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5-28-2020

### Rock Springs Mesquite II Owners' Ass'n v. Raridan, 136 Nev. Adv. Op. 28 (May 28, 2020)

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#### Recommended Citation

Coles, Madeleine, "Rock Springs Mesquite II Owners' Ass'n v. Raridan, 136 Nev. Adv. Op. 28 (May 28, 2020)" (2020). *Nevada Supreme Court Summaries*. 1304.

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## CLAIM PRECLUSION: WHAT AMOUNTS TO RAISING A CLAIM

### **Summary**

In an opinion drafted by Justice Stiglich, the Court reversed the district court's order granting a motion to dismiss on the basis of claim preclusion. The Court found that proposing a jury instruction cannot be considered raising a claim, even if the jury instruction is similar to the later claim. Further, the Court reiterated that claims must be based on the same facts and alleged wrongful conduct as the first proceeding to be subject to claim preclusion.<sup>2</sup> Where, as the case was here, an action is for declaratory relief, the Court concluded that no wrongdoing has been alleged, so it cannot be based on the same alleged wrongful conduct as the prior proceeding, and thus cannot be precluded.

### **Background**

Rock Springs Mesquite II Owners' Association owns a retaining wall that runs along the border of its property and a property formerly owned by Floyd and Gale Olsen. On the Olsens' side of the property, which is much higher in elevation, is an adjacent masonry wall that was owned by the Olsens.

#### *Case 1*

Rock Springs sued the Olsens, seeking monetary damages only, for trespass, nuisance, encroachment, and negligence, claiming that the Olsens' masonry wall caused damage to their retaining wall. Before the trial, Rock Springs submitted a proposed jury instruction stating that they were under no obligation to provide lateral support for the Olsens' masonry wall, as Rock Springs explained that it could not repair the retaining wall without causing the masonry wall to collapse. The district court rejected the proposed instruction, and the jury returned a verdict in favor of the Olsens.

#### *Case 2*

The Olsens then sold their property to Stephen and Judith Raridan. Rock Springs filed a declaratory relief action in the hopes of receiving a judicial declaration that it could remove the damaged retaining wall, even though that would possibly cause the Raridans' masonry wall to collapse. The Raridans moved to dismiss on the basis of claim preclusion, stating that Rock Springs' current action was or could have been brought in their case against the Olsens. The district court granted the motion to dismiss, finding that Rock Springs, in submitting the proposed jury instructions regarding lateral support in Case 1, raised essentially the same claim and that the proposed jury instructions were indicative of the fact that the claim could have been raised in the previous case.

### **Discussion**

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<sup>1</sup> By Madeleine Coles.

<sup>2</sup> *G.C. Wallace, Inc. v. Eighth Jud. Dist. Court*, 127 Nev. 701, 705, 262 P.3d 1135, 1137 (2011).

*Rock Springs' declaratory relief action in Case 2 was not brought in Case 1*

The Court rejected the district court's finding that the proposed jury instruction regarding the duty of lateral support equated to raising the same claim that Rock Springs was now attempting to bring. The Court explains that according to NRS 16.110(1), jury instructions are used only to instruct the jury on the law of a case, not to obtain actions for declaratory relief.<sup>3</sup> The Court further noted that even if the proposed jury instructions had been accepted by the district court, they would not have created a binding judicial declaration on the lateral support obligations of each party. Therefore, Rock Springs' proposed jury instruction in Case 1 did not amount to a raised claim for declaratory relief.

*Rock Springs' declaratory relief action in Case 2 could not have been brought in Case 1*

The Court next rejected the district court's finding that the fact that Rock Springs submitted the proposed jury instruction regarding the duty of lateral support meant that the claim could have been raised in Case 1. Though the Court noted that "all claims based on the same set of facts and alleged wrongful conduct that were or could have been brought in the first proceeding are subject to claim preclusion," it argued that was not the case here, as Rock Springs' current claim was neither based on the same facts as Case 1 nor alleging the same wrongful conduct as Case 1.<sup>4</sup>

The Court held that the facts in the current action involved an effort to repair a damaged retaining wall, which could lead to the destruction of a masonry wall, while the facts in Case 1 involved the damage a masonry wall did to the retaining wall. The Court further held that so long as the essential facts are different, a subsequent action based on facts that represent a continuation of the same course of conduct as the initial case should not be precluded.<sup>5</sup> This case was also not based on the same alleged conduct, the Court said, as Rock Springs' current action for declaratory relief did not allege any wrongful conduct at all. Additionally, the Court reasoned that Rock Springs had not yet determined that it needed to repair or remove the wall during Case 1, and had that case been resolved in Rock Springs' favor, the issue of lateral support obligations would have been irrelevant, so the current action could not have been brought simultaneously with their first claim.

Finally, the Court noted that precluding Rock Springs' claim in the current case would be at odds with the policy behind claim preclusion. Giving Rock Springs declaratory relief would not undermine the jury's verdict in Case 1, the Court said, and not giving it could lead to more future litigation as Rock Springs would not be able to adequately assess the risk involved in repairing their retaining wall.

**Conclusion**

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<sup>3</sup> NEV. REV. STAT. § 16.110(1) (2017).

<sup>4</sup> G.C. Wallace, 127 Nev. at 707, 262 P.3d at 1139.

<sup>5</sup> TechnoMarine SA v. Giftports, Inc., 758 F.3d 493, 499 (2d Cir. 2014).

Having determined that merely submitting proposed jury instructions cannot amount to raising a claim, and different facts and alleged wrongful conduct between the actions prevented the claim from being raised in the first proceeding, the Nevada Supreme Court found that Rock Springs' action for declaratory relief was not subject to claim preclusion. The Court reversed the district court's order granting the Raridans' motion to dismiss and remanded the case for further proceedings.

### **Dissent**

Justice Silver stated that she would have affirmed the district court's decision, arguing that Rock Springs could have requested declaratory relief in Case 1. She argued that the proposed jury instruction, among other statements made by Rock Springs during Case 1, indicated that Rock Springs was aware of its potential liability in repairing its retaining wall. She stated that there was no reason Rock Springs could not have also sought declaratory relief in Case 1 because a party is allowed to join claims for declaratory relief and damages in a single suit, and claim preclusion applies even if the type of relief sought in each case differs, so long as the other claim preclusion factors are met. In this case, Justice Silver found that Rock Springs' request for a declaration negating their liability in removing the retaining wall arose from the same set of facts and alleged wrongdoing upon which Rock Springs based their first case.