IN THE COURT OF APPEALS OF THE STATE OF NEVADA

VIORELIS PONTIKIS, AN INDIVIDUAL; AND MARGARET PONTIKIS, AN INDIVIDUAL, Appellants, vs. COLEMAN-TOLL, LLC, A FOREIGN CORPORATION, Respondent.	No. 65838
VIORELIS PONTIKIS, AN INDIVIDUAL; AND MARGARET PONTIKIS, AN INDIVIDUAL, Appellants, vs. COLEMAN-TOLL, LLC, A FOREIGN CORPORATION, Respondent.	No. 65945
VIORELIS PONTIKIS, AN INDIVIDUAL; AND MARGARET PONTIKIS, AN INDIVIDUAL, Appellants, vs. COLEMAN-TOLL, LLC, A FOREIGN CORPORATION, Respondent.	No. 66514

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court's summary judgment order and post-judgment order awarding costs and attorney fees. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

At issue in this case is whether expert reports and testimony regarding the present condition of a park and retaining wall create a genuine issue of material fact as to a builder's negligence at the time a park and retaining wall were built. Respondent Coleman-Toll developed

the Woodlands subdivision in Las Vegas. Appellants Viorelis and Margaret Pontikis (collectively the Pontikis) purchased a home within the Woodlands subdivision in October 2009; the house was first purchased by a third-party in 1999. Coleman-Toll also developed the adjacent park and water feature that were sold to Woodlands' Homeowners Association (HOA) shortly thereafter.[1] Coleman-Toll constructed a retaining wall separating the park from many of the residences, including the Pontikis'.

After moving into the residence, the Pontikis noticed water intrusion in several parts of the house. Coleman-Toll had a plumber investigate the water intrusion who determined the pipes in the concrete slab underneath the house needed to be rerouted. The rerouting, however, did not cure the water intrusion problem.

The Pontikis then hired experts to further investigate the problem. The experts concluded that water was most likely coming from the adjacent park through the retaining wall. This conclusion was based on the findings that the HOA was overwatering the park by 400 to 500%, the park contained broken sprinkler heads, the fountain contained internal leaks, and the turf areas contained a "low spot" causing water to accumulate and saturate the soil.

During discovery, experts hired by the Pontikis provided reports and depositions regarding the cause of the water intrusion. The

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[1]The HOA, along with other entities, remain as defendants in the case below.

experts agreed that the water was coming from the park and travelling through the retaining wall onto the Pontikis' property. The experts concluded the reason the water was travelling through the retaining wall was due to inadequate grading, inadequate drainage, the retaining wall not being deep enough, and inadequate water-proofing on the park side of the retaining wall.

After discovery closed, Coleman-Toll moved for summary judgment on the basis that the Pontikis provided no expert evidence that Coleman-Toll fell below the standard of care in developing the land or constructing the retaining wall. The district court summarily agreed and granted the motion in a one-line order. Additionally, the district court awarded Coleman-Toll $15,000 in attorney fees and costs as it was the prevailing party pursuant to NRCP 68. The Pontikis appeal this decision. The only issue on appeal is whether the Pontikis provided enough evidence as to the breach element to survive summary judgment.[2]

On appeal, a district court's grant of summary judgment is reviewed de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). In reviewing a motion for summary judgment, "the evidence, and any reasonable inferences drawn from it, must be viewed in

[2]The Pontikis also argue summary judgment was improper because Coleman-Toll owed a duty to the Pontikis, and because the statute of repose does not preclude their cause of action. Although the district court's order was not based on either of these arguments, we note that Coleman-Toll did not urge them in the district court, and does not now argue them on appeal; therefore, we deem these issues waived. *See Old Aztec Mine, Inc., v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

the light most favorable to the nonmoving party." *Id.* Summary judgment is appropriate when the pleadings and evidence demonstrate no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* "In a negligence action, summary judgment should be considered with caution." *Scialabba v. Brandise Const. Co., Inc.*, 112 Nev. 965, 968, 921 P.2d 928, 930 (1996). To be granted summary judgment in a Coleman-Toll must establish one of the negligence elements is clearly lacking as a matter of law. *See Id.*

The Pontikis argue the district court should not have granted summary judgment because they provided evidence that Coleman-Toll breached its duty at the time of construction. Coleman-Toll maintains this element is lacking as a matter of law because the Pontikis did not provide expert opinion that Coleman-Toll fell below the standard of care when it designed and constructed the park and retaining wall.

"One who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities." Restatement (Second) of Torts § 299A (Am. Law Inst. 1965). Expert testimony is required to establish the standard of care for the development, grading, and construction of property because it is not within the range of ordinary experience and comprehension. *See* Restatement (Second) of Torts § 179 (Am. Law Inst. 2015); *see also Pond Hollow Homeowners Ass'n v. The Ryland Group, Inc.*, 779 N.W.2d 920, 923-24 (Minn. Ct. App. 2010) (concluding summary

judgment was appropriate where plaintiff's expert opined developer fell below the standard of care, but did not establish the applicable standard of care).

Here, one of the Pontikis' experts, Dr. Brandys, opined that according to the HOA grading and drainage regulations (HOA rules "Section 7.2 Grading and Drainage"), the turf areas, shrubbery, and ground cover areas of the park should have a minimum of 1.5% slope for proper drainage. According to Dr. Brandys' report, these grading requirements were not met, and, as a result, the park has a depression area in the center of the grass. Dr. Brandys states the inadequate grading has led to water pooling and saturating the soil surrounding the retaining wall.

Dr. Brandys additionally opined that the retaining wall did not go deep enough to prevent water percolation from the park irrigation causing an elevated water table on the Pontikis' property. Moreover, another Pontikis expert, Ed Marsh, states in his report "[p]roper surface and subsurface drainage measures were not carried out during the design and/or construction process."

Viewing the Pontikis' expert reports and deposition testimony in the light most favorable to the Pontikis, we conclude the expert reports and deposition testimony create genuine issues of material fact as to whether Coleman-Toll breached the standard of care at the time it constructed the park and retaining wall. *See Pond Hollow Homeowners Ass'n*, 779 N.W.2d at 923 ("When qualified expert opinion with adequate

foundation is laid on an element of a claim, a genuine issue of material fact exists.") (internal quotation marks omitted). Therefore, summary judgment should not have been granted to Coleman-Toll. *See Wood*, 121 Nev. at 729, 121 P.3d at 1029; *Scialabba*, 112 Nev. at 968, 921 P.2d at 930. Because we determine summary judgment was inappropriate, we also conclude the award of attorney fees must be reversed. *See* NRCP 68.

Accordingly, we ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Silver

cc: Hon. Mark R. Denton, District Judge
Stephen E. Haberfeld, Settlement Judge
Alverson Taylor Mortensen & Sanders
Maupin, Cox & LeGoy
Eighth District Court Clerk