the condemnation or by the Project.

B. The RTC's Misconstruction of the Agreement.

In the stipulation, the Iliescus and RTC agreed on certain terms which were to govern their conduct. The RTC's Respondent's Answering Brief ("RAB") disingenuously mischaracterizes the nature of this agreement, and claims that any RTC conduct on the "remaining land" owned by the Iliescus, outside the granted easements areas, was somehow not implicated by this stipulated agreement, even if such conduct affected the Iliescus' access to and use of the non-condemned portions of their own parcel. *See, e.g.*, RAB at pp. 1-2; 5, and 12.

These characterizations do not accurately reflect the language of the stipulated agreement, which was clearly intended to protect the Iliescus' *use of* and *access to* the remainder of their owned parcel, outside the areas of the granted easements, from undue interference by the RTC. As such, the language in question was not meant to govern only what *the Iliescus* did or did not do, or could or could not do, on their said remaining land, but rather, was to protect the Iliescus' rights *to* access and *to use* said land, at all, free from unwarranted interference *by the RTC*

and its Project related activities: "During construction of the Project, RTC and [the Iliescus] agree to cooperate so as to *minimize interference* **between construction** of the [RTC's] Project and [Iliescus'] **use** of **and access to** [their] remaining land on APN 008-244-15." I JA0055 at ¶11, ll. 13-16. [Emphasis added.]

This agreement between the RTC and the Iliescus also stipulated that an order could issue, directing the "RTC and [Iliescus] **and their agents** to cooperate so as to minimize interference between use of the [easement] Property in the construction of the Project and [the Iliescus'] ... **use of and access to the remaining portions of APN 008-244-15**" which still belonged to the Iliescus (I JA0055, ¶2; ll. 20-22). [Emphasis added.] Based on said prior stipulation, an Order for Immediate Occupancy Pending Entry of Judgment was issued on December 1, 2016. I JA0066-0075. This Order reiterated these same agreed upon obligations, for the parties to cooperate with one another, so that the Iliescus would not unduly interfere with the RTC's Project, and so that *the RTC would not unduly interfere* **with the Iliescus' use of and access to their owned property**, outside the condemned areas. I JA0068 at ll. 12-15. As argued below (V1 JA1141-1142), this stipulation and resultant order constituted a contract.

Thereafter, the parties to the 2016 Condemnation Suit executed another stipulation for the entry of a final order of condemnation and judgment, which was entered on April 18, 2018 (I JA0076-0097), and led to a Final Order of

Condemnation and Judgment (I JA0098-0108), indicating that the easements being acquired by the RTC 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 easements were more fully described on Exhibit 1 to the Final Order (I JA0099, ll. 7-9), and continued to match that already described in the earlier stipulation. I JA0102-0108.

Meanwhile, in exchange for the Iliescus having not contested the granting of these easements, and having instead stipulated to the same, the RTC obligated itself and agreed to cooperate with the Iliescus, as indicated, to minimize any RTC interference with the Iliescus' access to and use of their remaining property, outside of and unaffected by the easements. I JA0068 at ll. 12-15. The RTC's assertions in the RAB, that the stipulated agreement in question somehow did not proscribe the RTC from using the Iliescus' remaining land in a manner which thereby prevented the Iliescus from accessing it and using it, simply cannot be reconciled with this actual language of the relevant stipulation and orders.

C. The RTC Breaches Its Obligations.

As the RTC worked on the Project, however, even after it had completed the specific work for which it had been granted a temporary construction easement on the Iliescus' property (I JA0077 at l. 27, through I JA0078 at l. 1), and had moved

on with other Project work, the RTC did not restrict its occupancy of the Iliescus' land to its one temporary or two permanent easements, and did not "cooperate" with the Iliescus, to "minimize" any "interference" with the Iliescus' "access to," or "use" of their "remaining [uncondemned] land" adjacent to the condemned areas, within APN 008-244-15 as the RTC had promised to do. I JA0055 at ll. 13-16; I JA0068 at ll. 12-15. Rather, the RTC essentially used the Iliescus' non-condemned parking lot as a staging area throughout the Project, and "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 [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 the Iliescus' remaining non-condemned property, "sometimes precluding [the Iliescus] from using any portion of [their own non-condemned] Remaining Property." I JA0128-0129; I JA0146-0147; IV JA0754-0756; IV JA0792-0794. Despite the RTC's contractual obligation to cooperate with the Iliescus, this "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," and, 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," which requests the RTC "ignored" in breach of its agreement to reasonably cooperate with the Iliescus to prevent just such interference. *Id.*

This led to the filing of the Iliescus' Complaint initiating this matter (I JA0126-0147), and of the subsequent Amended Complaint, reasserting these allegations. I JA0200-0218. Following these filings, the district court entered its Order of Dismissal under NRCP 12(b)(5), dismissing five of the Iliescus' causes of action (II JA0256-0257; AOB p. 6) and subsequently granted summary judgment dismissal of the Iliescus' remaining claims (VI JA1148-1159) and awarded the RTC certain costs and attorneys' fees. VII JA1365-1386. These consolidated appeals followed. VI JA1252-1255; VII JA1387-1389.

Notwithstanding the AOB's citation to legal authorities demonstrating that the stipulation formed a contract (AOB 4), the RTC argues, in its RAB (*e.g.*, at pp. 1-2; 5; 12, 23-24, 27), that it cannot be said to have violated any agreement with the Iliescus, since the use of the Iliescus' remaining non-condemned land, outside the easement areas, was outside of the scope of the contract, or that the stipulated agreement only dealt with *the Iliescus'*, not RTC's, use of this remaining non-condemned land. *Id.* But this argument is preposterous. Using someone else's land, to the exclusion of the land's owners, obviously prevents the owners' access to and use of that land for themselves. And this is what RTC and its agents promised not

to do, and then did anyway (IV JA0753-0756), and can be expected to continue to do with respect to their ongoing Project area access rights (I JA0077 at ll. 17-27), during anticipated ongoing and perpetual maintenance work. *Id.*

II. LEGAL ANALYSIS

A. The District Court's Rule 12(b)(5) Dismissal of the Iliescus' Claims for Injunctive Relief Cannot Stand.

(i) Standard of Review.

This Court reviews, *de novo*, a district court's order granting a motion to dismiss under NRCP 12(b)(5), under a standard of review pursuant to which the dismissal will not be upheld, unless it appears *beyond doubt* that the appellants/plaintiffs below, could have proven *no set of facts*, that would have entitled them to relief. *Jesseph v. Digital Ally, Inc.*, 136 Nev. 531, 533, 472 P.2d 674, 676-77 (2020). For purposes of such a review, this Court regards all factual allegations in a plaintiff's operative pleading *as true*, and draws *all inferences in favor* of said plaintiff. *Stockmeier v. Nevada Dept. of Corr. Physiological Rev. Panel*, 124 Nev. 313, 316, 183 P.3d 133, 135 (2008). Thus, dismissal was only proper if the allegations of the Amended Complaint were insufficient to establish the elements of any of the dismissed claims for relief, even if all of the allegations were presumed to be true, or if *no set of facts could be shown* which would entitle a plaintiff to relief. *Id.*; *Edgar v. Wagner,* 101 Nev. 226, 227, 699 P.2d 110, 111 (1985).

(ii) Injunctions Against Possible or Likely or Ongoing Future Misconduct Are Appropriate.

Demonstrating that this standard of review warrants reversal, the RTC's arguments with respect to the injunction cause of action which was dismissed under NRCP 12(b)(5) below, do not directly address the question of whether or not the Iliescus could have proven *any set of facts* that would have entitled the Iliescus to *any injunctive relief*, under their Amended Complaint pleading. Rather, the RTC relies on what are ultimately evidentiary challenges and factual arguments, more properly to be made at the end of a trial, not as the basis for precluding any suit from the outset under NRCP 12(b)(5).

For example, the RTC contends that an injunction against ongoing or future use of the Iliescus' remaining property was not warranted, where there was no basis to suppose that any of the conduct sought to be proscribed might continue to occur in the future, such that the injunction sought would have barred only "possible" future conduct. RAB 15. However, the likelihood of future harms and ongoing breaches is a factual question which, on a 12(b)(5) motion, was required to be resolved in favor of the claimants, such that this RTC argument must be rejected. Under a *de novo* NRCP 12(b)(5) review, it must be presumed that, had the Iliescus been able to present their case at trial, they could have demonstrated some "set of facts" as to the substantial likelihood of RTC's future breaches being more than a mere "possibility," such that the RTC's arguments should have been

rejected, and should now be rejected, under the appropriate and applicable standard.

Nor is this point solely academic. It is known that the RTC now controls a large transformer box and related equipment installed within the area of the Iliescus' Property on which the RTC now enjoys two permanent easements. It has already been ruled by a court of law that the RTC does have the right to continue to utilize these two easement areas, and is expected to do so, for "maintenance" and landscaping purposes. I JA0077 at ll. 17-27. Entropy is an inescapable fact of life, and it is therefore not a mere "possibility" but a complete certainty that the public equipment and public landscaping within the easements, as well as outside the easements but within the larger Project area, will inevitably need future maintenance and repair. *Id.* This is at the very least a set of facts which the Iliescus should have been presumed to be capable of demonstrating at trial under the standards applicable to an NRCP 12(b)(5) motion, which require a fatal *legal* flaw in a pleading's theory, *not* a *presumed factual* flaw.

An injunction compelling the RTC to simply comply with the stipulated contract it had previously entered into with the Iliescus, to "cooperate" with them, so as not to unduly interfere with the Iliescus' "access to" and "use" of their remaining property, outside of and adjacent to the permanent easements, during such future maintenance, repairs, landscaping or replacement work, known to be

anticipated (I JA0077), would therefore have been and would still be perfectly appropriate and necessary relief. At the very least, such relief should not have been precluded from the outset under a 12(b)(5) analysis, but instead, the question of whether the Iliescus were entitled to such relief should have gone to trial.

Nor is the RAB correct in arguing that, because such an injunction would focus on enjoining future conduct, the request for such a permanent injunction against such future conduct was legally untenable. In Nevada, it is perfectly appropriate to enjoin future conduct, whether or not prior conduct legally warranted any such relief. *See, e.g., Conway v. Circus-Circus Casinos, Inc.*, 116 Nev. 870, 8 P.3d 837 (2000) (reversing dismissal of plaintiffs' injunctive relief claims against employer's future and ongoing exposure of plaintiff employees to noxious fumes, even though dismissal of claims for past exposure was upheld).

(iii) Mandatory Injunctive Relief Warranted.

The RTC also contends that the Iliescus would not have been entitled to any mandatory injunction requiring RTC to restore the damage it had done upon their non-condemned property. However, Nevada case law is replete with examples of contrary rulings, including those cited by the Iliescus in the AOB, demonstrating that such restorative injunctions are completely appropriate as legally available relief in Nevada, in addition to and as a separate injunction from the viable injunction against any ongoing breaches discussed above.

See, e.g., Memory Gardens of Las Vegas Inc. v. Pet Ponderosa, 88 Nev. 1, 492 P.2d 123, 124-25 (1972) (where defendant landlord cut off the water supply to a plaintiff tenant's pet cemetery, causing all of the cemetery's landscaping to die, and then argued 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," upholding the district court's rejection of that argument, reasoning that the status quo in the case had been the growing lawn, plants and trees, and that "**[e]ven 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,**" because "**[a]ny 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**.") [Emphasis added.] *See also*; *Leonard v. Stoebling*, 102 Nev. 543, 550-51, 728 P.2d 1358, 1363 (1986) (mandatory injunctions may properly be "used to restore the status quo to undo wrongful conditions."); *City of Reno v. Matley*, 79 Nev. 49, 378 P.2d 256 (1963); *Hellerstein v. Desert Life Styles, LLC*, 2015 WL 6962862, *10 (U.S. Dist. Ct., Dist. Nev. 2015).

Similarly, in the present case, the Iliescus were entitled under an NRCP 12(b)(5) analysis to have the following allegations treated as true: that the equipment brought on to their non-condemned property resulted in "damages to the Property, both before, during and after the work" at issue, causing the need for restorative repairs (I JA0202 at ¶8), 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, including an injunction compelling the RTC to "correct or rectify" this damage. I JA0204, at ¶16.

The RTC's arguments presume that the Iliescus would not have been able to demonstrate facts warranting a mandatory injunction, but, again, such adverse presumptions are not appropriate under NRCP 12(b)(5), which requires the opposite factual presumptions. 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 afforded to them, had all factual presumptions been weighed in their favor as required by that rule. And, contrary to RTC's claims, that much of the preliminary damage had already been done, is no bar to such restorative relief, under the aforestated Nevada case law.

The RTC therefore also contends that these arguments were not properly preserved on appeal. *See, e.g.*, RAB at 16.

This contention should also be rejected however, as all intendments should be construed in favor of the non-moving party, and the Iliescus' pleading need not be so narrowly construed, under the actual record. For example, the Iliescus moved for leave to amend their injunction cause of action if it were not sufficiently pled, in response to the RTC's Motion to Dismiss (I JA0175 at l. 16; I JA0177 at ll. 5-12); and said Countermotion was ultimately never fully reached or ruled upon. Rather, while the Iliescus did file an Amended Complaint, --I JA0200-0218--this was done pursuant to a stipulation whereby the Iliescus dismissed, rather than adding to, certain of their allegations, in order to preclude certain medical-related discovery--I JA0198-0199-- and was a narrower amendment, agreed to by RTC, than what the Iliescus were otherwise seeking. The court later ruled on the motion to dismiss based on this amendment, rather than ever reaching the Iliescus' request to amend for other purposes. I JA0198-0199; II JA0256.

Nevertheless, even the Amended Complaint which was filed did seek "injunctive . . . relief" for the RTC's "destructive" conduct, which the Amended Complaint did allege had caused "damages to the Property[.]" Amended Complaint at ¶8; I JA0202 at ll. 8-13. Moreover, the Iliescus' Amended Complaint specifically indicated, as part of what it labelled its "Injunctive Relief" cause of action, that said prior paragraph 8 was incorporated by reference into that cause of action (I JA0203 @ ¶13); and also alleged that the RTC's conduct had led to "damage"

for which the Iliescus had "no adequate remedy at law" beyond an order to "correct or rectify" the effects of this conduct, including "irreparable damage" (I JA0204 at ¶16), such that injunctive relief was necessary to do so. I JA0204-0206.

Those pleading requests should be read broadly, not narrowly, in a Rule 12(b)(5) context, in determining whether the Iliescus properly preserved for appeal the question of whether they would be entitled to a mandatory injunction compelling the RTC to correct or rectify the situation and its results, such as other Nevada case law has allowed, if any set of facts allowing for such relief might be shown.

See, e.g., *Memory Gardens*, *supra*. *See also*, VI JA1145 at ll. 11-13, Iliescus' counsel arguing about the RTC's "duty to repair [the Iliescus'] parking lot."

This issue was properly preserved for appeal.

B. <u>The Iliescus' Waste Claims</u>.

Similarly, the district court should not have dismissed the Iliescus' waste claims under a Rule 12(b)(5) standard, based on an argument which overly narrowly construed the term "tenant" for purposes of Nevada's waste statute, for the reasons already set forth in the AOB, at pp. 23-24.

In response to those arguments, the RTC contends that, given the nature of the Iliescus' assertions, only a claim in trespass, rather than in waste, should stand.

RAB at 21. However, the RTC inconsistently argues that the Iliescus' trespass claims were also appropriately rejected below. RAB at 25-26. The RTC cannot have it both ways. By its own reasoning, if the RTC was not guilty of waste, then it was at least able to be sued for trespass, for which appropriate relief, including injunctive relief, should have been available, or at least not precluded until after a trial on the merits had occurred.

C. The District Court Improperly Granted RTC Summary Judgment Dismissal of the Iliescus' Contract Claims.

(i) The RTC's Arguments as to the Nature of the Agreement Should Be Rejected.

Summary judgment rulings are also reviewed *de novo* by this court. *MB America Inc. v. Alaska Pacific Leasing Co.*, 132 Nev. Adv. Op. 8, 367 P.3d 1286, 1287 (Nev. 2016). Under that standard, the summary judgment dismissal of Plaintiffs' contract claims should not stand.

The stipulation referenced and described in the Iliescus' First Amended Complaint, and in the AOB, describe a contract entered into between the Iliescus and the RTC. *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."). *DeChambeau v. Balkenbush*, 134 Nev. 625, 628, 431 P.3d 359, 361 (Ct. App. 2018) (a "written stipulation is a species of contract" enforceable as a contract, pursuant to general contract law principles). In order to support the district court's

granting of summary judgment with respect to the Iliescus' contract claims, the RTC misstates the nature of the Iliescus' argument, and pretzels together a twisted response combining a misreading of the subject contract, with a strawman's version of the Iliescus' argument.

More particularly, the RTC, at this portion of its brief, reiterates the theory that it was not, somehow, a breach of contract for the RTC to itself utilize the Iliescus' remaining (non-easement, non-condemned) property, even though the RTC had contractually obligated itself to not interfere with the Iliescus' use of and access to that very same property. RAB at 23-24. Despite repeatedly returning to this theme, the RTC never does explain how filling the Iliescus' parking lot with its own, or its hired vendors' and contractors' vehicles, was possibly consistent with, and not a violation of, the RTC's contractual obligation to not interfere with the Iliescus' use of and access to that same property, belonging to the Iliescus.

Unless the RTC has discovered some new law of physics, by which two bodies can now occupy the same space at the same time, this argument (that "I'm not interfering with your access to and use of your property in breach of my promise not to do so, I'm just using your property myself") must be rejected. There's more than one way to interfere with somebody's access to and use of their property, in breach of a contractual promise not to do so. Blocking their access in

front of an entry point is one way. But using that property yourself, to the owners' exclusion, is obviously another.

(ii) The RTC's Arguments as to the Court's Subject Matter Jurisdiction Should Be Rejected.

Furthermore, the RTC apparently contends that it would be improper for a district court in a second lawsuit to enforce a contractual stipulation entered into in an earlier lawsuit, and that the Iliescus were required to enforce the stipulation in the earlier case, solely "by motion to enforce" brought in that earlier suit. RAB at p. 25. However, this contention is legally inaccurate, as it is perfectly appropriate to enforce an earlier stipulation via a subsequent proceeding.

For example, in *Cohen v. State*, 113 Nev. 180, 181-182, 930 P.2d 125,126 (1997), "a formal, written stipulation executed by Cohen and the Gaming Control Board and 'accepted by the [Gaming] Commission'" had been entered into in an earlier proceeding, with the "intent and purpose . . . to resolve a complaint that the State had [previously] filed [in an earlier proceeding] against *Cohen* to revoke his gaming license at the Downtowner Hotel in Las Vegas, based on Cohen's felony conviction." *Id.* As part of this stipulation, "Cohen stipulated that he would relinquish his gaming license and pay a $2,000.00 fine and the State stipulated that Cohen's felony conviction would not be used as the 'sole grounds' to deny '*any* subsequent applications' that he might make for a restrictive gaming license." *Id.*

Thereafter, Cohen applied for a new license, which the Gaming Commission denied on the grounds it had previously stipulated *not* to use, in violation of that prior contractual stipulation. Cohen sued and the district court dismissed his lawsuit. On appeal, the Nevada Supreme Court reversed, and rejected the Gaming Commission's argument that the subsequent lawsuit was improper, reasoning instead as follows:

> The case now before us does . . . involve improper and unlawful repudiation of a stipulated agreement between the State and a license applicant. There appears to be no doubt here that **the State entered into a contract with Cohen, that the State legally obligated itself to refrain from doing certain things and that it later refused to honor that agreement. The courts cannot countenance such a cavalier trotting upon its citizens' legal rights**. . . . In the case before us, the State had wide discretion as to whether to enter into the contract, but **once the contractual relationship was established, performance of the contract . . . became an operational function, imposing upon the State the moral and legal duty to abide by its agreement**.

Cohen, 113 Nev. at 183-184, 930 P.2d at 127 (internal citations and quotation marks omitted; emphasis added).

In exactly like manner, the arguments raised in this case by the RTC, a political subdivision of the State of Nevada, claiming that the district court had no authority to review an agreement entered into by stipulation in a prior suit, between a private party and the RTC, must be rejected, in favor of upholding and recognizing the RTC's obligation to abide by its agreement, not only as a "moral and legal duty" but as an obligation which became an "operational function" of this

State agency, once the agreement was entered into. Applying this "operational duty" standard to the RTC's contract, also demonstrates that the range of remedies for a violation of this duty should not be so narrowly construed as the RTC now desires.

Nor does *Day v. Day*, 80 Nev. 386, 395 P.2d 321 (1964), cited in the RAB, which in any event involved the application of specific statutes applicable to divorce decrees, rather than civil stipulations and judgments, state differently. The *Day* decision simply upheld a litigant's right to enforce a divorce decree, and any contract statutorily incorporated therein, in the action wherein it was entered. But *Day* did not even address or reach, let alone resolve, the question of whether such a separate action would have been *allowed.*

This case, like the *Cohen* case involves the "improper and unlawful repudiation of a stipulated agreement" in this instance, between RTC and the Iliescus. There is no doubt here, just as there was no doubt in *Cohen* (or at the very least, the Iliescus should have been given the opportunity to prove at a trial), that the RTC entered into a contract with the Iliescus; that the RTC thereby legally obligated itself to refrain from doing certain things and that the RTC later refused to honor that agreement. These were also the truly stated facts in *Cohen*. Thus, just as in the *Cohen* case, this Court should likewise refuse to "countenance such a cavalier trotting upon its citizens' legal rights." Rather, once a contract had been

entered into between the RTC and the Iliescus, the RTC was duty bound to perform that contract as an "operational function," self-imposed upon the RTC, which then had a "moral and legal duty to abide by" its stipulated agreement.

See also, Williams v. City of North Las Vegas, 91 Nev. 62, 66, 541 P.2d 652, 655 (1975) (reversing dismissal of claims against City, where claims arose under contract City had entered into, which imposed broader specific duties on City than might be required under general tort law duty of care principles); *Coalville City v. Lundgren*, 930 P.2d 1206 (Utah Ct. App. 1997) (stipulation and order entered into in settlement of §1983 litigation,[1] was a proper subject for subsequent state court proceedings, to review and enforce various components of that prior stipulation between private entity and city, and to enforce or construe various provisions thereof.); *Trump v. Trump*, 128 N.Y.S. 3d 801 (NY Sup. Ct. 2020) (court accepted and reached a ruling in a suit arising from a "summons and verified complaint," and thus a new and separate suit, which invoked and alleged a breach of contract, and sought injunctive relief to enjoin contractual duties, under certain clauses of a

[1] Although the *Lundgren* decision is not entirely clear on this point, presumably any such §1983 litigation would have been in Federal court, and thus separate from the later Utah state court action.

stipulation signed by various parties in settlement of earlier litigation, concerning two family estates and numerous other intra-family disputes).[2]

Cases where it has been determined that a subsequent court should not hear disputes arising from a stipulation and order entered in an earlier suit, tend to be premised on facts which are not present herein, such as where the court in the earlier case has explicitly expressed its intention to retain continuing jurisdiction over any stipulated agreement, in its final order. *See, e.g., Houston v. Mercedes-Benz USA*, 711 S.E. 2d 585, 591 (W. VA. 2011) ("a district court wishing to retain continuing jurisdiction over a settlement agreement reached during proceedings over which it has presided after the case has been resolved and the litigation has completed must expressly state its intention to retain jurisdiction in its final dispositional order.")

In the present case, the final orders of the district court in which the stipulation was initially entered, made no such indication.

(iii) The RAB Argues that Summary Judgment Was Appropriate as a Discovery Sanction; But No Such Sanction, Preventing a Ruling on the Merits, Was Warranted.

The RTC also argues that the Iliescus' counsel's discovery failures, relating to timely producing a damages expert, nevertheless warranted summary judgment

[2] While the *Trump* decision ultimately did not grant the claimed relief, it reached this determination on the merits, not under a theory that the prior stipulation could only be enforced in the earlier suit.

dismissal of their contract claims. RAB 11, 24. This argument construes the summary judgment dismissal as actually being a discovery sanction, for the Iliescus' failure to treat their damages evidence, such as restoration bids, as expert testimony, timely and properly designated as such. This may actually be a fairly accurate characterization of what really happened below.

However, the district court acted inappropriately in that regard, as the court did not engage in or provide the "express, careful and preferably written explanation of the pertinent factors" for dismissal as a discovery sanction, which this Court has indicated, in *Young v. Johnny Ribeiro, Inc.*, 100 Nev. 88, 93, 787 P.2d. 777, 780 (1990), it will "require" before district courts may properly dismiss a suit as a discovery sanction. The factors to be so evaluated, as described in *Young*, include "whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney" in a manner which prevents application of the "policy favoring adjudication on the merits." *Id.* The district court's draconian dismissal sanction would be impossible to justify under this factor, which the district court however never reviewed.

The district court's refusal to allow additional damages discovery to be produced, once it informed the Iliescus that only an expert would be allowed for that purpose, clearly penalized the Iliescus for their ailing counsel's failures, and prevented a ruling on the merits in this case. The dismissal on said grounds also

violated other *Young* factors, which the court likewise did not review, calling for an inquiry into whether any evidence had been "irreparably lost" (which had not occurred) and the extent to which the non-offending party would be "prejudiced" by some lesser sanction (which it would not have been at all). *Id.*

This litigation was pending during an extraordinary era, involving a global pandemic, in which the vast majority of other pending suits were subject to continuing and ongoing discovery and trial deadline extensions. But, notwithstanding that, and notwithstanding the elderly Iliescus' counsel's neurological health concerns (I JA0153; V JA0969; VI JA1150); and notwithstanding that the Iliescus had already been fined $10,000.00 for their counsel's discovery failures (RAB 2), the district court (as the RAB essentially admits) ultimately entered what, for all intents and purposes, amounted to a second, double, discovery penalty, of dismissal for failure to comply with the expert designation deadline, in order to grant summary judgment dismissal of their claims. VI JA1154 at ¶¶18-19. This draconian discovery sanction should not be upheld, where the district court did not pursue the analysis in support of such a determination, which this Court in *Young* indicated it would always "require." If nothing else, the summary judgment dismissal should be reversed and remanded in order for the district court to properly review the *Young* factors.

This is especially true in the context of this case: The RTC was allowed by the Iliescus to commence discovery earlier than normal in this suit, which delayed and led to confusion as to when any Rule 16.1 conference was to be held (V JA0950 at ll. 11-20; I JA0171-0173). But no similar accommodations were then granted to the Iliescus to take any longer for their discovery than might have normally been acceptable to the RTC. V JA0950-0951. Indeed, although the operative pleadings below were not finalized until March 23, 2020 (II JA0262 *et seq.*), the district court quickly thereafter precluded the Plaintiffs from utilizing certain evidence if it had not yet been produced by June 30, 2020, *just three months after the operative pleadings were finalized*, and *before* the 16.1 conference had been held. III JA0617, V JA1027; JA1040.

A new discovery stipulation was then entered, to mitigate against that harsh ruling (III JA0649-0651). But the effect of said stipulation on that prior order was later determined to be nugatory (VI JA1152 at ll. 23-28 to VI JA1153 at l. 1), after it came to light that the stipulation's effect had been misunderstood by the Iliescus' neurologically ailing counsel. V JA0951-0952; 0969; V JA1040. Other similar rulings followed; and, ultimately, despite the Iliescus' continued objections in opposing the summary judgment ruling, that the discovery period had not yet fully closed (IV JA0724 at ll. 2425; IV JA0725 at ll. 21-27; IV JA0726 at l. 8; IV JA0727 at ll. 10-17; etc.), summary judgment dismissal issued, on the basis of

inadequate damages evidence, even though the Iliescus only learned for the first time, in that dismissal Order, that their evidence of cost-of-repair damages would not be allowed, because it had not been formally designated as expert evidence. VI JA1134; VI JA1144 at ll. 2-14; VI JA1154 at ll. 9-15.

This was an unduly harsh punishment, under the *Young* factors, for the Iliescus' counsel's error in not timely realizing that the parking lot repair bids from, and anticipated testimony of, the contractors who had submitted these bids (at least two of which -- from Desert Engineering and Summit Engineering -- the RTC acknowledged having received --VI JA1129-1130), would not be deemed sufficient damages evidence, if said bidders had not been timely, and formally, designated as experts, even though their identities and bid amounts were disclosed. VI JA1123; VI JA1144 at ll. 2-8; VI JA1154 at ll. 9-15. Clearly, this harsh ruling is not sustainable under the *Young* factors, including the factor addressing this court's policy preference for decisions on the merits.

D. The District Court Erred in Dismissing the Iliescus' Trespass Claims on a Summary Judgment Basis.

As noted in the AOB, the district court ruled that the Iliescus had waived the right to pursue even 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 as including such a waiver (found at I JA0192-0194), did not include any express or implied exclusion of nominal damages. Rather, the stipulation withdrew

the Iliescus' claims for emotional distress and personal injury, and related medical expense claims, such that their monetary claims would be "limit[ed] . . . solely to the property damage to their parking lot." I JA0192 through JA0193.

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 injury medical claims which the Iliescus had waived. *See, e.g., Droge v. AAAA Two Star Towing Inc.*, 136 Nev. 291, 312, 468 P.3d 862, 880 (Ct. App. 2020) at fn. 17 (physical damage claims are distinct from, and not a necessary component of, nominal damages claims). *See also*, *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 response to these arguments, the RTC contends that the Iliescus asserted substantial, not merely nominal, damages. RAB at p. 27. But this argument ignores the basis on which the district court granted summary judgment relief on the trespass claim: namely, on the theory that any nominal damage claims had been expressly waived, which is simply not an accurate description of the stipulation relied on by the district court, which merely withdrew claims for medical damages, and did not even address, much less expressly, knowingly and

intentionally waive, nominal damages. I JA0192-0194. The RAB, therefore, does not actually address the record, or the AOB arguments on this point.

E. The District Court Erred in Granting Summary Judgment Dismissal of the Iliescus' Claims for Declaratory Relief.

The district court should not have granted summary judgment dismissal of the Iliescus' declaratory relief claims. Said dismissal was based on the district court's erroneous rulings as to the outcome of the prior eminent domain proceedings against the Iliescus, which the district court mischaracterized, then relying on said mischaracterization as the basis for its erroneous dismissal. *See*, AOB at pp. 32-33.

The RAB avers that it was nevertheless too late to enforce any contract after the Project had been completed; or reiterates the assertion that the scope of the stipulated contract had nothing to do with the RTC's misuse of the Iliescus' remaining property. RAB 27-28. But these contentions are already thoroughly addressed and refuted both in the AOB, and also above, including at pp. 8-21 hereof; in addition to being contrary to Nevada's six-year statute of limitations for written contract claims. The RAB provides no other basis for overcoming the AOB's points on this issue, and sets forth no logical explanation for why summary judgment dismissal of the Iliescus' declaratory relief claim was proper.

The declaratory relief cause of action may have real value to the Iliescus. For example, a judicial declaration of the RTC's ongoing duties and obligations to

cooperate with the Iliescus so as to minimize interference with their use of their uncondemned real property in the future, while not as effective as a permanent injunction, could at least provide the Iliescus with some basis for insisting on ongoing compliance by the RTC hereafter, even if the injunction dismissal is upheld, as the RTC continues to access and maintain the Project and the easements and the landscaping installed on or near the Iliescus' real property. I JA0077, ll. 17-27. Nor would such declaratory relief need to rely on any expert damages evidence.

F. The District Court's Award of Fees and Costs Should Be Reversed, Pending the Outcome on Remand.

The district court's substantive errors led that court to award costs and fees to the RTC, as a prevailing party. VII JA1365-1373. But if any of the foregoing errors are corrected, the district court's award of costs and fees would also be subject to reconsideration, at least to that extent, after subsequent proceedings on the merits on remand. Such awards should therefore be set aside at this time, pending the outcome after remand.

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III. CONCLUSION

This Court should reverse the district court's Rule 12(b)(5) dismissal order and Rule 56 summary judgment dismissal order, and remand this case for completion of the discovery period, and a subsequent trial on the merits.

DATED this 29th day of March, 2022.

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

D. CHRIS ALBRIGHT, ESQ.
Nevada Bar No. 004904
801 South Rancho Drive, Suite D-4
Las Vegas, Nevada 89106
Tel: (702) 384-7111
dca@albrightstoddard.com
Counsel for Appellants

ATTORNEYS' RULE 28.2 CERTIFICATE

1. I 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

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 6,829 words.

3. Finally, I certify that I have read this Appellants' Reply Brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I 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

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

DATED this 29th day of March, 2022.

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

D. CHRIS ALBRIGHT, ESQ.
Nevada Bar No. 004904
801 South Rancho Drive, Suite D-4
Las Vegas, Nevada 89106
Tel: (702) 384-7111
dca@albrightstoddard.com
Counsel for Appellants

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c), I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT, and that on this 30th day of March, 2022, the foregoing **APPELLANTS' REPLY BRIEF**, was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

Dane W. Anderson, Esq.
Bronagh M. Kelly, Esq.
WOODBURN AND WEDGE
6100 Neil Road, Suite 500
Reno, Nevada 89511
danderson@woodburnandwedge.com
bkelly@woodburnandwedge.com
Attorneys for Defendant, the Regional Transportation Commission of Washoe County

____ Certified Mail
__X__ Electronic Filing/Service
____ Email
____ Facsimile
____ Hand Delivery
____ Regular Mail

Michael J. Morrison, Esq.
1495 Ridgeview Drive, #220
Reno, Nevada 89519
venturelawusa@gmail.com
Trial Counsel for Plaintiffs

____ Certified Mail
__X__ Electronic Filing/Service
____ Email
____ Facsimile
____ Hand Delivery
____ Regular Mail

Andrea Bubbia

An employee of Albright, Stoddard, Warnick & Albright