

IN THE SUPREME COURT OF THE STATE OF NEVADA

WPH ARCHITECTURE, INC., a  
Nevada Corporation,

Appellant,

vs.

EIGHTH JUDICIAL DISTRICT  
COURT and THE HONORABLE  
JESSIE WALSH,

Respondent,

and

VEGAS VP, LP, a Nevada Limited  
Partnership,

Real Party in Interest.

No. 54389

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REPLY APPENDIX Topic 6 Kindeman

Volume 1

**APPELLANT, WPH ARCHITECTURE, INC.'S**  
**REPLY APPENDIX**

Volume 1

JEAN A. WEIL, ESQ.  
Nevada Bar No. 006532  
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Nevada Bar No. 011253  
WEIL & DRAGE, APC  
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**TAB I**

1 **JEAN A. WEIL, California State Bar No. 128645**  
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8 Attorneys for Respondent,  
9 **WPH ARCHITECTURE, INC.**

10 **AMERICAN ARBITRATION ASSOCIATION**

11 VEGAS VP, LP, a Nevada limited partnership, ) **Case No. 79 110 Y 00128 07 HLT**  
12 )  
13 Claimant, )  
14 vs. ) **WPH ARCHITECTURE, INC.'S SPECIAL**  
15 ) **BRIEFING RE: ARCHITECTURAL**  
16 WPH ARCHITECTURE, INC., ) **STANDARD OF CARE OPINIONS**  
17 )  
18 Respondent. )  
19 )  
20 WPH ARCHITECTURE, INC., )  
21 )  
22 Counter-Claimant, )  
23 vs. )  
24 )  
25 VEGAS VP, LP, a Nevada limited partnership, )  
26 )  
27 Counter-Respondent. )  
28 )

21 Pursuant to Paragraph 15 of the Panel's February 10, 2008 Report of Preliminary Hearing  
22 and Scheduling Order<sup>1</sup>, WPH ARCHITECTURE, INC. ("WPH") submits Special Briefing  
23 requesting that the Panel preclude Gary Leach and Hank Falstad from testify on the standard of  
24 care of the WPH--the project architect--since neither of them are licensed architects in the State of  
25 Nevada. This Special Briefing is based on the following points and authorities.

26 ///

27  
28 <sup>1</sup> Paragraph 15 states: "Pursuant to the direction of the Panel, any other preliminary matters not otherwise provided for herein, shall be raised in writing to the AAA not later than Wednesday, October 15, 2008."

I.

**INTRODUCTION**

One of the percipient witnesses that VEGAS VP, LP ("Vegas VP") intends to call at the time of arbitration is Gary Leach, the construction manager hired by Vegas VP (the project developer). Although Mr. Leach will no doubt be able to testify as to matters within his own personal knowledge as the project construction manager, he is *not* a licensed architect in any state and, therefore, cannot provide a standard of care opinion with regard to the architectural services that WPH provided on the project. He simply does not have the requisite education, training, experience, and licensure as an *architect* to provide any such opinions regarding WPH's professional architectural services and whether WPH fell below the applicable standard of care. Further, Vegas VP has not designated Mr. Leach as an expert witness in this matter.

Vegas VP's only expert is Hank Falstad, AIA. Curiously, Mr. Falstad is *not* a licensed architect in the State of Nevada and, therefore, is not properly qualified to provide a standard of care opinion concerning WPH's professional architectural services in this architectural malpractice action.

II.

**AS A THRESHOLD REQUIREMENT FOR PROVIDING A STANDARD OF CARE  
OPINION AND TESTIMONY IN AN ARCHITECTURAL MALPRACTICE ACTION,  
THE WITNESS MUST BE A LICENSED ARCHITECT IN THE STATE OF NEVADA**

As noted above, neither Mr. Leach nor Mr. Falstad are licensed architects in the State of Nevada. In fact, Mr. Falstad's resume reveals that he is only licensed as an architect in Illinois and Wisconsin, but not Nevada (see Exhibit "A" attached). The Panel will recall that the subject project is located in Las Vegas, Nevada. As set forth below, NRS 50.275 and the related case law precludes both Mr. Leach and Mr. Falstad from providing any standard of care opinions regarding WPH's architectural services on the project.

///

///

///

1 NRS 50.275 provides:

2 If scientific, technical or other specialized knowledge will assist the trier of fact to  
3 understand the evidence or to determine a fact in issue, a witness qualified as an  
4 expert by special knowledge, skill, experience, training or education may testify to  
matters within the scope of such knowledge.

5 It is important to recognize that in this architectural malpractice action, the standard of care  
6 must be determined by an expert. See *Daniel, Mann, Johnson & Mendenhall v. Hilton Hotels*  
7 *Corporation*, 98 Nev. 113, 115 (1982). Vegas VP has not designated Mr. Leach as an expert  
8 witness and Mr. Leach is admittedly not licensed as an architect in any state.

9 As for Mr. Falstad, the Nevada Supreme Court has ruled that a court (in this case, the AAA  
10 Panel) may refuse to qualify an expert where the expert is not a licensed professional. *Cheyenne*  
11 *Construction, Inc. v. Hozz*, 102 Nev. 308, 311 (1986). In short, where a party asserts claims based  
12 on the alleged failure of a specialized area of construction, such as an architect, the party must rely  
13 upon a qualified, licensed professional to provide expert testimony to establish the applicable  
14 standard of care and alleged failure to meet that standard. Mr. Falstad does not meet this basic,  
15 essential requirement to provide any architectural standard of care opinions against WPH.


16 **III.**

17 **CONCLUSION**

18 For the foregoing reasons, WPH respectfully requests that the Panel preclude Mr. Leach  
19 and Mr. Falstad from providing any standard of care opinion regarding WPH's professional  
20 architectural services in relation to the subject project and this arbitration proceeding.

21 DATED: October 15, 2008

WEIL & DRAGE, APC

22  
23 By:   
24 JEAN A. WEIL  
25 TREVOR O. RESURRECCION  
26 Attorneys for Respondent,  
27 WPH ARCHITECTURE, INC.  
28

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 15<sup>th</sup> day of October, 2008, service of the foregoing  
**WPH ARCHITECTURE, INC.'S SPECIAL BRIEFING RE: ARCHITECTURAL  
STANDARD OF CARE OPINIONS** was made this date by e-mailing a true and correct copy of  
the same to:


Richard D. Daly, Esq.  
CADDELL & CHAPMAN  
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Houston, TX 77010  
Phone: (713) 751-0400  
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WEIL & DRAGE, APC

# **EXHIBIT A**

WPH0540



## RESUME

**Hank Falstad, AIA**  
**Managing Senior Associate**

**Registered Architect: Illinois#001-006609**  
**Wisconsin #2809**

**Member AIA (American Institute of Architects) #022775746**

**ICC - Certified Accessibility Inspector / Plans Examiner - #0001259-15 since 1997**

**Texas Department of Licensing and Regulation: Plan Review Services since 1997**  
**Inspection Services since 1997**

Access Technologies Services, Inc. specializes in the analysis of building compliance with federal regulations:

1. Americans with Disability Act (ADA)
2. Architectural Barriers Act (ABA)
3. Fair Housing Amendments Act (FHAA)
4. Department of Housing and Urban Development (HUD)
5. Department of Transportation - Federal Aviation Administration (DOT-FAA)

The analysis is accomplished by:

1. Plan Checks
2. Consulting
3. Audits

Access Technologies Services, Inc. to date has completed over 8,000 plan checks and over 1,500 audits on:

1. Airports
2. Apartments
3. Casinos
4. Condominiums
5. Convention Facilities
6. Event Centers
7. Hotels
8. Lodging Time Shares
9. Manufacturing Facilities
10. Municipal Buildings
11. Municipal Streets
12. Office Buildings
13. Parking Structures
14. Recreation Facilities
15. Restaurants
16. Retail Shops
17. Shopping Centers

The construction costs of these facilities are well over \$20 billion dollars.

**Hank Falstad, AIA**

Managing Senior Associate

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Hank Falstad has attended many technical conferences, some of which are:

1. ADA Business Connection Title III – Public Accommodation Training	1995
2. FHAA Training Seminar	1998
3. 1998 NAADAC Nation Conference Registration Form	1998
4. National Association of ADA Coordinators	1998
5. The Lodging Conference	1999
6. National Association of ADA Coordinators	1999
7. Designing for Accessibility in the Hospitality Industry	1999
8. Real Estate Finance and Investment Conference	1999
9. Guest Media announcement MGM & US Department of Justice	1999
10. 15 <sup>th</sup> Annual Hotel Industry Investment Conference	2000
11. The Lodging Conference	2000
12. National Association of ADA Coordinators	2000
13. 7 <sup>th</sup> Annual Nevada Construction Law Conference	2001
14. Designing Public Rights of Way Workshop	2001
15. ICSC Spring Convention	2003
16. National Association of ADA Coordinators	2003 – 2005
17. 2005 AIA National Convention	2005
18. ICC Design Professional Institute	2006
19. ICC Training	2006
20. National Association of ADA Coordinators	2006
21. 2006 AIA National Convention	2006
22. 2007 AIA National Convention	2007

Hank Falstad has been a speaker before groups, some of which are:

1. International Conference of Building Officials	1995
2. How to avoid litigation with American with Disabilities Act	1996
3. Nevada Governor's ADA/FHAA Accessibility Committee	1997
4. World Gaming Conference & Expo	1997
5. ADA – HUD Seminar	1998
6. ACEC Nevada, AIA LV & American Insurance Investment	1998
7. Coleman Homes – "Avoid Litigation"	1999
8. National Association of Women in Construction	1999
9. American Society of Safety Engineers	1999
10. UNLV	1999
11. Southwest Rotary	1999
12. The Lodging Conference	2000
13. 7 <sup>th</sup> Annual Nevada Construction Law Conference	2001
14. The Lodging Conference	2001
15. International Code Council, Las Vegas Chapter	2003
16. Stantec Consulting, Inc.	2004
17. Canepa, Riedy, & Rubino, Attorneys at Law	2005
18. City of North Las Vegas	2006

**Hank Falstad, AIA**  
Managing Senior Associate  
Page 3

Hank Falstad has combined his many years of experience as a former owner of an architectural firm (20 years) and a former owner of a construction firm (15 years) with his interest in the law to create this unique consulting service, his former work included:

1. Full architectural services
2. Full construction services
3. Feasibility studies.
4. Plant relocation analysis
5. Plant production analysis
6. Building cost analysis
7. Bid negotiations
8. Progress payments
9. Progress Inspections

Mr. Falstad has been selected twice to be the ADA Consultant to the Presidential Inauguration Committee in Washington, DC in 2001 and again in 2005.

He believes in public service and is active in Rotary. He has spent 10 ½ years in college and has a BS in Chemistry & Physics from the University of Wisconsin and a Bachelor of Architecture from the University of Michigan.

E:\8-2\ADA\Proposals\01 Standard Proposal\07 Exhibit B-Resume, 08.26.08.doc

**TAB II**

**Addendum – Cited Authority to WPH  
Architecture, Inc.’s Special Briefing Re:  
Architectural Standard of Care Opinions**

N.R.S. 50.275

**C**  
**WEST'S NEVADA REVISED STATUTES ANNOTATED**  
**TITLE 4. WITNESSES AND EVIDENCE**  
**CHAPTER 50. WITNESSES**  
**OPINIONS AND EXPERT TESTIMONY**  
**→ 50.275. Testimony by experts**

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge.

Current through the 2007 74th Regular Session and the 24th Special Session and technical corrections received from the Legislative Counsel Bureau through the 74th Regular Session (2007).

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Westlaw.

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Page 1

**C**

Supreme Court of Nevada.  
DANIEL, MANN, JOHNSON & MENDENHALL,  
Appellant,  
v.  
HILTON HOTELS CORPORATION, d/b/a Las  
Vegas Hilton, Respondent.  
No. 12190.

March 29, 1982.

Surveyor brought action against owner seeking to collect damages for breach of contract whereunder surveyor promised to perform all survey work and reports pertaining to construction of addition to owner's existing hotel and casino. The Eighth Judicial District Court, Clark County, James A. Brennan, J., entered judgment for owner, and surveyor appealed. The Supreme Court held that: (1) court properly instructed jury that surveyor's liability was founded upon implied duty to perform in workmanlike manner; (2) expert testimony was not required to prove breach of duty; (3) trial court did err by not submitting to jury issue of whether loss of profits was reasonably foreseeable; and (4) there was no error in award of interest on damages for remedial work.

Reversed and remanded.

West Headnotes

**[1] Contracts 95 ⚡353(6)****95 Contracts****95VI Actions for Breach****95k351 Trial****95k353 Instructions****95k353(6) k. As to Construction. Most****Cited Cases**

In surveyor's breach of contract action against owner, it was sufficient to instruct jury that surveyor who promised to perform survey work and reports pertaining to construction of 600-room addition to

hotel and casino had an implied duty to perform in workmanlike manner.

**[2] Negligence 272 ⚡1657****272 Negligence****272XVIII Actions****272XVIII(C) Evidence****272XVIII(C)5 Weight and Sufficiency****272k1657 k. Necessity of Expert Testi-****mony. Most Cited Cases****(Formerly 272k134(1))**

Standard of care must be determined by expert testimony unless conduct involved is within common knowledge of laypersons.

**[3] Contracts 95 ⚡323(1)****95 Contracts****95V Performance or Breach****95k323 Questions for Jury****95k323(1) k. In General. Most Cited Cases**

Where service rendered does not involve esoteric knowledge or uncertainty that calls for professional's judgment, it is not beyond knowledge of jury to determine adequacy of performance.

**[4] Contracts 95 ⚡322(3)****95 Contracts****95V Performance or Breach****95k322 Evidence****95k322(3) k. Weight and Sufficiency in****General. Most Cited Cases**

In surveyor's action against owner for breach of contract under which surveyor agreed to perform survey work and reports pertaining to construction of addition to hotel and casino, expert testimony was not required to prove breach of owner's duty.

**[5] Damages 115 ⚡208(1)****115 Damages****115X Proceedings for Assessment**



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#### 115k208 Questions for Jury

115k208(1) k. In General. Most Cited Cases  
In surveyor's action against owner for breach of contract whereunder surveyor agreed to perform survey work and reports pertaining to construction of addition to existing hotel and casino, trial court erred by not submitting to jury issue of whether loss of profits was reasonably foreseeable.

#### [6] Interest 219 ~~38~~38(2)

##### 219 Interest

##### 219II Rate

##### 219k38 On Judgments

219k38(2) k. Judgments Founded on Contract Fixing Rate. Most Cited Cases  
In surveyor's action against owner for breach of contract for survey work, there was no error in award of interest on damages for remedial work. N.R.S. 99.040, subd. 1.

\*113 \*\*1086 Dickerson, Miles & Pico, Las Vegas, Morris, Polich & Purdy, and Jeffrey S. Barron, Los Angeles, Cal., for appellant.  
Lionel, Sawyer & Collins, Las Vegas, for respondent.

#### \*114 OPINION

##### PER CURIAM:

Appellant and respondent entered into a written contract whereby appellant promised to perform all survey work and reports pertaining to the construction of a six hundred room addition to respondent's existing hotel and casino. Respondent agreed to compensate appellant for these services on a time-and-materials basis. It was the responsibility of appellant to pinpoint the location of caissons which were to constitute the major foundational support for the structure and elevator shaft. After the \*\*1087 caissons were drilled, it was discovered that several had been misplaced. Remedial work resulted in several days' delay in the final completion of the addition. Respondent brought suit for breach of

contract and obtained a judgment in its favor with an award of damages of approximately one million dollars.

Appellant cites numerous errors at trial, including: (1) the court's instruction of the jury on implied warranty to perform in a workmanlike manner; (2) the court's failure to instruct the jury regarding expert testimony and regarding the foreseeability of damages for lost profits; and (3) the court's award of prejudgment interest.

[1] It is appellant's main contention that the district court erred when it instructed the jury that appellant's liability was founded upon an implied duty to perform in a workmanlike manner. It is urged by appellant that the proper standard by which the jury should have measured appellant's conduct is the duty to perform as an ordinarily skillful surveyor under similar circumstances. In our view, it is sufficient to instruct the jury that appellant had an implied duty to perform in a workmanlike manner. It is clear from the nature of the work that, had the work been done in a workmanlike manner, the caissons \*115 would not have been misplaced. See *Broyles v. Brown Engineering Co.*, 275 Ala. 35, 151 So.2d 767 (1963). Appellant was provided plans and specifications that reflected the location and dimensions of the caissons. The survey emanated from existing, fixed monuments, the accuracy of which is not in doubt. There is nothing in the record to indicate that the survey required complex calculations or necessitated the reliance upon untrustworthy data such that accuracy could not be expected from performance done in a workmanlike manner.

[2][3][4] We also disagree with appellant's contention that expert testimony is required to prove the breach of duty. It is well settled that the standard of care must be determined by expert testimony unless the conduct involved is within the common knowledge of laypersons. *Bialer v. St. Mary's Hospital*, 83 Nev. 241, 427 P.2d 957 (1967). Where, as in the instant case, the service rendered does not involve esoteric knowledge or uncertainty that calls for the

professional's judgment, it is not beyond the knowledge of the jury to determine the adequacy of the performance. See *Aetna Insurance Co. v. Hellmuth, Obata, Kassabaum Inc.*, 392 F.2d 472, 478 (8th Cir. 1968).

[5] It is appellant's third claim that the trial court erred by not submitting to the jury the issue of whether the loss of profits was reasonably foreseeable.[FN1] We must agree. There can be no recovery for damages that are not reasonably foreseeable at the time of the contract. *General Elec. Supply v. Mt. Wheeler Power*, 94 Nev. 766, 587 P.2d 1312 (1978); *Mackay v. Western U. Tel. Co.*, 16 Nev. 222 (1881). Ordinarily, this presents a factual issue to be determined by the trier of fact. *Traylor v. Henkels & McCoy, Inc.*, 99 Idaho 560, 585 P.2d 970 (1978). Only if it can be said that the damages are the direct or natural result of \*116 the breach can they be presumed foreseeable as a matter of law. See *Hoag v. Jenan*, 86 Cal.App.2d 556, 195 P.2d 451 (1948); *Johnson v. Utile*, 86 Nev. 593, 472 P.2d 335 (1970). See also *Restatement (Second) of Contracts*, section 351, comment b (1981).

FN1. The jury was read the following instruction:

"If you find that the plaintiff is entitled to damages for the delay in the opening of the Hilton 600-room addition, then you may award the Hilton the lost profits which are attributable to such delay. Lost profits are an appropriate measure of damages so long as the evidence provides a basis for determining, with reasonable certainty, what the profits would have been had the contract not been breached.

"Although a degree of uncertainty may be present in fixing damages for lost profits, this does not destroy the right to recover them. The rule against the recovery of uncertain damages is directed

against uncertainty as to the existence of damage as opposed to the amount of them."

Respondent contends the loss of profits caused by the delayed opening of the addition was a direct or natural result of appellant's\*\*1088 breach because the contract involved work essential to the construction of an addition to an operating hotel and casino. Respondent misplaces its reliance upon *Hoag v. Jenan*, supra. In *Hoag*, the plaintiff contracted for the construction of needed additional space for his existing repair shop. Damages for the loss of profits from delay in completion of the addition were recoverable as the direct result of the breach because a completion date was specified in the contract for the purpose of preventing such loss. *Id.* 195 P.2d at 456. Respondent concedes that neither appellant's contract to perform the survey work, nor the general conditions and specifications of the construction project as a whole, contain a completion date for the addition. In our view, it cannot be said as a matter of law that the loss of profits flow foreseeably from the breach of a construction contract where, as here, there is no evidence of a contemplated completion date at the time of the contract. Therefore, failure to submit to the jury the issue of foreseeability of lost profits is reversible error.

[6] The final issue to be considered is whether the district court erred in awarding prejudgment interest. The district court awarded prejudgment interest on damages claimed for the remedial work and for the loss of profits occasioned by the delay. NRS 99.040(1) provides that interest shall be allowed upon all money from the time it becomes due, upon contracts, express or implied, other than book accounts.[FN2] The interest awarded upon the damages for remedial work fits within our construction of the statute in *Paradise Homes v. Central Surety*, 84 Nev. 109, 437 P.2d 78 (1968). Therefore, there is no error in the award of interest on damages for the remedial \*117 work. In view of our decision that the issue regarding lost profits must be

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submitted to the jury, we need not consider the appropriateness of prejudgment interest on the damages for lost profits. Accordingly, the judgment of the district court is affirmed insofar as it awards damages to respondent for costs, remedial work and the interest thereupon. Insofar as it awards damages for lost profits, including interest, judgment is reversed and remanded to the district court for further proceedings consistent with this opinion. Other issues raised by appellant are without merit and need not be considered.

FN2.NRS 99.040(1) provides as follows:

“99.040 Interest rate when no express written contract. When there is no express contract in writing fixing a different rate of interest, interest shall be allowed at the rate of 8 percent per annum upon all money from the time it becomes due, in the following cases:

“1. Upon contracts, express or implied, other than book accounts.”

The statute was amended effective July 1, 1981 to increase the statutory rate to 12 percent per annum and change “shall be allowed” to “must be allowed.” The amended statute does not affect the instant case. See ch. 739, 1981 Nev.Stat.1858.

GUNDERSON, C. J., MANOUKIAN, SPRINGER and MOWBRAY, JJ., and ZENOFF, Senior Justice,[FN3] concur.

FN3. The Honorable David Zenoff, Senior Justice, was assigned to participate in this case by the Chief Justice, pursuant to Nev.Const.Art. 6, s 19.

Nev., 1982.

Daniel, Mann, Johnson & Mendenhall v. Hilton Hotels Corp.

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END OF DOCUMENT



Westlaw.

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Page 1

**C**

Supreme Court of Nevada.  
**CHEYENNE CONSTRUCTION, INC.**, a Nevada  
 corporation; David W. Bingham; Kathie E. Bing-  
 ham; and St. Paul Fire and Marine Insurance Com-  
 pany, a corporation, Appellants,  
 v.  
 Morris HOZZ, Respondent.  
 No. 16243.

June 26, 1986.

Mobile home park owner brought action against contractor for breach of contract for paving work at park, and contractor filed counterclaim for payment due for work completed. The Eighth Judicial District Court, Clark County, Robert G. Legakes, J., awarded owner the cost of an asphalt overlay required to remedy contractor's breach of the contract and awarded contractor the contract price for the work performed. Contractor appealed. The Supreme Court held that: (1) factual findings were supported by the evidence; (2) refusal to qualify, as an expert, witness who was not a licensed engineer was not an abuse of discretion; (3) testimony by owner's attorney did not waive attorney-client privilege as to whether attorney advised owner not to repair damaged paved areas; (4) calculation of cost to correct paving defects as of time of trial, rather than time of breach, was not error; but (5) owner was improperly awarded a double recovery of damages.

Affirmed in part and remanded.

West Headnotes

**[1] Contracts 95 ⚡350(1)**

95 Contracts  
 95VI Actions for Breach  
 95k347 Evidence  
 95k350 Weight and Sufficiency  
 95k350(1) k. In General. Most Cited  
 Cases

Findings that contractor was responsible for delay in paving work at mobile home park, that contractor breached contract for paving work by failing to apply part of prime coat, failing to apply seal coat, and using type of gravel other than that specified in contract, and that asphalt overlay would make paving conform to its expected state of durability were supported by the evidence, in action by park owner against contractor for breach of paving contract.

**[2] Evidence 157 ⚡546**

157 Evidence  
 157XII Opinion Evidence  
 157XII(C) Competency of Experts  
 157k546 k. Determination of Question of Competency. Most Cited Cases  
 Decision concerning competency of witness to offer opinion as expert is within sound discretion of trial court. N.R.S. 50.275.

**[3] Appeal and Error 30 ⚡971(2)**

30 Appeal and Error  
 30XVI Review  
 30XVI(H) Discretion of Lower Court  
 30k971 Examination of Witnesses  
 30k971(2) k. Competency of Witness.  
 Most Cited Cases  
 Ruling as to competency of witness to offer opinion as an expert will not be disturbed unless clear abuse of trial court's discretion is shown. N.R.S. 50.275.

**[4] Evidence 157 ⚡536**

157 Evidence  
 157XII Opinion Evidence  
 157XII(C) Competency of Experts  
 157k536 k. Knowledge, Experience, and Skill in General. Most Cited Cases  
 Refusal to qualify as an expert a witness who was not a licensed engineer was not an abuse of discretion, in action for breach of contract for paving work at mobile home park. N.R.S. 50.275.

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**[5] Witnesses 410 ⚡219(3)**

**410 Witnesses**

**410II Competency**

**410II(D) Confidential Relations and Privileged Communications**

**410k219 Waiver of Privilege**

**410k219(3) k. Communications to or Advice by Attorney or Counsel. Most Cited Cases**  
If there is disclosure of privileged communications, such disclosure waives remainder of privileged consultation between attorney and client on the same subject. N.R.S. 49.095.

**[6] Witnesses 410 ⚡205**

**410 Witnesses**

**410II Competency**

**410II(D) Confidential Relations and Privileged Communications**

**410k197 Communications to or Advice by Attorney or Counsel**

**410k205 k. Confidential Character of Communications or Advice. Most Cited Cases**  
Acts or services which are performed by attorney for his client in course of employment and are accessible to others or to public do not fall within attorney-client privilege, in that no private communication is involved. N.R.S. 49.095, 49.385.

**[7] Witnesses 410 ⚡206**

**410 Witnesses**

**410II Competency**

**410II(D) Confidential Relations and Privileged Communications**

**410k197 Communications to or Advice by Attorney or Counsel**

**410k206 k. Communications Through or in Presence or Hearing of Others. Most Cited Cases**

Testimony by attorney for a mobile home park owner, regarding attorney's dealings with contractor in respect to construction, repair work, and payment involving paving project, did not concern acts which were private communications within attor-

ney-client privilege and, thus, did not waive attorney-client privilege as to whether attorney advised park owner not to repair damaged paved areas. N.R.S. 49.095, 49.385.

**[8] Damages 115 ⚡117**

**115 Damages**

**115VI Measure of Damages**

**115VI(C) Breach of Contract**

**115k117 k. Mode of Estimating Damages in General. Most Cited Cases**

Where special circumstances show proximate damages of amount greater than that which existed on date of breach of contract, date different from time of breach may be fixed for establishing damages.

**[9] Damages 115 ⚡123**

**115 Damages**

**115VI Measure of Damages**

**115VI(C) Breach of Contract**

**115k123 k. Defects in Performance. Most Cited Cases**

Calculation of cost to correct paving defects as of time of trial, rather than time of breach of contract by contractor for paving work at mobile home park, was not error.

**[10] Damages 115 ⚡121**

**115 Damages**

**115VI Measure of Damages**

**115VI(C) Breach of Contract**

**115k121 k. Partial Performance. Most Cited Cases**

Where there has been partial performance, contractor is entitled to recover total price promised less cost of completing performance and other consequential damages.

**[11] Damages 115 ⚡121**

**115 Damages**

**115VI Measure of Damages**

**115VI(C) Breach of Contract**

**115k121 k. Partial Performance. Most**

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#### Cited Cases

Measure of owner's damages for contractor's partial performance of construction contract is sum that will put owner in as good a position as if contract had been fully performed.

#### [12] Damages 115 ¶15

##### 115 Damages

##### 115III Grounds and Subjects of Compensatory Damages

##### 115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

##### 115III(A)1 In General

##### 115k15 k. Nature and Theory of Compensation. Most Cited Cases

Mobile home park owner improperly received double recovery for contractor's partial performance of contract for paving work at park, where sum awarded to contractor for its partial performance of contract was reduced by sums allocable to missing prime and seal coats, and owner's award of damages was increased to cover the costs of the same two treatments.

**\*\*1225 \*309** Gordon C. Richards, Las Vegas, Heaton, Doescher & Owen, Carson City, for appellants.

Jolley, Urga & Wirth and Troy Peyton, Las Vegas, for respondent.

#### \*310 OPINION

#### PER CURIAM:

##### *The Facts*

Appellant Cheyenne Construction, Inc. (Cheyenne) and respondent Morris Hozz entered into a contract in which appellant agreed to perform paving work at respondent's mobile home park. The contract specified that the subsoil on which the pavement was to be applied was to be compacted to a specified degree and depth; the gravel bases were to be compacted to another specified degree. Cheyenne utilized a different type of gravel than that specified

in the contract. Cheyenne also failed to apply part of a prime coat specified in the contract and failed to apply a seal coat as required by the contract. Portions of the paving thereafter subsided and cracked and the gravel base ravelled away from the concrete surface.

Respondent sued for breach of contract and Cheyenne counterclaimed for payment due for work completed. At trial, respondent's geotechnical engineer testified that the subbase and gravel base were below the compaction level required by the contract and concluded that poor compaction caused the subsidence and ravelling. The engineer expressed the opinion that the **\*\*1226** foregoing deficiencies would reduce the life of the paving work to approximately one-half its normal expected life. The engineer recommended that an asphalt overlay be applied to the surface so that the paving would conform to its expected state of durability.

The district court found that the failure both to apply the seal coat and part of the prime coat and to use the specified type of gravel constituted breach of contract. The court also found that the failure to achieve adequate compaction constituted both a breach of contract and the cause of the ravelling and subsidence. The court awarded respondent the cost of an overlay to remedy the ravelling and subsidence and awarded Cheyenne the contract price for the work performed. This appeal followed.

#### \*311 Discussion

[1] Cheyenne claims that the factual findings are unsupported by the evidence. We disagree. Respondent's testimony of delays in performance of the contract supports the court's finding that Cheyenne was responsible for delay in construction. *Udevco, Inc. v. Wagner*, 100 Nev. 185, 678 P.2d 679 (1984). The findings that Cheyenne breached the contract by failing to apply part of the prime coat, failing to apply the seal coat, and using a type of gravel other than that specified in the contract are also supported by the testimony. *Id.* The testi-

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mony of respondent's expert engineer established that in many areas there was a compaction level of less than that specified in the contract. Respondent's expert engineer's testimony that the overlay would cure the ravelling problem, would fill in the cracks, and provide a stronger structural section supports the district court's finding that the overlay would remedy the breach.

[2][3][4] Cheyenne next contends that the district court erred in refusing to qualify its witnesses as experts because the witnesses were not licensed engineers. A decision concerning the competency of a witness to offer an opinion as an expert is within the sound discretion of the trial court and the ruling will not be disturbed unless a clear abuse of the court's discretion is shown. NRS 50.275; *Provence v. Cunningham*, 95 Nev. 4, 7, 588 P.2d 1020, 1021 (1979); *Cardinal v. Zonneveld*, 89 Nev. 403, 514 P.2d 204 (1973). Many courts, including this Court, permit witnesses to testify as experts based on the witness' practical experience. *McKiernan v. Caldor, Inc.*, 183 Conn. 164, 438 A.2d 865 (1981). However, it was within the district court's discretion to refuse to qualify appellant's witness as an expert where, among other factors, he was not a licensed engineer. *Cardinal v. Zonneveld*, 89 Nev. at 407, 514 P.2d at 206.

[5][6] Cheyenne also argues that the district court erred in refusing to require respondent's attorney to testify over an attorney-client privilege objection concerning whether respondent's attorney advised respondent not to repair damaged paved areas. Cheyenne contends respondent waived the privilege by calling his attorney to the witness stand. The client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications between himself and his lawyer. NRS 49.095; *Tahoe Regional Planning Agency v. McKay*, 769 F.2d 534, 539-540 (9th Cir.1985). If there is disclosure of privileged \*312 communications, this waives the remainder of the privileged consultation on the same subject. However, acts or services performed by an attorney for his client in

the course of employment and which are accessible to others or to the public do not fall within the privilege because no private communication is involved. NRS 49.385; *Arkansas National Bank v. Cleburne County Bank*, 258 Ark. 329, 525 S.W.2d 82, 84 (1975).

[7] Respondent's attorney testified regarding his dealings with Cheyenne in respect of the construction, repair work and payment involving the project. Respondent's attorney's testimony therefore concerned acts that were neither private communications nor within the attorney-client privilege. \*\*1227 *Arkansas National Bank v. Cleburne County Bank*, 525 S.W.2d at 84. Therefore, the attorney did not testify concerning privileged communications which waived disclosure of the remainder of the privileged communication on the same topic. However, respondent's attorney's advice to respondent would be an unrelated privileged confidential communication. Moreover, Cheyenne has not demonstrated how the exclusion of evidence regarding advice not to repair was relevant or how the exclusion of the evidence was prejudicial. The district court did not err in excluding the testimony.

[8][9] Cheyenne next claims that the district court erred in calculating the cost to correct the paving defects as of the time of trial. Where special circumstances show proximate damages of an amount greater than existed on the date of the breach, a date different than the time of breach may be fixed for establishing damages. *Fairway Builders, Inc. v. Malouf, Etc.*, 124 Ariz. 242, 603 P.2d 513, 526 (Ct.App.1979) (measure of the damages for breach of a construction contract as of the time of trial). There was no error.

[10][11][12] Finally, Cheyenne complains that by reducing the amount of its award on the counterclaim by sums allocable to the missing prime and seal coats and increasing respondent's award to cover the costs of the same treatments constitutes a double recovery by respondent. We agree. Where there has been partial performance, a contractor is



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entitled to recover the total price promised less the cost of completing performance and other consequential damages. *Fleming v. Twine*, 58 A.2d 498, 499-500 (D.C.1948). Thus the deduction from Cheyenne's award for the uncompleted application of the prime and seal coats was proper. The measure of the owner's damages is the sum that will put him in as good a position as if the contract had been fully performed. *Fleming v. Twine*, 58 A.2d at 499-500. The court awarded respondent the \$313 cost of the overlay, which also included a cost component covering the application of prime and seal coats. Respondent was not entitled to be placed in a better position because of the breach than he would have enjoyed had the contract been performed. Here, by reducing Cheyenne's award to cover the missing prime and seal coats, and then awarding damages to respondents to cover the application of the same two treatments, resulted in respondent receiving the benefit of said treatments without cost. This was improper and constituted an unwarranted advantage to respondent. Accordingly, upon remand, the district court will have to determine the cost of repairing the defects, less the cost of the application of one-half of the prime coat and the seal coat.

Cheyenne's remaining contentions have been considered and are without merit. <sup>FN1</sup>

FN1. The district court dismissed the complaint as to the individual appellants David W. Bingham and Kathie E. Bingham. The district court entered judgment against Cheyenne's bonding company, St. Paul Fire and Marine Insurance Company. David W. Bingham, Kathie E. Bingham and St. Paul Fire and Marine Insurance Company have not raised any contentions on appeal.

#### *Disposition*

We remand this case to the district court for a re-determination of respondent's damages as noted above and for entry of judgment in accordance therewith. In all other respects the judgment of the

district court is affirmed.

Nev., 1986.  
*Cheyenne Const., Inc. v. Hozz*  
102 Nev. 308, 720 P.2d 1224

END OF DOCUMENT

# **TAB III**

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8 **VEGAS V.P., L.P.**

9 **AMERICAN ARBITRATION ASSOCIATION**

10 **VEGAS V.P., L.P., a Nevada limited partnership,**

11 **Claimant,**

12 **vs.**

13 **WPH ARCHITECTURE, INC.,**

14 **Respondent.**

15 **WPH ARCHITECTURE, INC.,**

16 **Counter-Claimant,**

17 **vs.**

18 **VEGAS, VP, LP, a Nevada limited partnership,**

19 **Counter-Respondent.**

20 **Case No. 79 110 Y 127 08 HLT**

21 **CLAIMANT'S RESPONSE TO WPH**  
22 **ARCHITECTURE, INC.'S SPECIAL**  
23 **BRIEFING RE: ARCHITECTURAL**  
24 **STANDARD OF CARE OPINIONS**

25 Claimant Vegas VP, LP submits this Response to WPH Architecture, Inc.'s Special Briefing  
26 Re: Architectural Standard of Care Opinions ("Brief"). In support, Vegas VP will show:

27 **I. INTRODUCTION**

28 WPH wastes the Panels time and resources by attempting to exclude testimony for reasons  
completely unsupportable by logic or authority. First, WPH suggests that the Panel prevent a fact  
witness, Gary Leach, from testifying as to the standard of care for architects in construction projects  
because he is not a licensed architect. Brief at 2. Because he lacks a license, WPH argues, he  
cannot offer an opinion as to the proper standard of care for architects. *Id.* The Panel should  
disregard these arguments because the Rules of Evidence will permit his testimony.

Similarly, WPH asks the Panel to exclude the testimony of its expert witness, Hank Falstad,  
because his lack of a Nevada architect's license prevents him from offering an opinion on the

1 standard of care for architects in this state. Brief at 2. This lack of a license, WPH claims, is a  
2 "basic, essential requirement" that mandates exclusion of Mr. Falstad's testimony as to the  
3 appropriate standard of care. *Id.* at 3. The Panel should refuse this invitation, as WPH's position  
4 borders on the preposterous.

## 5 **II. DISCUSSION AND ANALYSIS**

### 6 **A. The Panel Should Not Exclude Mr. Leach's Fact-Based Testimony**

7 WPH correctly asserts that Vegas VP has not designated Mr. Leach as an expert witness.  
8 The fact that Mr. Leach has no Nevada architect's license does not prevent him from offering an  
9 opinion regarding facts he has perceived. The Nevada Rules of Evidence expressly permit an  
10 individual to testify about facts within the witness's own personal knowledge, even if those facts  
11 are the witness's opinion on a particular subject. NEV. REV. STAT. § 50.265(1). Mr. Leach's  
12 testimony will be admissible under the evidence rules.

13 Mr. Leach will testify, simply, how WPH's conduct relates to the standard of care  
14 established by Vegas VP's expert witness, Hank Falstad. So long as his testimony is based upon  
15 facts within his personal knowledge, Mr. Leach may testify as a fact witness without limitation. *Id.*  
16 § 50.025(1)(a). Should Mr. Leach stray from the strictures of the rules, the Panel may exclude his  
17 testimony in response to a timely objection by WPH's Counsel. Any ruling on this testimony now  
18 is premature.

### 19 **B. A Nevada Architecture License Is Not a Prerequisite to Offering Expert** 20 **Testimony Regarding the Standard of Care for Architects**

21 WPH next contends that the Panel should exclude any standard-of-care testimony from  
22 Vegas VP's expert witness, Hank Falstad, because his lack of a Nevada architect's license prevents  
23 him from opining on that subject. Brief at 3. Any appeal this position may have on the surface is  
24 utterly eviscerated by WPH's own authority and simple, common sense.

25 WPH provides no authority for its apparent argument that Nevada's standard of care for  
26 architects is so unique that only Nevada-licensed architects may offer opinions about it. While  
27 Vegas VP agrees that a qualified expert must establish the standard of care, it completely disagrees  
28 with WPH's suggestion that Mr. Falstad must be licensed in Nevada to testify as to the standard of  
care for architects in this state. Mr. Falstad has a degree in architecture from the University of

1 Michigan. He is a licensed architect in Wisconsin and Illinois and is imminently qualified to offer  
2 his opinion on the standard of care for all architects, as he has done so as a designated expert in the  
3 State of Nevada for more than 14 years.

4 WPH relies on *Cheyenne Construction, Inc. v. Hozz*, 720 P.2d 1224 (Nev. 1986) for the  
5 proposition that the Panel may refuse to allow Mr. Falstad's testimony due to his lack of a Nevada  
6 architect's license. Brief at 3. *Cheyenne Construction* says nothing of the sort. Rather, that case  
7 affirmed the trial court's exclusion of expert testimony from a witness who, "among other factors,  
8 [ ] was not a licensed engineer." 720 P.2d 1226. Two things from therefore be gleaned from this  
9 case, both of which belie WPH's contentions about it.

10 First, *Cheyenne Construction* does not purport to exclude expert witnesses who are not  
11 licensed engineers. Instead, as the court makes perfectly clear, the lack of a license was only one  
12 factor supporting exclusion of that witness. *Id.* Nowhere does the court hold that the fact that an  
13 expert lacks a license is, standing alone, sufficient to support exclusion.

14 Second, while it agreed with the exclusion of the witness in question because he lacked a  
15 professional license, the *Cheyenne Construction* court makes no mention of the need to exclude  
16 testimony from experts who—although licensed in other states—simply lack a license *issued by the*  
17 *State of Nevada*. *See id.* This illogical leap is one simply made in the minds of WPH's Counsel;  
18 the proposition does not exist in Nevada law. Mr. Falstad's lack of a Nevada license is no basis to  
19 exclude his testimony on an architect's standard of care in this state. He resides in Las Vegas,  
20 Nevada, and has been consulting as an expert for many years. He no longer drafts plans that require  
21 a stamp. Accordingly, he has not needed a Nevada license.

### 22 III. CONCLUSION

23 WPH presents no reasoned argument for the exclusion of either Mr. Leach or Mr. Falstad  
24 regarding the standard of care for architects in the State of Nevada. Mr. Leach, as a fact witness,  
25 may certainly testify to facts he personally knows and relate those facts to an established standard  
26 of care. Mr. Falstad may also testify as an expert witness, to establish that standard of care, because  
27 there is no requirement that Mr. Falstad possess a Nevada architect's license to testify about the  
28 standard of care in a Nevada case. Accordingly, the Panel should deny WPH's Special Briefing.

1 DATED: October 24, 2008

CADDELL & CHAPMAN

2  
3 By:

  
Richard D. Daly

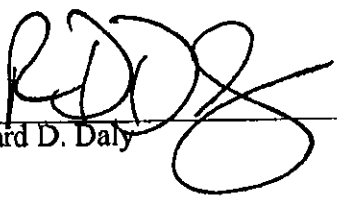
4 ATTORNEYS FOR CLAIMANT/PLAINTIFF  
5 VEGAS V.P., L.P.  
6  
7  
8

9 **CERTIFICATE OF SERVICE**

10 I certify that, on October 24, 2008, I served a true copy of the foregoing document on the following counsel of record, via email transmission:

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Richard D. Daly

**TAB IV**

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10 **AMERICAN ARBITRATION ASSOCIATION**

11 VEGAS VP, LP, a Nevada limited partnership, ) **Case No. 79 110 Y 00128 07 HLT**  
12 )  
13 Claimant, )  
14 vs. ) **REPLY TO CLAIMANT'S RESPONSE TO**  
15 ) **WPH ARCHITECTURE, INC.'S SPECIAL**  
16 WPH ARCHITECTURE, INC., ) **BRIEFING RE: ARCHITECTURAL**  
17 ) **STANDARD OF CARE OPINIONS**  
18 Respondent. )  
19 )  
20 WPH ARCHITECTURE, INC., )  
21 )  
22 Counter-Claimant, )  
23 vs. )  
24 )  
25 VEGAS VP, LP, a Nevada limited partnership, )  
26 )  
27 Counter-Respondent. )  
28 )

21 WPH ARCHITECTURE, INC. ("WPH") submits this Reply to Claimant VEGAS VP,  
22 LP's ("Vegas VP") Response to WPH's Special Briefing requesting that the Panel preclude Gary  
23 Leach and Hank Falstad from testifying concerning WPH's standard of care. This Special Briefing  
24 is based on the following points and authorities.

25 **I.**

26 **INTRODUCTION**

27 As stated in WPH'S Special Briefing, Vegas VP intends to call Gary Leach (the  
28 construction manager) at the time of the arbitration hearing. However, Mr. Leach is *not* a licensed



1 architect in any state and, therefore, cannot provide a standard of care opinion with regard to the  
2 architectural services that WPH provided on the Metropolis Project. Vegas VP, in its Response,  
3 fails to acknowledge that a fact witness cannot determine WPH's standard of care in this matter.

4 Vegas VP's only expert is Hank Falstad, AIA. Mr. Falstad is also *not* a licensed architect  
5 in the State of Nevada, nor does he possess other requisite qualifications. As such, Mr. Falstad is  
6 not properly qualified to provide a standard of care opinion concerning WPH's professional  
7 architectural services in this architectural malpractice action.

## 8 II.

### 9 THE PANEL SHOULD EXCLUDE ANY OF GARY LEACH'S TESTIMONY 10 RELATING TO AN ARCHITECT'S STANDARD OF CARE BECAUSE 11 HE IS NOT QUALIFIED TO RENDER SUCH OPINIONS

12 Contrary to Vegas VP's emphasis in its Reponse, WPH is *not* asking this Panel to exclude  
13 Mr. Leach's fact-based testimony. Rather, WPH is merely asking this panel to exclude Mr. Leach  
14 from providing any *standard of care opinions* with regard to any architectural services WPH  
15 provided on the Project, as well as any other expert opinions. Despite Vegas VP's contentions to  
16 the contrary, the reason is clear: Mr. Leach is not a licensed architect in Nevada and he has not  
17 been designated as an expert witness in this matter.

18 Notably, Vegas VP's Response does not take issue with the fact that NRS 50.275, and the  
19 other authority set forth in WPH's Special Briefing, stand for the proposition that the standard of  
20 care of an architect *must* be determined by an expert witness. (See Special Briefing at 3.) Mr.  
21 Leach does not have a professional license in any discipline of any design engineer in any state,  
22 and Mr. Leach has never held a license as an architect in any state. (See Deposition Transcript of  
23 Gary T. Leach, August 19, 2008, Volume 1, Page 71, Line 11-13, attached as Exhibit "A".)  
24 Essentially, allowing Mr. Leach to testify to an architect's standard of care in this case would be  
25 akin to allowing a lawyer to testify to a the standard of care applicable to a doctor in a medical  
26 malpractice action. Not only would such testimony regarding the standard of care be unhelpful,  
27 but it would be in contravention of well-established rules.  
28

1 However, Vegas VP contends that, "Mr. Leach will testify, simply, how WPH's conduct  
2 relates to the standard of care..." (Claimant's Response at 2.) Vegas VP does not grasp that Mr.  
3 Leach *cannot* offer *any* opinions even "relating" to WPH's standard of care. Such standard of  
4 care testimony by a fact witness is in contravention of well-established authority. (See Special  
5 Briefing at 3.) Therefore, this panel should exclude any of Mr. Leach's testimony relating to  
6 *standard of care opinions* with regard to any architectural services WPH provided on the Project,  
7 as well as any other "expert" opinions.

### 8 III.

#### 9 THE PANEL SHOULD EXCLUDE ANY OF HANK FALSTAD'S TESTIMONY 10 RELATING TO AN ARCHITECT'S STANDARD OF CARE BECAUSE HE IS NOT 11 QUALIFIED TO RENDER SUCH OPINIONS

12 For the same reasons set forth above and in WPH'S Special Briefing, this panel should  
13 exclude Mr. Falstad from providing any *standard of care opinions* with regard to any architectural  
14 services WPH provided on the Project. As demonstrated, Mr. Falstad is not a licensed architect in  
15 Nevada. (Special Briefing at 2.) As a result, Mr. Falstad should be excluded from offering  
16 opinions on the standard of care of WPH – a Nevada licensed architect – on the Metropolis Project  
17 in Nevada.

18 Despite the authority cited in WPH's Special Briefing, Vegas VP "completely disagrees  
19 with WPH's suggestion that Mr. Falstad must be licensed in Nevada to testify as to the standard of  
20 care for architects in this state." (Claimant's Response at 2.) Rather, Vegas VP argues that Mr.  
21 Falstad "is a licensed architect in Wisconsin and Illinois and is imminently qualified to offer his  
22 opinion on the standard of care for all architects, as he has done so as a designated expert in the  
23 State of Nevada for more than 14 years." (Claimant's Response at 3.) Curiously, Vegas VP offers  
24 *no authority* for that contention. Vegas VP's suggestion that an architect licensed in one state can  
25 testify as to the standard of care of "all architects" is without authority. Vegas VP either ignores  
26 that each state has separate licensure requirements, or is bold enough to suggest that a state's  
27 unique licensure requirements are meaningless. Regardless, there is no "national" architectural  
28 license, as Vegas VP would like this Panel to believe.

1 Further, Vegas VP's suggestion that Mr. Falstad has opined on the standard of care of  
2 architects as a designated expert in Nevada for more than 14 years is untruthful, as described more  
3 fully below. See *infra*.

4 Further, Vegas VP attempts to manipulate the holding of *Cheyenne Construction*, cited by  
5 WPH in its Special Briefing, to suggest that the lack of a Nevada architectural license is "only one  
6 factor" supporting the exclusion of Mr. Falstad as an expert witness. (Claimant's Response at 3.)  
7 Assuming, *arguendo*, that Vegas VP's understanding of *Cheyenne Construction* is accurate in this  
8 regard, there are *numerous* other factors which support excluding Mr. Falstad from offering  
9 opinions on the standard of care of WPH.

10 ***Mr. Falstad has never been asked since he has been living in Las Vegas (for the last 22***  
11 ***years), besides on this case, to opine on an architect's standard of care as a retained expert.***  
12 (See Deposition Transcript of Hank Falstad, October 23, 2008, Page 135, Line 18-22, attached as  
13 Exhibit "B"; emphasis added.)

14 Mr. Falstad does not recall looking at any technical books, including books on building  
15 codes, in support of the opinions he will be offering at this arbitration. (See Deposition Transcript  
16 of Hank Falstad, Page 12, Line 2-19.) Mr. Falstad has no recollection of looking at the edition of  
17 the UBC in effect at the time the plans and specifications were permitted. *Id.* Mr. Falstad did not  
18 review WPH's job file, because he "didn't feel it was necessary." (See Deposition Transcript of  
19 Hank Falstad, Page 14, Line 2-23.) ***Mr. Falstad has never stamped any architectural plans for***  
20 ***any type of project in the State of Nevada.*** (See Deposition Transcript of Hank Falstad, Page 26,  
21 Line 17-25; emphasis added.) Rather, the focus of Mr. Falstad's practice for the last 14 years in  
22 the State of Nevada is related to his practice of performing plan checking for accessibility  
23 requirements. (See Deposition Transcript of Hank Falstad, Page 30, Line 5-13.) Mr. Falstad  
24 admits that in terms of the practice of architecture, meaning the design and production of  
25 construction documents for construction, he has not done such design work in the last 22 years.  
26 (See Deposition Transcript of Hank Falstad, Page 31, Line 8-15.)  
27  
28

1 Mr. Falstad has *never* served as the architect of record for *any* residential structure, and has  
2 *never* served as architect of record for *any* structure in Nevada. (See Deposition Transcript of  
3 Hank Falstad, Page 35, Line 24-25, Page 36, Line 1-2.) Mr. Falstad did not undertake any  
4 consultation with other licensed architects in Nevada that do residential work to assist him in  
5 reaching his opinions. (See Deposition Transcript of Hank Falstad, Page 126, Line 20-25.) Mr.  
6 Falstad has never reviewed any Project photographs (See Deposition Transcript of Hank Falstad,  
7 Page 177, Line 7-8.) **Mr. Falstad did not review the owner/architect agreement** (See  
8 Deposition Transcript of Hank Falstad, Page 193, Line 4-11.) Mr. Falstad believes has only been  
9 involved in one case that went to trial, and in that case he was a defendant. (See Deposition  
10 Transcript of Hank Falstad, Page 145, Line 1-20.)

11 Mr. Falstad obviously does not have a clear understanding of the standard of care  
12 applicable to licensed Nevada architects. Thus, he should not be able to testify as to that standard  
13 of care at the upcoming arbitration.

14 **IV.**

15 **CONCLUSION**

16 For the foregoing reasons, WPH respectfully requests that the Panel preclude Mr. Leach  
17 and Mr. Falstad from providing any standard of care opinion regarding WPH's professional  
18 architectural services in relation to the Metropolis Project and this arbitration proceeding.

19 DATED: October 31, 2008

WEIL & DRAGE, APC

20  
21 By: 

22 JEAN A. WEIL  
23 TREVOR O. RESURRECCION  
24 Attorneys for Respondent,  
25 **WPH ARCHITECTURE, INC.**  
26  
27  
28

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 31<sup>st</sup> day of October, 2008, service of the foregoing  
**REPLY TO CLAIMANT'S RESPONSE TO WPH ARCHITECTURE, INC.'S SPECIAL  
BRIEFING RE: ARCHITECTURAL STANDARD OF CARE OPINIONS**  
was made this date by e-mailing a true and correct copy of the same to:


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WEIL & DRAGE, APC

# **EXHIBIT “A”**

## AMERICAN ARBITRATION ASSOCIATION

VEGAS VP, LP, a Nevada )  
 limited partnership )  
 Claimant )  
 VS. ) Case No.  
 ) 79 110 Y 00128 07 HLT  
 WPH ARCHITECTURE, INC. )  
 Respondent )  
 )  
 WPH ARCHITECTURE, INC. )  
 Counter-Claimant )  
 VS. )  
 )  
 VEGAS VP, LP, a Nevada )  
 Limited partnership )  
 Counter-Respondent )

\*\*\*\*\*

ORAL DEPOSITION OF  
 GARY T. LEACH  
 AUGUST 19, 2008  
 VOLUME 1

\*\*\*\*\*

ORAL DEPOSITION OF GARY T. LEACH, produced as a  
 witness duly sworn by me at the instance of the  
 Respondent/Counter-Claimant WPH Architecture, Inc.,  
 taken in the above styled and numbered cause on the  
 19th day of August, 2008, from 9:54 a.m. to 5:48 p.m.,  
 before Gloria Phillips, Texas Certified Shorthand  
 Reporter No. 919, at the offices of Caddell & Chapman,  
 1331 Lamar, Suite 1070, pursuant to Notice, the rules  
 of the American Arbitration Association (and the  
 provisions stated on the record or attached therein.)

1 engineering in any state.

2 Q. Was it engineering in training for civil, or  
3 what was the --

4 A. I think it was engineering in training. I  
5 think it's a broad certificate. I don't think it's for  
6 one discipline per se.

7 Q. Okay. Have you ever held a license in any  
8 state as a licensed architect or engineer?

9 A. I have as a contractor, not as an architect or  
10 engineer.

11 Q. Okay. So no professional licenses in any  
12 discipline of any design engineer, correct?

13 A. No.

14 Q. Correct?

15 A. Not as a design engineer.

16 Q. Let me ask the question again. I asked you a  
17 double negative. Am I correct, Mr. Leach, that you  
18 don't hold and have never held any licenses as a  
19 professional engineer in any discipline in any state,  
20 ever?

21 A. That's correct.

22 Q. Am I correct, Mr. Leach, you've never held a  
23 license as an architect in any state, ever?

24 A. That's correct.

25 Q. And am I correct that you have never been



# **EXHIBIT “B”**

## AMERICAN ARBITRATION ASSOCIATION

VEGAS VP, LP, a Nevada limited  
partnership,

Claimant,

vs.

CASE NO.

79 110 Y 00128 07 HLT

WPH ARCHITECTURE, INC.,

Respondent.

~~~~~

WPH ARCHITECTURE, INC.,

Counter-Claimant,

vs.

VEGAS VP, LP, a Nevada limited  
partnership,

Counter-Respondent.

~~~~~

DEPOSITION OF  
HANK FALSTAD

October 23, 2008

10:10 a.m.

6085 West Twain Avenue, Suite 203  
Las Vegas, Nevada

Karen B. Nowak, CCR No. 476

1 Q. Do you have that?

2 A. Yes, I see that.

3 Q. Okay. On these various you have the name of  
4 the project and then the description of what was  
5 involved with the project.

6 A. Okay.

7 Q. Do you have that?

8 A. Yes.

9 Q. When you've been retained as a consultant  
10 over the past four years, have you been primarily  
11 retained to opine on ADA issues?

12 A. Yes.

13 Q. And in any of these prior consulting  
14 retentions that you've undertaken, were any of them,  
15 did any of them involve you being retained to opine on  
16 the architect standard of care?

17 A. No.

18 Q. Have you ever been asked, since you have been  
19 living in Las Vegas, besides this project, have you  
20 ever been retained as an expert to opine on an  
21 architect standard of care?

22 A. No.

23 MS. WEIL: Let's go ahead and mark this as  
24 Exhibit 205.

25 \ \ \

1 books?

2 A. I don't recall looking at any technical  
3 books.

4 Q. Did you look at any codes like the code that  
5 was in effect when this building was permitted?

6 A. Well, that would be a technical book.

7 Q. Okay. So you don't know if you looked at any  
8 codes?

9 A. No, I really don't.

10 Q. Do you know what code under which this  
11 project was permitted?

12 A. UBC.

13 Q. What year?

14 A. I don't remember that.

15 Q. Okay. So as you sit here today, you don't  
16 believe that you looked at the edition of the UBC that  
17 was in effect when these plans and specifications were  
18 permitted?

19 A. I don't have any recollection of doing so.

20 Q. What documents did you review in order to  
21 prepare the opinions which you'll be expressing at  
22 arbitration?

23 A. Well, these documents that are in front of  
24 me.

25 Q. The report that you wrote. Let me just go

1 A. Yes, I am.

2 Q. Okay. And in the practice of architecture  
3 typically architects maintain a job file that contains  
4 all their correspondence and information received  
5 through the course of the design and construction of  
6 the project.

7 A. Okay.

8 Q. Do you understand that's typically --

9 A. Yes.

10 Q. -- what happens?

11 A. Yes.

12 Q. And that on this particular project are you  
13 aware that WPH did, in fact, maintain a job file that  
14 included basically all of the information,  
15 correspondence, e-mails, basically everything that  
16 occurred on this job?

17 A. I have not reviewed everything. I've  
18 reviewed a few things.

19 Q. Okay.

20 A. But have I reviewed their whole job file?  
21 The answer is no.

22 Q. Okay. Why not?

23 A. I didn't feel it was necessary.

24 Q. Is it your position, Mr. Falstad, that you  
25 didn't think it would be important to review the

1 Fair Housing?

2 A. What I'm saying is I wanted my fellow  
3 architects to know that I was never going to compete  
4 with them in the design profession. So as a result of  
5 that, they're much more comfortable having me take a  
6 look at their work product because they know that I'm  
7 never going to copy anything or never going to go back  
8 to a client and say you should have hired me as the  
9 architect and I would have done it right for you.

10 Q. Well, in your experience in Nevada, are most  
11 ADA and Fair Housing consultants also licensed  
12 architects in Nevada?

13 A. Very few.

14 Q. So you're not licensed in Nevada. Are you  
15 licensed in any other states?

16 A. No.

17 Q. So would it be fair to say that you have  
18 never stamped any architectural plans for any type of  
19 projects in the state of Nevada?

20 A. That's correct.

21 Q. And you don't affix any type of seal or stamp  
22 to plans that you check for ADA or Fair Housing;  
23 correct?

24 A. We will stamp all the drawings that we plan  
25 check that we have plan checked them. And on that

1 one of the requirements for the Texas license was also  
2 to be certified by the code council, but it was called  
3 a different -- it was not called the International Code  
4 Council at that time.

5 Q. Okay. So is it fair to say that for the last  
6 14 years in the state of Nevada that you've been  
7 performing plan checking for accessibility?

8 A. Correct.

9 Q. And that's been the focus of your practice in  
10 your company called Access Technologies Services?

11 A. Yes. It's not always been called that. But  
12 that's essentially what I've been doing for the last  
13 14 years.

14 Q. Is that when you moved to Nevada was 14 years  
15 ago?

16 A. Beg your pardon?

17 Q. You moved to Nevada 14 years ago?

18 A. No. About 22 years ago.

19 Q. Okay. So between 22 years ago and 14 years  
20 ago, what kind of work were you doing in Nevada?

21 A. Essentially retired. Got bored to death.

22 Q. Okay. So did you sit for this exam to obtain  
23 your ICC credential 14 years ago?

24 A. Yes.

25 Q. Is it fair to say that you've not practiced

1 architecture for the last 22 years?

2 A. Well, I would like to say that my practice  
3 today is a very specialization of the overall practice  
4 of architecture.

5 Q. Looking for code compliance for  
6 accessibility?

7 A. Right.

8 Q. Okay. But in terms of the practice of  
9 architecture, meaning the design and production of  
10 construction documents for construction, is it fair to  
11 say that you've not practiced architecture in that  
12 regard for --

13 A. I do no design work. That is correct.

14 Q. And you've not done so for the last 22 years?

15 A. That's probably correct.

16 Q. Okay. Well, if you'd give me a description  
17 of what type of work you've been doing in the field of  
18 architecture from 1965 until you retired 22 years ago.  
19 So if you retired 22 years ago, that was, what, 1986?

20 A. Yeah. That's all on our website. Basically  
21 I had my own architectural company. I had my own, you  
22 know, for -- during that period of time. I also had a  
23 design-build company during that period of time.

24 Q. Okay. Well, I appreciate that it's on your  
25 website. But if you could just tell me. And we'll



1           Q.     And in that ten years did F & D, Inc., serve  
2     as the design-builder of any residential projects?

3           A.     No.

4           Q.     Can you give me an example of some of the  
5     types of commercial buildings that F & D, Inc.,  
6     designed and built?

7           A.     We did a lot of remodeling for Illinois Bell  
8     Telephone. We did new construction for manufacturing  
9     companies. Hirsch was one of them. You know, most of  
10    these companies don't exist anymore.

11          Q.     Okay.

12          A.     We did a lot of work for pharmaceutical  
13    companies.

14          Q.     Have you ever served as architect of record  
15    for any residential structure?

16          A.     No. I should quantify that a little bit. In  
17    the practice of architecture, somewhat similar to the  
18    practice of law, if you -- the first job I ever had,  
19    the architect told me that you've got to decide whether  
20    you want to do residential work or commercial because  
21    whatever you -- you can't do both. So I decided I  
22    didn't want to do residential. That's why all I did  
23    was commercial.

24          Q.     Okay. Well, am I correct that you have never  
25    served as architect of record for any residential

1 structure?

2 A. That's correct.

3 Q. And you've never served as architect of  
4 record for any structure in Nevada.

5 A. That's correct.

6 Q. Okay. So between 1986 and the year 2000,  
7 would it be fair to say that you were -- I'm sorry.  
8 How many years were you retired? From '86 to when?

9 A. There's a period of -- you know, I've been  
10 working going on 15 years now. So back it up, and  
11 that's a period of time for about seven years that I  
12 was retired.

13 Q. Okay. So from about 1986 to '73 you were  
14 retired -- wait, '72?

15 A. About that.

16 Q. Okay. Retired. And then do you know when  
17 you formed Access Technologies or predecessor company  
18 to it?

19 A. Well, about 15 years ago.

20 Q. Okay. So that would be somewhere around  
21 1972 -- I mean, excuse me, ninety -- 2002? My dates  
22 are bad. No. '92. Thank you. About 1992?

23 A. Okay.

24 Q. Sorry. I'm having trouble adding. Okay. So  
25 in 1992 you formed some other company, not Access

1           A.     The answer to that was I'm sure I had some  
2     questions on specific ones. And I asked Gary that, and  
3     Gary gave me his answer.

4           Q.     Okay. So you didn't discuss each CPR. But  
5     you think you discussed some of them?

6           A.     That I had questions on.

7           Q.     Okay. Do you know which ones those were  
8     generally?

9           A.     No, I do not.

10          Q.     Now, were you provided with just the CPRs?  
11     Or were you provided with the CPRs and anything else?

12          A.     No. I think it was just the CPRs.

13          Q.     Okay. And then what other documents did you  
14     review before preparing this July 25th, 2008, report?

15          A.     I believe I said just the CPRs.

16          Q.     Just the CPRs. Did you review any  
17     architectural plans and specifications before producing  
18     the report of July 25th, 2008?

19          A.     You know, there's a typo in this. And we  
20     sent it out. And then after it was sent out, you know,  
21     I noticed that the staff had put in that I reviewed the  
22     architectural drawings. And that was not true. I did  
23     not review the architectural drawings.

24          Q.     What line are you referring to that contains  
25     the --

1           A.     Right above the 1 through 11. "I have found  
2     the architectural drawings deficient in the following."

3           Q.     Yes.

4           A.     I did not review the architectural drawings.

5           Q.     So these opinions in items 1 through 11,  
6     those are essentially just based on your review of the  
7     CPRs?

8           A.     Right. That's kind of a summary of the CPRs.

9           Q.     Okay.

10          A.     So it should read, "I have found the  
11     architect deficient in the following."

12          Q.     Okay. So that shouldn't say, "I found the  
13     architectural drawings deficient."

14          A.     No. No.

15          Q.     Okay. When did you notice this typo?

16          A.     When I read the work product of the office.

17          Q.     Was that before you signed it?

18          A.     I never -- I -- I never proofread anything.  
19     The staff knows that I do not proofread things before I  
20     sign it. They give it to me, and I sign it. It's not  
21     until after -- I'm not good at proofreading. So that's  
22     their job to be sure that they get it right.

23          Q.     Well, did you dictate this letter and --

24          A.     No.

25          Q.     -- then your staff transcribed it?

1 Q. Okay. Item No. 2 in your handwritten note  
2 says, "Does not want lengthy analysis."

3 A. Yes.

4 Q. Did Mr. Daly tell you don't bother doing a  
5 lengthy analysis?

6 A. He said he doesn't need that.

7 Q. Okay. Let's go to your e-mail dated  
8 September 16th, 2008.

9 A. Okay.

10 Q. In the bottom of that page, actually it's an  
11 e-mail that says September 15th, 2008. You say quote,  
12 "I also assume that Jean will be doing her best to try  
13 and disqualify me as your expert witness. I will be  
14 prepared."

15 What, Mr. Falstad, have you done to prepare  
16 yourself from being disqualified as an expert?

17 A. Just tell the truth. I'm told you're a good  
18 attorney. You're not a sloppy one. So be prepared.  
19 She's not an amateur.

20 Q. Did you undertake consultation with any other  
21 licensed architects in the state that do residential  
22 work to assist you in reaching your opinions?

23 A. No. I think that I've reviewed more plans  
24 than anybody in the country. So well qualified to  
25 render opinions on plans.

1           A.     The kind of pipe that's in there is really  
2 immaterial.

3           Q.     Well, I'm talking about exposed pipe not in  
4 soffits, galvanized steel exposed pipe not in soffits.

5           A.     I don't know that. But the photographs would  
6 indicate what kind of pipe that was.

7           Q.     Okay. Did you ever review any photographs?

8           A.     No.

9           Q.     Okay. You have a September 4th, 2008,  
10 summary review of change proposals 2 through 10 and 11  
11 through 15. Does that encompass all of the CPRs that  
12 are at issue in this case?

13          A.     I don't know.

14          Q.     So you reviewed those, and you believe that  
15 Mr. Leach testified adequately about them?

16          A.     Correct.

17          Q.     Okay. September 4th, 2008, "Dear Rick, I  
18 have reviewed the drawings of The Metropolis Lofts and  
19 Flats, and the following are my comments." You see  
20 that?

21          A.     Yes.

22          Q.     Okay. And you identify the various plans  
23 that you've reviewed.

24          A.     Correct.

25          Q.     And you state, "On this issue I do not see,"

1 see that? When is the first time you reviewed this  
2 document, if ever?

3 A. I don't think I ever reviewed it.

4 Q. And you did not believe that it was important  
5 to review the owner-architect agreement before  
6 rendering your opinion that the architect fell below  
7 the standard of care?

8 A. No.

9 Q. Why not?

10 A. Because my opinions are based upon the work  
11 product. It has nothing to do with the contract.

12 Q. All right. Would you take a moment and  
13 review the agreement.

14 MR. DALY: You want him to read the entire  
15 thing?

16 MS. WEIL: I would like him to review it.

17 MR. DALY: He's not an attorney. So any  
18 questions you're going to ask him are going to be  
19 objectionable based on the legal conclusion.

20 BY MS. WEIL:

21 Q. Let me just ask you this: In your mind,  
22 Mr. Falstad, it doesn't matter what the owner-architect  
23 agreement says, that wouldn't have any impact on your  
24 opinions concerning the standard of care?

25 A. No.

1 identified this as Exhibit No. 202.

2 Okay. Let's go to the first, this page 2 of  
3 3. It says, "A list of cases in which Mr. Falstad was  
4 retained is also attached. Of those cases, to the best  
5 of Mr. Falstad's recollection, he was deposed in the  
6 following." Do you see that?

7 A. Yes.

8 Q. In reviewing this list, are you able -- does  
9 that refresh your recollection of which of these cases,  
10 if any, went to trial or arbitration?

11 A. I think New York-New York is the only one.

12 Q. Okay. In that case were you an expert or a  
13 party?

14 A. Party.

15 Q. What was the nature of your involvement as a  
16 party?

17 A. We got sued for negligence. And Nick handled  
18 that one.

19 Q. Nick Wieczorek?

20 A. Yes.

21 Q. Right. You and I talked about that one.

22 A. Yeah.

23 Q. And you won that case; correct?

24 A. Right. Well, kind of.

25 Q. What do you mean kind of?