

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 CASHMAN EQUIPMENT COMPANY,
3 a Nevada corporation,

4 Appellant,

5
6 vs.

7 WEST EDNA ASSOCIATES, LTD., dba
8 MOJAVE ELECTRIC, a Nevada
9 corporation; WESTERN SURETY
10 COMPANY, a surety; THE WHITING
11 TURNER CONTRACTING COMPANY,
12 a Maryland corporation; FIDELITY AND
13 DEPOSIT COMPANY OF
14 MARYLAND, a surety; TRAVELERS
15 CASUALTY AND SURETY
16 COMPANY OF AMERICA, a surety; QH
17 LAS VEGAS LLC, a foreign limited
18 liability company; PQ LAS VEGAS,
19 LLC, a foreign limited liability company;
20 L W T I C SUCCESSOR LLC, an
21 unknown limited liability company;
22 FC/LW VEGAS, a foreign limited
23 liability company;

24 Respondents.

Case No: 61715

Case No: 65819

Case No: 61652 Electronically Filed
Oct 20 2015 10:10 a.m.
Tracie K. Lindeman
Clerk of Supreme Court
District Court Case No.: A642583

**APPELLANT CASHMAN
EQUIPMENT COMPANY'S
REPLY BRIEF**

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Appellant, CASHMAN EQUIPMENT COMPANY (“Cashman”), is a Nevada corporation.

The law firm of Pezzillo Lloyd is the only firm to represent Cashman in the District Court action.

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ARGUMENT

This appeal centers on the district court's error in denying Cashman, a material supplier, its statutory and contractual right to payment for the emergency standby power system (hereinafter "the Materials") it supplied to the Las Vegas City Hall project ("the Project"). As set forth below, Nevada has long recognized that parties such as Cashman are in a vulnerable economic position and are the parties least able to protect their economic interests, which is why the mechanic's lien remedy was created. This appeal is not about whether Mojave will pay twice for the Materials provided by Cashman. Respondents (hereinafter collectively "Mojave Parties") attempt to obfuscate the issues on appeal because the district court's errors require reversal. Cashman was not paid for the materials it supplied to the Project. Cashman took every action it could as a material supplier to obtain payment, including request a joint check from Mojave, which would have ensured payment to Cashman but was unreasonably denied by Mojave.

A. The District Court Erred By Failing to Enforce Cashman's Lien Claim.

Despite the plain and unambiguous language of NRS 108.2357(5)(e) which renders the Unconditional Waiver & Release ("the Release") void, the district court enforced the Release against Cashman and dismissed its mechanic's lien claim. This was in error and requires reversal pursuant to

1 Nevada law. Cashman's failure to receive payment for the Materials it
2 supplied to the Project is a textbook example of why the legislature created
3 the mechanic's lien remedy. As has been reiterated by this Court, "'A
4 mechanic's lien is a statutory creature" designed "to provide contractors
5 secured payment for their work and materials" because they are generally in
6 a vulnerable position." *Simmons Self-Storage v. Rib Roof, Inc.*, 130 Nev.
7 Adv. Op. 57, 331 P.3d 850, 854 (2014); quoting *In re Fontainebleau Las*
8 *Vegas Holdings, L.L.C.*, 128 Nev. —, —, 289 P.3d 1199, 1210 (2012).
9 To effectuate that purpose, we have held that these "statutes are remedial in
10 character and should be *liberally construed*." *Id.* (internal quotation marks
11 omitted) (emphasis added). The Nevada legislature in 2003 and 2005
12 "substantially revised the mechanic's lien statutes with the intent "to facilitate
13 payments to lien claimants.'" *In re Fontainebleau Las Vegas Holdings,*
14 *L.L.C.*, 128 Nev. —, —, 289 P.3d 1199, 1211 (2012), *quoting Hardy*
15 *Companies, Inc. v. SNMARK, LLC*, 126 Nev. —, —, 245 P.3d 1149,
16 1156 (2010). The district court disregarded Nevada's strong public policy in
17 protecting lien claimants like Cashman and ignored the plain language of
18 NRS 108.2357(5)(e) and must be reversed.

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1 1. The Release Is Void As The Check For Which It Was Exchanged
2 Failed to Clear the Bank.

3 Cashman correctly relies upon NRS 108.2457(5)(e) in seeking reversal
4 of the district court, as the district court erred in enforcing the Release against
5 Cashman which is void and of no legal effect. It is well established that “when
6 the language of a statute is plain and unambiguous, such that it is capable of
7 only one meaning, this court should not construe that statute
8 otherwise.” *MGM Mirage v. Nevada Ins. Guaranty Ass'n*, 125 Nev. 223,
9 228–29, 209 P.3d 766, 769 (2009). The Court should give statutory language
10 that is plain and unambiguous its ordinary meaning and not go beyond it.
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12 *Blaine Equip. Co. v. State*, 122 Nev. 860, 138 P.3d 820 (2006).

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16 NRS 108.2457(5)(e) provides:

17 Notwithstanding any language in any waiver and
18 release form set forth in this section, if the payment
19 given in exchange for any waiver and release of lien
20 is made by check, draft or other such negotiable
21 instrument, ***and the same fails to clear the bank on***
22 ***which it is drawn for any reason, then the waiver***
23 ***and release shall be deemed null, void and of no***
24 ***legal effect whatsoever*** and all liens, lien rights,
25 bond rights contract rights or any other right to
26 recover payment afforded to the lien claimant in law
27 or equity will not be affected by the lien claimant’s
28 execution of the wavier and release.

29 (Emphasis added). Despite the plain and unambiguous language of this
30 statute, which renders the Release void, the district court enforced the Release

1 and dismissed Cashman's lien claim, after finding that Cashman had properly
2 perfected its lien.
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4 Contrary to Mojave Parties' arguments, Cashman provided the Release
5 to Cam in exchange for a check from Cam. JA 27:6662-63; 11:2595-97;
6 31:7736, ¶4. Cam's check failed to clear the bank. JA 11:2602; 31:7736,
7 ¶36. Therefore, the Release Cashman provided to Cam in exchange for the
8 check is "null, void and of no legal effect whatsoever." NRS 108.2457(5)(e).
9 Cashman relied upon this statute in exchanging the Release for the check,
10 knowing it could only be enforced if the check cleared. JA 27:6663-65.
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14 Mojave Parties erroneously rely upon language contained in the
15 Release to the effect that the document serves to release all claims in arguing
16 its enforceability. Such language is subject to NRS 108.2357(5)(e), which
17 renders a release void when given in exchange for a check that fails to clear
18 the bank. Mojave's payment to Cam is not relevant to the enforceability of
19 Cashman's lien, as Cashman's rights cannot be eliminated by payment to a
20 third party. *See* NRS 108.2457(1) (any action seeking to eliminate rights of
21 a lien claimant are void if not in compliance with the provisions of statute);
22 *see also* NRS 108.2457(2)(5) (waiver valid only to extent that payment is
23 actually received by claimant). Mojave knew the Release was being provided
24 in exchange for Cam's payment and was on notice that the payment would
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1 need to clear for it to be enforceable. If Mojave had actually provided its
2 check to Cashman in exchange for Cashman's release, Cashman would have
3 been paid and the Release would have been valid.
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5 Mojave Parties' interpretation of NRS 108.2457(5)(e) is not only
6 counter to the plain language of the statute, but it also ignores this Court's
7 clear precedent that the mechanic's lien statutes are in place and should be
8 construed to protect lien claimants, who are in a vulnerable position on
9 construction projects. The statutes are there to facilitate payment to lien
10 claimants, like Cashman, and are not to be interpreted in such a narrow or
11 technical way so as "to fritter away, impede or destroy the right of the lie
12 claimant." *Lamb v. Goldfield Lucky Boys Mining Co.*, 37 Nev. 9, 138 P. 902,
13 905 (1914). To hold that Mojave's check, **which Cashman did not receive**,
14 constitutes Cashman's payment and renders Cashman's Release, given to
15 Cam in exchange for a different check that failed to clear the bank,
16 enforceable, destroys Cashman's properly perfected lien claim in spite of the
17 clear mandates of NRS 108.2357(5)(e). The district court ignores the plain
18 language of NRS 108.2357(5)(e).
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25 Mojave Parties make a material misrepresentation of the record when
26 stating that Cashman delivered the Release to Mojave. Cashman did not
27 provide the Release to Mojave. Cashman provided the Release to Cam in
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1 exchange for the check from Cam to pay for the Materials in full. JA 27:6662-
2 63; 11:2595-97; 31:7736, ¶34. It is not relevant, in reviewing the validity of
3 the Release provided by Cashman to Cam; whether Mojave paid
4 Cam. Mojave did not provide payment to Cashman; if Mojave had done that,
5 Cashman would have been paid in full and this litigation would not have been
6 necessary. The uncontroverted evidence before this Court is that Cashman
7 received payment from Cam and provided the Release at issue in exchange
8 for Cam's payment. JA 27:6659; JA 11:2602-04; JA 31:7736, ¶34; JA
9 27:6662-63; JA 11:2595 – 97. Cashman likewise accepted the check with the
10 express understanding that in the event the payment failed the Release would
11 not be of any force or effect. JA 27:6663 – 65.

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17 Mojave Parties are unable to counter the plain language of the statute
18 which renders the Release void, requiring reversal of the district court, and
19 instead, distract with misrepresentations of the record and attempts to cloud
20 the issues on appeal.

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22 2. Cashman Amended Its Lien As Allowed By NRS 108.229 And
23 Mojave Parties' Misrepresentations Concerning The Amended
24 Lien Are Not Supported By The Record.

25 Mojave Parties insinuate that Cashman engaged in an attempt to
26 intentionally overstate its mechanic's lien to distract from the district court's
27 error in enforcing a void release. This is verifiably untrue, not supported by
28

1 the record and not relevant to the legal issues presented. Cashman amended
2 its lien at trial pursuant to NRS 108.229. “A lien claimant may record an
3 amended notice of lien to correct or clarify the lien claimant’s notice of lien”
4 at any time before *or during* trial. See NRS 108.229 (emphasis added).
5 Cashman’s lien on the Project was recorded on July 22, 2011, in the amount
6 owed at the time, which was \$755,893.89. JA 11:2616-21; 27:6677; 31:7737,
7 ¶41.
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11 It was not until trial that Cashman became aware that its mechanic’s
12 lien needed to be amended to reflect a battery purchased by a different
13 subcontractor that had been purchased and supplied to the Project. JA
14 27:6619-23. Cashman then immediately amended its lien to reflect a credit
15 for the batteries it sold to the subcontractor, evidencing its good
16 faith. Cashman was not attempting to double recover for the Materials and
17 Mojave Parties’ argument to the contrary blatantly misrepresents the evidence
18 offered at trial because Mojave Parties cannot counter the district court’s
19 misapplication of NRS 108.2457(5)(e).
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24 3. Mojave Parties’ Attempt To Blame Cashman Fails, Both
25 Factually and Because Equity Does Not Justify The District
26 Court’s Blatant Disregard Of NRS 108.2457(5)(e).

27 Cashman seeks reversal of the district court on its lien claim based upon
28 the district court’s misapplication of the law. As this Court recognized in *In*

1 *Re Fontainebleau Las Vegas Holdings*, “mechanic’s liens ‘ha[ve] no place in
2 equity jurisprudence.” 128 Nev. —, —, 289 P.3d 1199, 1212 (2012),
3
4 quoting *Lamb v. Goldfield Lucky Boys Mining Co.*, 37 Nev. 9, 138 P. 902,
5 904 (1914). Further, this Court has held “that equitable principles will not
6 justify a court’s disregard of statutory requirements.” *Pellegrini v. State*, 117
7 Nev. 860, 878, 34 P.3d 519, 531 (2001). Therefore, to the extent that the
8 district court reached its decision on the lien claim based upon misplaced
9 equity, and as to Mojave Parties’ arguments concerning fairness or actions
10 Cashman should have taken, it is established that equity does not allow a
11 district court to disregard statutory requirements.

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15 Mojave Parties disingenuously argue that Cashman could have taken
16 additional steps to obtain payment, when Mojave prevented or refused all
17 reasonable actions, as was set forth at trial. First, Mojave Parties claim that
18 Cashman could have issued a conditional waiver in exchange for Cam’s
19 check. Notwithstanding that any release would have been void if the check
20 given in exchange fails to clear the bank, it was Mojave who demanded that
21 Cashman provide an unconditional release. JA 27:6661, lns. 18-23. In fact,
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24 Mojave had repeatedly contacted Cashman requesting that Cashman provide
25 an unconditional release. JA 27:6661, lns. 18 – 23. It was Cashman that
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28 refused to do so since it had not been paid. JA 27:6661 – 62; 31:7736, ¶29 –

1 30. Cashman did not have the option of providing a conditional release, as it
2 would not have received the check from Cam had it done so. *Id.* Mojave
3 Parties' statements to the contrary are not supported by its citation to the
4 record and in fact are directly contradicted to the record. Again, it was
5 Mojave that arranged a meeting at Mojave's offices on April 26, 2011 so that
6 Cam could make payment to acquire the Release from Cashman. JA 27:6658.
7 As set forth above, Cashman only provided the Release in exchange for the
8 check from Cam.
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12 Second, Mojave Parties argue that Cashman could have required
13 Mojave to issue a joint check. Mojave Parties mislead this Court because
14 Cashman did request payment by joint check and Mojave refused. JA
15 27:6655; JA 31:7736, ¶27 - 28. In its quest to blame Cashman, Mojave Parties
16 ignore that a joint check *was* requested by Cashman, and then offers a self-
17 contradictory argument that a joint check could not be used on the project as
18 it may have interfered with the alleged DBE requirement.¹ *Id.* at fn. 66.
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22 The sole reason that a joint check was not issued to Cashman was
23 Mojave's refusal. There is no authority, legal or factual, offered that a joint
24 check could not be used on the Project and joint checks are common-place in
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27 ¹ The record is devoid of any evidence that the use of a DBE was mandated on the
28 Project, but rather, that it was encouraged that a certain percentage of the work,
overall, be performed by DBE contractors/suppliers.

1 the construction industry. Additionally, Mojave Parties' argument is belied
2 by the fact that Mojave had previously made payments to Cam and another
3 supplier on the Project by a joint check. JA 27:6655; JA 28:6825, lns. 15 –
4 23. Mojave could have ensured payment to Cashman with a joint check.
5 Cashman requested the joint check but Mojave refused. It is inconceivable
6 how Mojave Parties can make this absurd argument in light of what actually
7 occurred.
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11 Lastly, Mojave Parties argue that Cashman could have required Cam
12 to sign over the check Cam received from Mojave. Mojave Parties fail to cite
13 to any authority which would empower Cashman to make a demand upon
14 Cam that it take such action. Such an argument defies credulity given the fact
15 that it is well established that higher-tiered contractors pay those
16 “downstream” of them. Indeed, if Cashman could not force Mojave to issue
17 a joint check, it follows that it also could not force Cam to sign over its check
18 to Cashman. The lien was created because lower-tiered suppliers do not have
19 control over how and when payment is made.
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24 In conclusion, Mojave is not being asked to pay twice. Mojave
25 voluntarily obtained and posted a lien release bond, which replaces the real
26 property as security for the mechanic's lien. Cashman is enforcing its lien
27 claim, and Mojave chose to step into the shoes of the Project owner and accept
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1 liability with the posting of the lien release bond. Mojave could have easily
2 ensured that the Release was enforceable by issuing payment to Cashman. It
3 simply chose not to and then wants to blame Cashman for using the lien
4 statutes to secure payment. Cashman properly perfected its lien claim and the
5 district court must be reversed pursuant to NRS 108.2457(2)(5).
6
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8 **B. The District Court Erred In Denying Cashman's Claim Against**
9 **The Payment Bond, As Mojave Failed To Ensure Payment To**
10 **Cashman As It Was Contractually Obligated To Do.**

11 The district court erred in failing to enforce Cashman's claim against
12 the Payment Bond, as the doctrine of impossibility is not applicable and the
13 other arguments offered by Mojave fail. The district court found Cashman
14 within the persons for which the Payment Bond was intended. JA 31:7738-
15 39, ¶6. Mojave did not ensure payment to Cashman as it was contractually
16 obligated to do.
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19 1. **The Doctrine Of Impossibility Was Not Properly Applied By**
20 **The District Court To Excuse Mojave's Performance.**

21 There are two inquiries to be made in considering whether the doctrine
22 of impossibility will excuse performance of a party under a contract. The
23 performance must be impossible and it must have been made impossible by
24 an unforeseen contingency. *See Nebaco, Inc. v. Riverview Realty Co.*, 87
25 Nev. 55, 57, 482 P.2d 305, 307 (1971). Mojave Parties fail to provide citation
26 to evidence in the record that it was impossible for Mojave to make payment
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1 to Cashman, because no such evidence was presented. Mojave Parties then
2 focus on whether it was possible for Mojave to foresee that Cam would
3 abscond with the funds, but that is not the relevant inquiry to be made under
4 *Nebaco*. The defense of impossibility only applies where an unforeseen
5 contingency renders performance impossible, and the failure of a lower-tiered
6 contractor to make payment downstream is not an unforeseen contingency on
7 a construction project.
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11 2. Mojave's Payment To Cam Does Not Discharge Its Contractual
12 Obligation To Cashman Under The Payment Bond.

13 Mojave contracted to accept the risk of nonpayment to those persons,
14 like Cashman, supplying in the performance of its contract by obtaining the
15 Payment Bond. JA 31:7733-34, ¶5; 16:3783-86. Mojave's legal obligation
16 to Cashman under the Payment Bond existed from the inception of the
17 Project; Mojave chose to ignore that obligation and wants to pretend it was
18 only legally obligated to pay Cam. That is simply not the case. Mojave
19 bargained for the risk associated with ensuring payment to its downstream
20 subcontractors and suppliers, including those with which it did not
21 contract. Cam's failure to pay Cashman was not an unforeseen contingency;
22 and even if it were, it did not prevent Mojave from ensuring payment to
23 Cashman. Mojave could have paid Cashman directly or issued a joint
24 check. Mojave's answer is to blame Cashman for not doing more to collect
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1 money it did not control, when Mojave could have prevented Cam's actions
2 and easily paid Cashman, directly.
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4 Mojave had an independent obligation to Cashman to ensure payment
5 to Cashman for the Materials it supplied. Mojave Parties argue at length that
6 Mojave's payment to Cam discharged its obligations to Cashman under the
7 Payment Bond. This argument fails as the Payment Bond required that
8 Mojave "promptly make payments to **all persons** supplying labor, materials,
9 rental equipment, supplies or services" in the performance of Mojave's
10 contract in order to discharge its obligations. JA 16:3784 (emphasis
11 added). The Payment Bond does not state that Mojave's obligations are
12 limited to only those persons with which Mojave contracted; it is much
13 broader than that. Mojave contracted for the Payment Bond and was aware
14 of its obligations. JA 28:6823. Mojave chose not to take the actions required
15 to discharge its obligation to Cashman under the Payment Bond.
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21 3. Mojave Parties' Reliance On The Doctrine Of Accord and
22 Satisfaction Is Not Supported By The Record.

23 Mojave Parties' reliance on the doctrine of accord and satisfaction in
24 support of the district court's decision is misplaced. Mojave Parties are
25 unable to satisfy a *single element* of the doctrine. First, there was no dispute
26 concerning the amount owed to Cashman. Cashman presented invoices to
27 Cam, Cam billed that amount to Mojave, Mojave approved the billing and
28

1 issued payment to Cam. JA 27:6660-61; 31:7736, ¶31. There is no evidence
2 in the record that Mojave disputed the billing, or that there was a bona fide
3 dispute, because there was none.
4

5 Second, Mojave did not pay Cashman in full to settle the
6 dispute. Again, there is no evidence of a dispute, but even if there were,
7 Mojave did not tender payment to Cashman. Mojave paid Cam. JA 27:6660-
8 61; 31:7736, ¶31. Mojave Parties want to represent this payment as payment
9 to Cashman, but it was not.
10
11

12 Third, Cashman did not receive any payment that it could accept in
13 satisfaction of a dispute. Mojave Parties misrepresent how Cashman
14 provided the Release, by including citation to a point of testimony that was
15 not clear and later directly clarified under objection. It was established at trial
16 that Cashman provided the Release to Cam in exchange for the check from
17 Cam in the full amount owed. JA 27:6663; JA 31:7721, ¶11. Cashman did
18 not provide the Release to Mojave. Mojave was at the meeting, and saw the
19 exchange. JA 27:6661. Therefore, Mojave knew the Release would only be
20 enforceable if the check Cashman received from Cam cleared the bank. There
21 was no meeting of the minds as to an accord and satisfaction and Mojave
22 Parties fail to demonstrate that *even one element* of the doctrine was met. As
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1 such, accord and satisfaction cannot operate to release Cashman's claim on
2 the Payment Bond or justify the district court's denial of its claim.
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4 4. Mojave Parties' Argument That Cashman Is Not Owed
5 \$683,726.89 For The Materials Supplied Is Improper And
6 Should Not Be Considered By This Court, As This Issue Is Not
7 On Appeal.

8 The district court found that Cashman was owed \$683,726.89 for the
9 Materials supplied to the Project based upon the evidence presented at
10 trial. JA 31:7721, ¶9. Mojave Parties did not appeal this finding by the
11 district court, and cannot now challenge this finding.² NRAP 3(a)(1) and
12 4(a)(2).
13

14 Mojave Parties also argues about the amounts it alleges it incurred after
15 Cashman stopped work on the Project due to nonpayment. The district court
16 specifically considered these issues and held that Mojave was not entitled to
17 a setoff, as Cashman acted in accordance with NRS 624.626(9). JA 31:7727,
18 ¶42. Again, if Mojave wished to challenge the district court's finding on its
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24 ² Mojave's arguments as to other amounts Cashman collected after trial are not
25 properly before this Court; there is no evidence in the record concerning the matters
26 raised. At the time of trial, Cashman had not collected on the judgments against
27 other defendants. Cashman is not seeking double recovery; Cashman is merely
28 seeking to be paid for the Materials it supplied to the Project and would properly
document any amounts collected after trial after reversal. This argument is not
relevant to the issues on appeal.

1 setoff defense, it was required to file a notice of appeal or cross-appeal and it
2 did not.

3
4 **C. Mojave Parties Are Not Entitled To Injunctive Relief As The**
5 **Matter Has Proceeded To Trial And Cashman Prevailed On All**
6 **Issues Asserted By Mojave.**

7 Mojave erroneously argues that Cashman is required to provide certain
8 installation codes associated with the equipment provided to the Project.
9 Mojave's argument is properly disregarded by the Court as Mojave has
10 misrepresented the findings of the district court, ignored the relevant case law
11 as set forth in Cashman's Opening Brief and failed to address the fact that the
12 requested relief is moot as the matter has proceeded to trial and Cashman has
13 prevailed on all causes of action asserted by Mojave.
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16
17 1. **The District Court's Previously Issued Preliminary Injunction Is**
18 **Moot as The Action Has Proceeded to Trial and Cashman Has**
19 **Prevailed on all Claims Asserted by Mojave.**

20 The Court has clearly articulated the well-established doctrine that
21 moot issues will not be decided and that it is "the duty of every judicial
22 tribunal to decide actual controversies by a judgment which can be carried
23 into effect, and not to give opinions upon moot questions or abstract
24 propositions. . ." *National Collegiate Athletic Association v. University of*
25 *Nevada, Reno*, 97 Nev. 56, 57, 624 P.2d 10 (1981). Mojave ignores the fact
26 that the preliminary injunction previously issued is moot as the action has
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1 proceeded to trial and Cashman has prevailed upon all counterclaims asserted
2 by Mojave. JA 31:7742, ¶29. Having failed to prevail on even one cause of
3 action Mojave cannot maintain that it is somehow entitled to injunctive relief
4 upon defeated causes of action. Mojave's logic is truly untenable as it must
5 go without saying that a party cannot maintain an argument that it is likely to
6 prevail upon the merits, *when it has already lost upon the merits of the case*
7 *at trial.*³
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11 Even in the event the issue of the preliminary injunction were ripe,
12 Mojave has not disputed the fact that it lacks standing to enforce such a claim.
13 Mojave's rights are not implicated by the previously filed motion for
14 preliminary injunction. The owner, against whom unjust enrichment has been
15 granted, is the only party who would allegedly suffer damages, assuming any
16 actually existed.
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19 Additionally, the only damages sought against Cashman by Mojave
20 were monetary damages, accordingly injunctive relief would have been
21 inappropriate as Mojave had an adequate remedy in the form of compensatory
22 damages which would have been sufficient had Mojave prevailed upon any
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26 ³ In this regard it should be noted that Mojave misrepresents the record on
27 appeal in stating that the district court found that Mojave had a "reasonable
28 likelihood of success on the merits". In reality the district court found that
Cashman had a likelihood of success on the merits given that it had supplied
equipment and had not been paid. JA 2:430 – 432.

1 of its claims. *See Fritz Hansen A/S v. Eighth Judicial Dist. Court* 116 Nev.
2 650 (2000)(“irreparable harm is harm for which compensatory damages
3 would be inadequate”).
4

5 2. The District Court Did Not Order Cashman to Provide The
6 Installation Codes Requested by Mojave at the Time of Trial.

7 As detailed above, the district court’s preliminary injunction ruling was
8 just that – *preliminary*. The preliminary ruling of the district court has now
9 been subsumed by its final judgment in matter. In issuing its final judgment,
10 the district court ruled in favor of Cashman on all causes of action asserted by
11 Mojave. Mojave acknowledges that the district court ruled in favor of
12 Cashman on its claim for unjust enrichment against the Project owner in the
13 amount \$86,600.00. Mojave likewise acknowledges that the district court did
14 not order Cashman to install the requested codes, but rather, stated that
15 Cashman would be required to install the codes only if it accepted payment
16 in the amount of \$86,600.00. JA 31:7742, ¶28. Cashman properly appealed
17 from the district court’s final judgment, just as it appealed from the order
18 granting the preliminary injunction. Cashman has not failed to follow the
19 court orders as both were timely appealed. Mojave’s request that this Court
20 mandate a turnover of the codes is made without any basis and is properly
21 ignored.
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1 **D. The District Court Properly Granted Cashman Judgment on its**
2 **Security Interest But Erred in Reducing Damages by Applying a**
3 **Comparative Fault Analysis.**

4 Mojave argues that Cashman must be wholly at fault for the damages
5 it suffered when Cam stopped payment on the check issued to Cashman. As
6 set forth above, a majority of Mojave's argument is that Cashman should have
7 taken different action to obtain payment.⁴ The fact that Cashman was not
8 paid as agreed is not Cashman's fault, but demonstrates the nature of risk
9 encountered by suppliers like Cashman and underscores the importance of
10 enforcing the payment protections which inure to Cashman. As noted by
11 commentators:
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15 The flow of money is the life blood of any
16 construction project....The payment process has
17 always been fairly challenging in the construction
18 industry. As a consequence, Congress and many
19 state legislatures have taken an interest in how
20 payment is made and secured on construction
projects.

21 *Bruner & O'Conner on Construction Law*, §8.1, pp. 7 – 8. A construction
22 contract is essentially a credit transaction in which a party is "risking his labor
23 and materials on the promise of the other party to pay . . ." *Id.* at p. 9, *citing*,

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26 ⁴ Although Mojave claims that Cashman could have taken precautions to
27 protect its economic interests, it has been shown herein that Mojave has cited
28 to no evidence and its claims are contradicted by the record. Cashman's
actions were typical and reasonable actions, including having asked Mojave
for payment by joint check, which Mojave refused.

1 3A Corbin on Contracts p. 271, §692. The district court found that pursuant
2 to the contract between Cashman and Cam, Cashman properly perfected its
3 security interest in the Materials provided. JA 31:7740, ¶17 – 18. This is not
4 in dispute. Mojave did not contest or appeal from this express finding and its
5 arguments for reversal of this finding are not properly before the court.
6 Mojave argues in favor of the district court's erroneous equitable fault
7 analysis. In doing so, Mojave seeks to gain the benefits of the contract
8 between Cashman and Cam but none of the obligations. Such a position is
9 the epitome of inequity.
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14 Mojave claims that equity should apply to reduce or eliminate
15 Cashman's damages because Cashman could have done many things to
16 protect itself. In part, Mojave is correct, Cashman could have, and did, take
17 action to protect itself by utilizing its statutorily created rights to properly
18 perfect a security interest in the Materials it supplied to the Project. Mojave
19 cites to no authority whatsoever to support the novel proposition that a party
20 loses its statutory right to payment because, with 20/20 hindsight, it might
21 have been able to take additional steps to protect itself.⁵
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27 ⁵ The frivolity of Mojave's argument is underscored by the fact that had
28 Mojave acceded to Cashman's request for the issuance of a joint check this
matter would never resulted in litigation.

1 Mojave likewise engages in a tortured argument claiming that the
2 district court was proper in its application of an equitable fault analysis
3 because Cashman did not have a contract with Mojave and therefore equity
4 must be applied. Mojave submits this argument as a means of distracting
5 from its own fault. At any time Mojave could have required the security
6 interest in the Materials to be released; however, Mojave did not; therefore,
7 Mojave knowingly accepted the Materials subject to the filed security interest.
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11 It is well-settled doctrine that a security interest created under the
12 Uniform Commercial Code (“UCC”), such as the one at issue, is a
13 **contractual** remedy. See Bruner & O’Connor on Construction Law, §19:48,
14 p. 180 (emphasis added). If, as suggested by Mojave, Cashman’s security
15 interest was not contractual then Cashman would be free to seek damages far
16 in excess of its contract with Cam – a position which Mojave would no doubt
17 contest if it meant that Mojave had to pay in excess of the contract price for
18 the Materials. As the security interest is a contract, equitable fault is
19 inappropriate to reduce the amount owed and Mojave may not collaterally
20 attack a contract to which it is not a party by placing blame on Cashman where
21 Cashman did not breach. See JA 29:7081, lns. 6-19 (district court noting that
22 fault of stealing the money due and owing to Cashman is completely the fault
23 of Mr. Carvalho, owner of Cam). Mojave does not dispute that when the
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1 security interest at issue is contractual in nature that equity can not be properly
2 applied, as there is no legal grounds to dispute it.

3
4 **E. The District Court Erred In Not Awarding Cashman Its Attorney's**
5 **Fees And Costs.**

6 Cashman should have been awarded its attorneys fees and costs as the
7 prevailing party in this matter pursuant to NRS 104.9607. Mojave repeatedly
8 argues that Cashman was not the prevailing party and is therefore not entitled
9 to its fees and costs; however, Mojave does not cite any case law or facts in
10 support of that argument or in counter to the legal arguments made by
11 Cashman, because it cannot. Mojave's arguments fail as a matter of
12 law. **Cashman was explicitly found by the district court to be the**
13 **prevailing party**, entitled to damages on its claim for Foreclosure of Security
14 Interest, and was awarded damages on its Unjust Enrichment claim against
15 the Owner. JA 31:7745. A party does not need to succeed on every issue to
16 be a prevailing party entitled to recover attorney fees and costs. *LVMPD v.*
17 *Blackjack Bonding*, 131 Nev. Adv. Op. 10, 343 P.3d 608, 615 (2015). The
18 district court later flip-flopped when it stated there was no prevailing party in
19 its order denying fees to all parties, but that finding is clearly erroneous
20 pursuant to Nevada law when the outcome of the trial is considered.

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27 It is inconceivable that Mojave advances the argument that Cashman is
28 not the prevailing party in this matter. Cashman was awarded damages on

1 two of its claims while all of Mojave's claims were dismissed and its offset
2 defense was denied. JA 31:7743, ¶32. "A party prevails "if it succeeds on any
3 significant issues in litigation which achieves some of the benefit it sought in
4 bringing suit."" *LVMPD*, 343 P.3d at 615 quoting *Valley Elec. Ass'n v.*
5 *Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005). Cashman succeeded
6 on two of its claims and was awarded a portion of what it sought at
7 trial. Cashman asserts in this appeal that the district court erred in denying
8 Cashman recovery on other of its claims, but that does not mean that Cashman
9 is not the prevailing party. Mojave forced Cashman to litigate for over three
10 years to collect payment for the Materials Cashman supplied to the Project
11 because Mojave chose not to ensure Cashman was paid. Mojave was
12 unreasonable in its dealings with Cashman on the Project and continued to be
13 unreasonable in this litigation.

14
15 NRS 104.9607 allows for an award of fees to a secured party where it
16 exercised its rights pursuant to a valid security interest. The district court
17 found that Cashman had a valid and enforceable security interest against the
18 value or proceeds derived from the Materials. JA 31:7722. Mojave was paid
19 \$1,254,992.00 for the Materials. *Id.* See also JA 28:6757-58 (Whiting Turner
20 has paid Mojave in full on this Project). Mojave cannot now challenge these
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1 findings as it did not appeal from the judgment of the district court. NRAP
2 3(a)(1).
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4 In finding Mojave liable to Cashman and enforcing its security interest,
5 the district court found that Mojave was obligated on the collateral and
6 therefore subject to an award of fees under NRS 104.9607. The district court
7 erred in not awarding Cashman its attorney's fees as the fees incurred by
8 Cashman were necessary, reasonable and incurred in the prosecution of its
9 claims in this matter, when considered under the factors set forth in *Barney v.*
10 *Mt. Rose Hearing & Air Conditioning*, 124 Nev. 821, 829, 192 P.3d 730, 736
11 (2008). *See also Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349-
12 50, 455 P.2d 31, 33 (1969). The separate claims pursued by Cashman due to
13 Mojave's failure to ensure it was paid were interrelated, and it would be
14 difficult to separate the fees incurred in the prosecution of the claims upon
15 which Cashman prevailed. Further, *Barney* does not stand for the proposition
16 that a party is required to apportion its attorney's fees in order to be awarded
17 fees for prevailing on only certain of its claims, as Mojave implies. The
18 district court did not conduct any analysis under *Barney* or *Brunzell* and
19 simply denied Cashman's Motion for attorney's fees based on the outcome of
20 the trial. JA 32:7777-80. Cashman was the prevailing party at trial. It was
21 Mojave's unreasonable conduct that resulted in Cashman not being paid for
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1 the Materials it supplied to the Project and ultimately led to this protracted
2 litigation that ended with judgment in favor of Cashman. As such, the district
3 court erred in denying Cashman's Motion for Attorney's Fees in the amount
4 of \$229,733.00, and should be reversed.
5

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7 Further, the district court erred in denying Cashman its costs as
8 Cashman was the prevailing party after trial, as addressed above. NRS 18.020
9 **mandates** that costs be allowed to the prevailing party and against the party
10 liable on the judgment in an action for money or damages where the plaintiff
11 seeks to recover more than \$2,500.00. Cashman is the prevailing party and it
12 sought to recover in excess of \$2,500.00 in this matter. Cashman properly
13 filed its Memorandum of Costs pursuant to NRS 18.010 and Mojave did not
14 file a Motion to Retax. JA 31:7748-49. The district court must be reversed
15 and Cashman awarded its costs in the amount of \$24,780.45 against Mojave.
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19 Finally, as was set forth above, this Court must reverse the district
20 court's clear error in enforcing a void release against Cashman and enter
21 judgment in favor of Cashman on its lien claim. A judgment in favor of
22 Cashman on its lien claim mandates an award of the attorney's fees incurred
23 to enforce the lien pursuant to NRS 108.237. NRS 108.237 requires the court
24 award the lienable amount found due, the costs of the proceedings,
25 reasonable attorney's fees, and any other amounts found to be justly due and
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owing to the lien claimant. Cashman requests that this Court reverse the district court, enter judgment in favor of Cashman on its lien claim in the amount of \$683,726.89, as was found due at trial, and remand for a determination of the total attorney's fees that must be awarded Cashman pursuant to NRS 108.237.⁶

F. Mojave Parties Failed To File A Notice of Appeal or Cross-Appeal And Are Therefore Prohibited From Challenging the Judgment and Raising New Issues.

Mojave Parties' inclusion of arguments in their Answering Brief for reversal of the judgment are not properly before this Court and are in blatant disregard of the Nevada Rules of Appellate Procedure.⁷ In their Brief, specifically Sections C and F, Mojave Parties argue that the district court improperly ruled against them and in favor of Cashman on certain claims that are not on appeal and request these claims be dismissed and/or reversed in

⁶ As was set forth above, Mojave's request that this Court reverse the district court's denial of its Motion for Attorney's Fees cannot be considered because Mojave did not appeal from that order. It is important to note as well, that Mojave was not entitled to fees under NRS 108.237 as the district court did not find that Cashman pursued its lien without a reasonable basis in law or fact. The district court found Cashman's lien was properly perfected, and Cashman seeks reversal of the district court's error in enforcing a release that is void pursuant to NRS 108.2457(5)(e).

⁷ Cashman filed a Motion to Strike Respondents' Answering Brief on September 24, 2015, addressing this issue in detail. Mojave Parties filed their Opposition on October 2, 2015; and Cashman filed its Reply in Support of the Motion on October 9, 2015.

1 Mojave's favor. Pursuant to NRAP and this Court's clear precedent, the
2 arguments set forth in Sections C and F of the Answering Brief must be
3 disregarded.
4

5 In order to raise issues on appeal, a party aggrieved by a judgment **must**
6 file a notice of appeal. NRAP 3(a)(1). "A notice of appeal must be filed after
7 entry of a written judgment or order, and no later than 30 days after the date
8 that written notice of entry of the judgment or order appealed from is served."
9 NRAP 4 (a)(1). After one party files a timely notice of appeal, "any other
10 party may file and serve a notice of appeal within 14 days after the date when
11 the first notice was served...." NRAP 4(a)(2).
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15 A timely filing of a notice of appeal "is mandatory and jurisdictional
16 with respect to a cross-appeal." *Mahaffey v. Investor's Nat'l Security*, 102
17 Nev. 462, 725 P.2d 1218 (1986). The United States Supreme Court has held:
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19 It is true that a party who does not appeal from a
20 final decree of the trial court cannot be heard in
21 opposition thereto when the case is brought here by
22 the appeal of the adverse party. In other words, **the**
23 **appellee may not attack the decree with a view**
24 **either to enlarging his own rights thereunder or of**
25 **lessening the rights of his adversary**, whether what
26 he seeks is to correct an error or to supplement the
27 decree with respect to a matter not dealt with below.

28 *Ford v. Showboat*, 110 Nev. 752, 755 (1994), citing *United States v. American*
Ry. Exp. Co., 265 U.S. 425, 435, 44 S.Ct. 560, 563, 68 L.Ed. 1087 (1924)

1 (*emphasis added*). “Under this rule, a respondent who seeks to alter the rights
2 of the parties under a judgment must file a notice of cross-appeal.” *Ford v.*
3 *Showboat*, 110 Nev. at 755 (*emphasis added*). Further, this Court has
4 consistently refused to consider additional issues raised by respondents in
5 their answering briefs due to the failure to properly raise the issue in a cross-
6 appeal. *See Barton v. DeRousse*, 91 Nev. 347, 351, 535 P.2d 1289, 1291
7 (1975); *Sierra Creek Ranch, Inc. v. J. I. Case*, 97 Nev. 457, 460, 634 P.2d
8 458, 460 (1981). Here, Mojave Parties improperly request that the court alter
9 the district court’s findings which are not on appeal, enlarging their rights and
10 lessening Cashman’s rights.
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15 Mojave Parties failure to appeal bar them from asking this Court to
16 reverse the following: (1) the district court’s ruling in favor of Cashman on
17 Cashman’s claim for unjust enrichment; (2) the district court’s ruling in favor
18 of Cashman on Cashman’s claim for foreclosure of security interest; and (3)
19 the district court’s ruling in favor of Cashman and against Mojave on
20 Mojave’s claim for misrepresentation. These issues are not on appeal and
21 therefore Mojave Parties’ request for the Court to dismiss or reverse these
22 district court findings must be disregarded.
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27 Further, Mojave Parties incorrectly contend that since Cashman
28 appealed the denial of its Motion for Attorneys’ Fees and Costs, that Mojave

1 Parties' Motion for Fees and Costs was also appealed and demands that this
2 Court reverse the district court's denial of its Motion for Fees and Costs.
3
4 Having not appealed the Order, this argument is jurisdictionally barred. This
5 issue has been directly addressed by this court. In *Sierra Creek Ranch, Inc.*,
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7 the respondent did not appeal but argued that the district court erred in
8 refusing to award its attorney's fees and costs; however, this Court refused to
9 consider respondent's argument. The respondent was aggrieved by the
10 district court's refusal to award fees and costs and sought to increase its rights
11 under the judgment; therefore, it was required to file a notice of appeal. *Sierra*
12
13 *Creek Ranch, Inc.*, 97 Nev. 457, 460, 634 P.2d 458, 460 (1981). The facts
14 here are almost identical. Mojave, the respondent, did not appeal but still
15 argues that the district court should have awarded its attorneys' fees. Mojave
16 was aggrieved by the district court's denial and was required to appeal if it
17 wanted to challenge the decision. Therefore, as in *Sierra Creek*, Mojave was
18 required to file a notice of appeal and as it did not its request for reversal of
19 the district court's order denying its fees and costs should not be considered.
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24 CONCLUSION

25 Based on the foregoing, Cashman requests that this Court reverse the
26 district court's findings and enter judgment in favor of Cashman on its
27 mechanic's lien claim, Payment Bond claim in the amount of \$683,726.89,
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1 increase its award on its security interest to \$683,726.89, and remand to the
2 district court for a determination of the amount of attorneys' fees and costs to
3 be awarded.
4

5 DATED: Oct. 19, 2015

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