IN THE SUPREME COURT OF THE STATE OF NEVADA

CASHMAN EQUIPMENT COMPANY, a Nevada corporation, Appellant, vs. WEST EDNA ASSOCIATES, LTD., dba MOJAVE ELECTRIC, a Nevada corporation; WESTERN SURETY COMPANY, a surety; THE WHITING TURNER CONTRACTING COMPANY, a Maryland corporation; FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a surety; TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, a surety; QH LAS VEGAS LLC, a foreign limited liability company; PQ LAS VEGAS, LLC, a foreign limited liability company; L W T I C SUCCESSOR LLC, an unknown limited liability company; FC/LW VEGAS, a foreign limited liability company; Respondents.	**Case No: 66452** **Case No: 61715** **Case No: 65819** Electronically Filed Jun 18 2015 03:44 p.m. Tracie K. Lindeman Clerk of Supreme Court District Court Case No.: **A642583** **Appeal from the Eighth Judicial District Court, The Honorable Rob Bare Presiding**

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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

The law firm of Pezzillo Lloyd is the only firm which represented Cashman in the District Court action.

Dated this 18th day of June, 2015.

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JURISDICTIONAL STATEMENT

This appeal arises from four separate orders from the district court and is properly under the jurisdiction of the Nevada Supreme Court.

Appellant filed a Notice of Appeal on September 13, 2012 (Case No. 61715) from the Findings of Fact and Conclusions of Law Based Upon Counterclaimants' Motion to Procure Codes, entered on August 13, 2012. This Court has jurisdiction under NRAP 3A(b)(3).

Appellant filed a Notice of Appeal on May 30, 2014 (Case No. 65819) from the Findings of Fact and Conclusions of Law, entered on May 5, 2014 after trial. This Court has jurisdiction under NRAP 3A(b)(1).

Appellant filed a Notice of Appeal on September 2, 2014 (Supreme Court Case No. 66452) from the Decision and Order denying Cashman's Motion for Attorneys' Fees, entered on August 4, 2014; and the Order Denying Cashman's Request for Costs pursuant to NRS 18.020, entered on September 2, 2014. This Court has jurisdiction under NRAP 3A(b)(8).

All three appeals were consolidated by this Court on or about October 20, 2014 (14-34913).

STATEMENT OF THE ISSUES

1. Whether the district court erred in denying recovery to Cashman on its properly perfected mechanic's lien claim by enforcing an Unconditional Waiver and Release Upon Final Payment that is void pursuant to NRS 108.2457;

2. Whether the district court erred in denying recovery to Cashman on its payment bond claim by applying the defense of impossibility when Mojave did not prove its performance was impossible and Cam's failure to pay Cashman was not an unforeseen contingency;

3. Whether the district court erred in reducing Cashman's award on its security interest claim using an equitable fault analysis and by an award conditioned on completing performance;

4. Whether the Court erred in issuing a preliminary injunction in favor of Defendants requiring Cashman to input codes for materials supplied when the Court found that Cashman was likely to prevail upon the merits and where Cashman did prevail upon the merits at trial;

5. Whether the district court erred in denying recovery to Cashman on its Countermotion for Attorney's Fees and Interest pursuant to NRS 104.9607, when Cashman was declared the "prevailing party" at trial;

6. Whether the district court erred in refusing to issue Cashman an award for costs as the prevailing party pursuant to NRS 18.020 when the Memorandum of Costs was uncontested.

STATEMENT OF THE CASE / SUMMARY OF THE ARGUMENT

This case arises from the construction of the New Las Vegas City Hall located in Las Vegas, Nevada ("the Project"). Pursuant to a valid and enforceable contract, Cashman provided specialty materials to be incorporated into the Project. Cam Consulting, Inc. ("Cam"), the party with whom Cashman contracted, failed to make the required payments which resulted in Cashman asserting various causes of action seeking recovery of amounts which the district court found to be due and owing.

Cashman appeals from the order and final judgment of the district court after trial, and from two post trial orders denying attorney's fees and costs to Cashman.[1] At trial, Cashman sought recovery based on the following claims: foreclosure of its mechanic's lien, recovery against the payment bond obtained by WEST EDNA ASSOCIATES, LTD., dba MOJAVE ELECTRIC ("Mojave"), foreclosure of the security interest Cashman had in the Materials, fraudulent transfer, and unjust enrichment.

Cashman seeks a *de novo* review of various conclusions of law reached by the district court, which denied full recovery to Cashman despite the district court's

[1] The factual findings of the district court have not been appealed; it is the district court's application of the law to the facts from which Cashman appeals. Mojave did not file a cross-appeal on any issues of fact or law.

finding that Cashman had fully performed its contractual duties except as it was excused by Cam's breach of contract.

The district court erred when it denied Cashman recovery on its mechanic's lien claim after determining that Cashman had properly perfected and proven it had an enforceable lien claim. The court erred by finding that the Unconditional Waiver & Release Upon Final Payment ("Unconditional Release"), which Cashman exchanged for a check that failed to clear the bank, was valid despite the plain meaning of NRS 108.2457(5)(e) that renders the Unconditional Release void.

The district court erred in denying recovery to Cashman on its claim against the Payment Bond obtained by Mojave after determining Cashman had standing to bring its claim by applying the defense of impossibility to discharge Mojave's contractual obligation to Cashman even though the risk Cashman may not be paid was foreseeable and Mojave specifically contracted to accept the risk of ensuring payment to all of its downstream subcontractors and suppliers, like Cashman, when it contracted for the Payment Bond.

The district court erred in reducing the contractual damages it awarded to Cashman on its perfected security interest in the materials using an equitable fault analysis. Cashman's claim was based upon a valid and enforceable contract. It is well-established that it is not proper to apply comparative fault to contract damages

as comparative fault is based upon the concept of negligence. The reduction of the award conditioned on completing performance was also in error.

The district court erred in failing to award Cashman its attorneys' fees pursuant to NRS 104.9607 and costs pursuant to NRS 18.020, as Cashman was the prevailing party against Mojave on its claim to enforce its security interest in the materials supplied.

Cashman seeks reversal of the district court and, given the factual findings of the district court concerning the validity and enforceability of Cashman's mechanic's lien, payment bond claim and security interest, to have judgment entered in favor of Cashman in the amount of $683,726.89 on its mechanic's lien claim, its payment bond claim and its security interest claim, and remand for a determination of attorney's fees and costs.

Finally, early in this matter the district court granted the Defendants' Motion to Procure Codes issuing a preliminary injunction which sought to force Cashman to complete the work of its purchase order even though Cashman had not received payment for the materials and was owed $755,893.89. The district court erred in issuing a preliminary injunction as the district court did not find and Defendants did not establish a likelihood of success on the merits of Defendants' counterclaims, nor did the district court find that Defendants would suffer irreparable harm if Cashman was not forced to provide the codes. The district

court included the completion of this same work as a condition of the unjust enrichment award to Cashman after trial even though this issue was on appeal. This possibly renders moot the preliminary injunction. However, because it was not clearly addressed, Cashman seeks reversal of the district court's order issuing the preliminary injunction. The reversal is further warranted given that Cashman prevailed on all counterclaims asserted against it at trial.

FACTUAL AND PROCEDURAL BACKGROUND

A. Statement Of Facts

Cashman Equipment Company supplied an emergency standby power system comprised of generators, switchgear, and associated items (the "Materials") for a total price of $755,893.89 to the New Las Vegas City Hall Project (the "Project") and failed to receive payment for the Materials. JA 31:7733, ¶1; JA 11:2694-97; JA 27:6593. These materials were specialty items that are project specific. JA 27:6593, lns. 17-25. The Project was privately owned at the time of construction by Forest City Enterprises through a conglomerate of private entities (hereinafter "Owner") from December 2009 until February 17, 2012, when the building was transferred after construction to the City of Las Vegas, Nevada. JA 31:7733, ¶2.

The Owner contracted with THE WHITING TURNER CONTRACTING COMPANY ("Whiting Turner") to serve as the general contractor on the Project

and Whiting Turner then contracted with Mojave to be the electrical subcontractor on the Project. JA 12:2790-2816; JA 16:3794-3834. Mojave's subcontract with Whiting Turner, dated February 11, 2010, required Mojave to perform all electrical work, which included the providing the Materials Cashman supplied to the Project. *Id*. *See also* JA 31:7733, ¶¶ 3 and 5. Mojave was required by its subcontract to obtain a payment bond and did so; the payment bond is dated March 2, 2010 with WESTERN SURETY COMPANY ("Western") as surety and is in the amount of $10,969,669.00 ("Payment Bond"). JA 16:3783-86, JA 31:7733-34, ¶5. The Payment Bond provides that the bond is for the benefit of all persons supplying labor, material, rental equipment, supplies or services in the performance of Mojave's subcontract. *Id*.

Initially, Cashman provided bids directly to Mojave to supply the Materials to the Project and understood that it would be contracting with Mojave. JA 31:7734, ¶ 6-7; JA 27:6567, lns. 16-19. Mojave accepted Cashman's bid on or about January 11, 2010. JA 31:7734, ¶ 6-7; JA 27:6567, lns. 11-19; JA 16:3869. Mojave later informed Cashman that the Materials needed to be supplied through a disadvantaged business entity ("DBE"). JA 31:7734, ¶8; JA 27:6567, lns. 21-22. Mojave introduced Cashman to Cam Consulting, Inc. ("Cam"). JA 27:6568-69, lns. 16-17. To fulfill the DBE requirement, on April 23, 2010, Mojave issued two purchase orders to Cam to purchase the Materials that would be supplied by

Cashman to the Project on April 23, 2010. JA 31: 7734, ¶ 9; JA 16:3857-64. Cam's only role on the Project was to collect a fee; it was an intermediary to satisfy the DBE requirement. JA 27:6572, lns. 7-14. Cashman was not concerned about supplying the Materials to the Project through Cam as it understood that Mojave would be issuing payment. JA 27:6651. Mojave had contracted with Cam on two other projects to fulfill similar DBE requirements, one of which was prior to this Project. JA 31:7734, ¶10. Cashman commenced work shortly thereafter preparing the submittals required for the Materials to be approved. *Id*. *See also* JA 27:6577, ln. 2 - 6578, ln. 4.

Cashman's scope of work on the Project included preparing submittals for approval of the Materials, responding to requests for additional information, and startup functions. JA 31: 7734, ¶11 and 7737, ¶40. On April 29, 2010, Cashman served a Notice of Right to Lien, pursuant to NRS 108.245 by certified mail. JA 11:2681-82; JA 27:6648. Mojave sent notice to Cashman on May 24, 2010 that the Materials as detailed were approved and issued a Material Release Order on August 11, 2010 to Cashman. JA 11:2702-04; JA 31:7734, ¶13 -14. Cashman then began procuring the Materials. *Id*. Cashman served a second Notice of Right to Lien pursuant to NRS 108.245 on December 7, 2010, based upon job information provided by Mojave. JA 11:2687-88; JA 11:2685-86; JA 27:6648; JA 31:7735, ¶4. The Materials were delivered in a series of shipments beginning on

November 18, 2010 and ending with the delivery of the two Caterpillar diesel generators to the Project on January 19-20, 2011, where they were set in place by crane. JA 31:7735, ¶16. Cashman served a third Notice of Right to Lien pursuant to NRS 108.245 on April 20, 2011. JA 11:2600-01, JA 27:6650; JA 31:7735, ¶18. Cashman served a fourth Notice of Right to Lien pursuant to NRS 108.245 on April 28, 2011. JA 27:6532-33; JA 31:7735, ¶19. Cashman personnel were on site at the Project as needed to perform certain startup and installation functions beginning January 20, 2011 and continuing until May 23, 2011. JA 31:7735, ¶20; 27:6589-92.

Prior to supplying the Materials to Cam, Cashman required Cam to sign a credit agreement granting Cashman a security interest in the Materials. JA 11:2583-85; JA 27:6644; JA 31:7735, ¶ 22. Cashman caused a UCC Financing Statement to be filed with the Nevada Secretary of State on February 16, 2011, identifying the Materials and all proceeds thereof. JA 11:2598-99; JA 27:6644-46; JA 31:7735, ¶23-24. Cashman did not release the UCC financing statement and at no point was Cashman requested to do so. JA 27:6646, lns. 11-16.

After delivery of the Materials to the Project, Cashman issued two invoices to Cam dated February 1, 2011 totaling $755,893.89 and Cam failed to pay Cashman as required by the terms of the invoice. JA 11:2586-91; JA 27:6653; JA 31:7735, ¶25-26. Cashman contacted Mojave several times due to Cam's failure

to pay and became concerned when Cam could not be reached. JA 27:6655-56. Cashman requested Mojave issue payment for the Materials in the form of a joint check, made payable to Cam and Cashman. JA 27:6655; JA 31:7735-36, ¶27. Mojave refused to issue a joint check as payment for the Materials. JA 27:6655; JA 31:7736, ¶28. No reason was given for the refusal at the time and it was later learned that Mojave had issued a joint check to Cam and another supplier. JA 27:6655; JA 28:6825, lns. 15-23.

Mojave contacted Cashman repeatedly to request that Cashman provide an Unconditional Waiver and Release Upon Final Payment for the Materials provided. JA 27:6661, lns. 18-23. Cashman refused to provide the release as it had not been paid for the Materials. JA 27: 6661-62; JA 31:7736, ¶29-30. Mojave arranged a meeting at Mojave's offices on or about April 26, 2011 so that payment could be exchanged for the requested releases. JA 27:6658. Mojave tendered payment to Cam, for the Materials at the meeting. JA 27:6660-61; 31:7736, ¶31. Within minutes of Cam's receipt of Mojave's payment and while still at Mojave's offices, Cam provided a check to Cashman for the full amount due, $755,893.89. JA 27:6659; JA 11:2602-04; JA 31:7736, ¶34. After Cashman received this check from Cam, and in exchange for this check, Cashman executed an Unconditional Waiver and Release Upon Final Payment for the Materials it supplied and provided it to Cam. JA 27:6662-63; JA 11:2595-97; JA 31:7736, ¶34. Cashman understood

that if it provided a release in good faith in exchange for a check and if the check does not clear, then the release is null and void, and further that it had to provide the release Mojave was requesting or it would not receive payment. JA 27:6663-65. Very shortly thereafter, Cam stopped payment on the check it issued to Cashman and it was returned unpaid. JA 11:2602-02; JA 31:7736, ¶36. Cashman attempted collection of the amount owed from Cam and obtained from Cam another check, which was immediately presented at the bank from which the check was drawn and the bank refused to cash the check as there were insufficient funds in the account. JA 27:6673-74; JA 31:7736-37, ¶ 37-38.

Cam then ceased operations leaving Cashman unpaid for the Materials Cashman had provided to the Project. JA 27:6673-74; JA 31:7737, ¶39. Despite Cam's failure to pay and cease operations, Cashman continued working on the Project, anticipating that the nonpayment would be resolved. JA 27:6675. Not all start-up functions were completed and the batteries for the UPS were not provided due to Cam's stopping payment on the check it issued to Cashman. JA 31:7737, ¶40; JA 27:6581. On June 22, 2011, Cashman recorded a mechanic's lien in the amount of $755,893.89 against the Project as it had not received payment for the Materials supplied. JA 11:2616-21; JA 27:6677; JA 31:7737, ¶41. On January 22, 2014, Cashman recorded an Amended Notice of Lien in the amount of $683,726.89 against the Project reflecting a credit for batteries that were not

delivered. JA 31:7737, ¶44.

Subsequent to Cashman's mechanic's lien being recorded, Mojave obtained a Mechanic's Lien Release Bond ("Lien Release Bond") from Western Surety Company (Bond No. 58685401) in the amount of $755,893.89 and recorded the Lien Release Bond with the Clark County Recorder's Office on or about September 13, 2011. JA 12:2786-89.

B. District Court Proceedings

1. Cashman filed its initial Complaint against Cam and ANGELO CARVALHO ("Carvalho") on June 3, 2011 (District Court Case No. A642583). JA 1:1-9.

2. Cashman filed an Amended Complaint on July 25, 2011 to include claims against Mojave, Western, Owner and Whiting Turner. JA 1:10-27.

3. Cashman filed a Second Amended Complaint on September 30, 2011 to replace the lien foreclosure claim with a claim for enforcement of the lien against the Lien Release Bond, obtained by Mojave from Western. JA 1:34-50.

4. Cashman filed a separate lawsuit on December 9, 2011 against the recipients of the monies belonging to Cashman, which were wrongfully possessed and fraudulently disbursed by Cam and Carvalho (District Court Case No. A653029). JA 1:104-11.

5. District Court Case No. A653029 was consolidated with Case No. A642583 on or about January 31, 2012. JA 1:129-34

6. Cashman filed a Third Amended Complaint on May 24, 2012 to include a claim on a Payment Bond obtained by Whiting Turner from TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA's ("Travelers"). JA 2:276-94.

7. On July 18, 2012, Mojave filed a Motion for Mandatory Injunction to Procure Codes on Order Shortening Time or in the Alternative Application for Writ of Possession. JA 2:332-58.

8. The district court granted Mojave's Motion for Mandatory Injunction on August 3, 2012 and the Findings of Fact and Conclusions of Law Based on the Motion to Procure Codes was entered on August 13, 2012. JA 2:417-22.

9. Cashman filed a Notice of Appeal on September 13, 2012 (Supreme Court Case No. 61715). JA 3:610-19.

10. Cashman filed a Motion to Stay or Suspend the Order Granting in Part the Motion for Preliminary Injunction to Procure the Codes on September 28, 2012. JA 4:858-84.

11. An Order Granting Cashman's Motion to Stay was entered on November 2, 2012. JA 5:1079-83.

12. Cashman filed a Fourth Amended Complaint on January 10, 2013 to include a claim on Mojave's Payment Bond and to include an unjust enrichment claim against Owners. JA 5:1154-72.

13. The Parties each filed various dispositive motions, including a Motion to Expunge or Reduce Mechanic's Lien and Motions for Summary Judgment relating to the payment and license bond claims and the mechanic's lien claim, all of which were denied by the district court. *See* Notice of Entry of Orders, JA 2:300-04; 10:2390-95; 10:2396-2401; 10:2402-07; 10:2408-13.

14. A bench trial was held on January 21 - 24, 2014. The District Court's Findings of Fact and Conclusions of Law ("Trial FFCL") was entered on May 5, 2014. JA 31:7730-47.

15. Cashman filed a Notice of Appeal as to the Trial FFCL on May 30, 2014 (Supreme Court Case No. 65819). JA 32:7751-72.

16. The Judgment after trial was entered on August 18, 2014. JA 32:7792-96.

17. On March 20, 2014, Cashman filed a Motion for Attorneys' Fees and Costs Pursuant to NRS Chapter 108. The Court entered a Decision and Order denying an award for attorneys' fees ("Order Denying Attorneys' Fees") on August 4, 2014. JA 32:7777-81.

18. On May 13, 2014, Cashman filed a Verified Memorandum of Costs. The Court entered an Order Denying the Request for Costs ("Order Denying Costs") on September 2, 2014. JA 32:7799-7804.

19. Cashman filed a Notice of Appeal as to the Order Denying Attorneys' Fees and Order Denying Costs on September 2, 2014 (Supreme Court Case No. 66452). JA 32:7813-29.

ARGUMENT

A. STANDARDS OF REVIEW

"This court reviews a district court's conclusions of law, including statutory interpretations, *de novo*." *Birth Mother v. Adoptive Parents*, 118 Nev. 972, 974, 59 P.3d 1233, 1235 (2002); *see also City of Reno v. Van Ermen,* 79 Nev. 369, 381, 385 P.2d 345, 351 (1963); *Great American Airways v. Airport Authority*, 103 Nev. 427, 429, 743 P.2d 628, 629 (1987). "Review in this court from a district court's interpretation of a statute is *de novo*." *Madera v. State Indus. Ins. Sys.*, 114 Nev. 253, 257, 956 P.2d 117, 120 (1998) (citing *State, Dep't of Mtr. Vehicles v. Frangul,* 110 Nev. 46, 48, 867 P.2d 397, 398 (1994)). "It is well-settled that: 'Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.'" *Madera*, 114 Nev. at 257, (*citing Erwin v. State of Nevada*, 111 Nev. 1535, 1538–39, 908 P.2d 1367, 1369 (1995)). "When construing a statute, we look first to the statute's plain language." *Estate of Maxey v. Darden,* 124 Nev. 447, 454, 187 P.3d 144, 149 (2008).

"The district court's findings of fact will not be set aside unless those findings are clearly erroneous." *Hermann Trust v. Varco–Pruden Buildings,* 106 Nev. 564, 566, 796 P.2d 590, 591–92 (1990). "Accordingly, if the district court's

findings are supported by substantial evidence, they will be upheld." *Pandelis Constr. Co. v. Jones–Viking Assoc.*, 103 Nev. 129, 130, 734 P.2d 1236, 1237 (1987). "Substantial evidence is that evidence which a reasonable mind might accept as adequate to support a conclusion." *State Emp. Security v. Hilton Hotels*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986).

Although an award of attorneys' fees is generally entrusted to the sound discretion of the district court, when a party's eligibility for a fee award is a matter of statutory interpretation, a question of law is presented, which we review *de novo*. *See Barney v. Mt. Rose Heating & Air*, 124 Nev. 821, 192 P.3d 730, 733 (2008); *see also In re Estate & Living Trust of Miller*, 125 Nev. 550, 216 P.3d 239 (2009).

B. THE DISTRICT COURT ERRED IN DENYING RECOVERY TO CASHMAN ON ITS MECHANIC'S LIEN CLAIM BY ENFORCING AN UNCONDITIONAL RELEASE THAT IS VOID PURSUANT TO NRS 108.2457(5)(e).

The district court erred in ruling in favor of Mojave and Western on Cashman's mechanic's lien claim against the Lien Release Bond. At trial, the Court determined that Cashman complied with the statutory requirements under NRS 108.221, *et seq*., in perfecting its lien claim against the Project; however, the district court found that the Unconditional Release provided by Cashman to Cam in exchange for payment from Cam was enforceable, even though Cam's payment failed to clear the bank on which it was drawn. JA 11:2602-02; JA 27:6673-74; JA

31:7736-37, ¶ 36-38. Pursuant to the plain language of NRS 108.2457(5)(e), as the payment to Cashman failed, the Court should have ruled the Unconditional Release null and void and of no legal effect and found in favor of Cashman as to its mechanic's lien claim against the Lien Release Bond.

1. The District Court Found Cashman's Mechanic's Lien Was Properly Perfected and Enforceable In The Amount Of $683,726.89.

After hearing all evidence presented at trial as to Cashman's mechanic's lien claim, the Court found that Cashman was a proper lien claimant under NRS Chapter 108. The Conclusions of Law relating to the lien claim state:

> (9.) Regarding Cashman's Ninth Cause of Action for Enforcement of Mechanic's Lien Release Bond, the operative documents are Exhibits 11, 66, 4 and 13. Exhibits 11 and 66 are the Notice of Lien and the Amended Notice of Lien, respectively. These two documents stand for the proposition that Cashman had a lien in place relating to the Materials provided and ***the Court finds that Cashman did perfect its lien claim against the Project, pursuant to the requirements of NRS 108.221, et seq. and the amount of the amended lien is $683,726.89.*** *(Emphasis added).*
>
> (10.) The Court finds that Cashman complied with NRS 108.245 in the service of its preliminary notices, and therefore, as a matter of law, there was sufficient preliminary or legal notice to the owner.

JA 31:7739.

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2. The District Court Erred In Enforcing The Unconditional Release, Releasing Cashman's Mechanic's Lien Claim, As It Is Void Pursuant To NRS 108.2457(5)(e).

At trial, Cashman presented evidence relating to Cashman providing the Unconditional Release to Cam in exchange for payment from Cam for the Materials supplied to the Project. Specifically, Cashman's witness, Shane Norman, testified about the events that took place the day the Unconditional Release was exchanged for the check:

> Q.: And you provided an unconditional final payment release at that point?
> A.: Yes.
> Q.: And you -- like you said, you exchanged it directly for the check you were receiving from CAM?
> A.: Right.
> Q.: And you provided the unconditional because Mojave had requested it?
> A.: Right.
>
> ……..
>
> Q.: So you understood that day you had to provide an unconditional release in exchange for the payment --
> A.: Yes.
> Q.: -- the check you were given?
> A.: Yeah. I mean, [Frances at Mojave] was the one that requested it. In fact, she sent us over an unconditional form on her own and then this, I believe, is our own format that we signed on her behalf -- I mean, on our behalf. But so she had sent us a form of her own that was unconditional release.

> Q.: So in order to get paid you understood you had to provide an unconditional, you didn't have an option?
> A.: No, that's correct.
> Q.: And so did you feel comfortable providing the unconditional release in exchange for the check that day?
> A.: Yeah.
> Q.: And can you tell me why?
> A.: Well, I think the point you're getting to is why would you sign off and give a release when taking a paper check that you don't know that it's good or not. And from my expertise, I understand with Nevada NRS guidelines and statutes, if you provide a release in good faith with a check and that check does not clear, then the release is null and void. So that's why I felt comfortable accepting the release.

JA 27:6663-65.

The circumstances of the exchange of the payment for the Unconditional Release were not in dispute at trial. Cashman provided the release to Cam in exchange for Cam's check that day, believing that should Cam's payment fail to clear the bank for any reason, the Unconditional Release would become null and void. Mojave did not present any evidence to refute Cashman's recollection of the exchange.

Although the Court determined Cashman's lien was perfected, the Court incorrectly concluded that the Unconditional Release provided by Cashman to Cam was valid, stating:

(11.) However, Exhibit 4, the Unconditional Waiver and Release Upon Final Payment, stands for the proposition that Cashman released any notice of lien when it provided the Unconditional Waiver and Release Upon Final Payment in exchange for the check from Cam. This Release states as follows: "NOTICE: THIS DOCUMENT WAIVES RIGHTS UNCONDITIONALLY AND STATES THAT YOU HAVE BEEN PAID FOR GIVING UP THESE RIGHTS. THIS DOCUMENT IS ENFORCEABLE AGAINST YOU IF YOU SIGN IT, EVEN IF YOU HAVE NOT BEEN PAID. IF YOU HAVE NOT BEEN PAID, USE A CONDITIONAL RELEASE FORM."

(12.) Notwithstanding the language in the waiver and release, if the payment given in exchange for the waiver or release is made by check, draft or other such negotiable instrument and the same fails to clear the bank on which it is drawn for any reason, then the waiver and release shall be deemed null and void and of no legal effect.

(13.) However, the Court finds that the check identified as Exhibit 13-004, that Mojave furnished to CAM on April 26, 2011 in the amount of $820,261.75 is the payment. Thus, once Mojave made this payment (Exhibit 13-004) to CAM, then Cashman waived and released any lien it had relating to the Materials provided.

(14.) In other words, the check Mojave provided to CAM constitutes payment to Cashman for purposes of the enforceability of the Unconditional Waiver and Release Upon Final Payment that Cashman provided in exchange for the payment Cashman received from CAM.

JA 31:7739-40.

The Court erred in concluding that Mojave's direct payment to Cam somehow constituted payment to Cashman. Cam issued its own check to Cashman as payment for the amounts due and owing. JA 27:6659; JA 11:2602-04; JA 31:7736, ¶34. Cashman exchanged the Unconditional Release for ***Cam's*** check, not Mojave's check. JA 27:6662-63; JA 11:2595-97; JA 31:7736, ¶34. The Court's analysis may be plausible had Mojave issued a joint check to Cam and Cashman; however, Mojave refused to issue a joint check. JA 27:6655; JA 31:7736, ¶28. Cashman should not be punished for providing an Unconditional Release to Cam, whose payment did fail, when the plain language of NRS 108.2357(5)(e) protects potential lien claimants like Cashman from waiving lien rights should payments fail, as discussed *infra*.

3. The District Court Erred By Failing To Apply The Plain Language Of NRS 108.2457(5)(e) Which Renders The Unconditional Release Provided By Cashman Void.

It is well established in Nevada that "[w]hen construing a statute, [Nevada courts must] first examine its plain meaning." *Davis v. Beling*, 28 Nev. Adv. Op. 28, ——, 278 P.3d 501, 508, (2012) (citing *Arguello v. Sunset Station, Inc*., 127 Nev. ——, ——, 252 P.3d 206, 209 (2011)). "When a statute is clear and unambiguous, [Nevada courts] give effect to the plain and ordinary meaning of the words and do not resort to the rules of construction." *Id*. at 509 (*citing Cromer v. Wilson*, 126 Nev. ——, ——, 225 P.3d 788, 790 (2010)). The language of NRS

108.2457(5)(e) is clear and unambiguous, so there is no need for the court resort to the rules of statutory construction. The statute states:

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

Here, Cashman exchanged the Unconditional Release for payment from Cam in the form of a check. JA 27:6662-63; JA 11:2595-97; JA 31:7736, ¶34. The payment from Cam to Cashman then failed to clear the bank on which it was drawn. JA 11:2602-02; 27:6673-74; JA 31:7736, ¶36. The plain and ordinary meaning of NRS 108.2457(5)(e) clearly states that the Unconditional Release "shall be deemed null, void and of no legal effect whatsoever and all liens, lien rights, bond rights … will not be affected by [Cashman's] execution of the [Unconditional Release]. Instead, the district court incorrectly found that *Mojave's* payment to Cam and Cam alone, which did clear the bank, was the "payment" to Cashman for purposes of this statute and released Cashman's lien rights even though Cashman was not paid. The district court enforced the Unconditional Release against Cashman, even though it is void as a matter of law and Cashman

did not receive payment. The court ignored the plain language of the statute and the statutory protection put in place to protect lien claimants like Cashman from nonpayment.

The district court's finding essentially renders NRS 108.2457(5)(e) meaningless. The purpose of the statute is to protect lien claimants in the event the payment accepted in exchange for the release "***fails to clear the bank on which it is drawn for any reason***", which is exactly what happened in this instance. Cashman provided the Unconditional Release to Cam, knowing that the law protected its lien rights should Cam's payment fail to clear the bank. Cam's payment did fail to clear the bank; however the district court enforced the Unconditional Release disregarding the statute.

Based on the foregoing, it is clear that the district court erred in finding the Unconditional Release valid and enforceable, requiring reversal. Further, as the district court ruled that Cashman perfected its mechanic's lien, judgment should be entered in favor of Cashman in the amount of its lien totaling $683,726.89.

4. Cashman Is Entitled To An Award Of Attorneys' Fees, Interest And Costs Pursuant To NRS 108.237 As Its Mechanic's Lien Claim Is Enforceable.

Nevada law entitles a prevailing mechanic's lien claimant to the enforcement proceedings' costs, including reasonable attorney fees. *Barney v. Mt.*

Rose Heating & Air Conditioning, 124 Nev. 821, 823, 192 P.3d 730, 732 (2008). Specifically, NRS 108.237(1) states:

> The court shall award to a prevailing lien claimant, whether on its lien or on a surety bond, the lienable amount found due to the lien claimant by the court and the cost of preparing and recording the notice of lien, including, without limitation, attorney's fees, if any, and interest. The court shall also award to the prevailing lien claimant, whether on its lien or on a surety bond, the costs of the proceedings, including, without limitation, reasonable attorney's fees, the costs for representation of the lien claimant in the proceedings, and any other amounts as the court may find to be justly due and owing to the lien claimant….

As this Court should reverse and enter judgment in favor of Cashman on its lien claim, Cashman is entitled to an award for attorneys' fees and interest pursuant to NRS 108.237(1), and the Court should remand this matter for the district court to determine Cashman's award of attorneys' fees, costs and interest.

C. THE DISTRICT COURT ERRED IN RULING IN FAVOR OF MOJAVE ON CASHMAN'S CLAIM AGAINST THE PAYMENT BOND BASED UPON THE DEFENSE OF IMPOSSIBILITY AS IT DOES NOT APPLY WHERE THE CONTINGENCY WAS A KNOWN AND BARGAINED FOR RISK AND MOJAVE WAS ABLE TO PERFORM ITS OBLIGATION TO CASHMAN.

The district court erred in excusing Mojave from its obligations to Cashman under the Payment Bond based upon the defense of impossibility. The district court correctly ruled that Cashman is a proper claimant on the Payment Bond and that Cashman had standing to bring a claim against the Payment Bond. JA

31:7738. However, the district court misapplied the defense of impossibility, incorrectly finding that the nonpayment to Cashman was an unforeseen contingency. *Id.* Not only is nonpayment of subcontractors and suppliers a known contingency on a construction project, Mojave, in contracting for the Payment Bond, agreed to accept the risk of that contingency, when it agreed to ensure payment to all of its downstream subcontractors and suppliers. The facts as determined by the district court simply do not give rise to the defense of impossibility, and the district court should be reversed and judgment entered in favor of Cashman on this claim.

1. The Payment Bond Obtained By Mojave On The Project Is A Contract And Should Be Construed As Such.

Mojave, a subcontractor on the Project, obtained a Payment Bond pursuant to its contract with Whiting Turner, Contract No. 12600-26A. JA 31:7733-34, ¶ 5; JA 16:3783-86. The Payment Bond was provided by Mojave to protect Whiting Turner from claims for payment from "persons supplying labor, material, rental equipment, supplies or services" in the performance of Mojave's Contract on the Project and allows those persons to "maintain independent actions" upon the Payment Bond. JA 16:3784. Mojave's liability on the Payment Bond is only extinguished where Mojave "promptly make[s] payments to all persons supplying labor, material, rental equipment, supplies, or services in the performance of the said Contract…" *Id.*

The Payment Bond states:

> The said Principal and the said Surety agree that this Bond shall inure to the benefit of all persons supplying labor, material, rental equipment, supplies, or services in the performance of the said Contract, as well as to the Obligee, and that such persons may maintain independent actions upon this Bond, in their own names.

Id. at 3785. The Payment Bond contains no other requirements for a claimant to fulfill prior to enforcing a claim against it. *Id*.

"A surety bond is a contract and should be construed as such." *John McShain, Inc. v. Eagle Indem. Co.*, 180 Md. 202, 205 (Md. 1942). The interpretation of a contract is a question of law, where the facts in a case are not in dispute. *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1103, 1115 (Nev. 2008). The provisions of the payment bond govern the requirements for making a claim and set forth the procedure to be followed in prosecuting such a claim. Where a bond is a private bond and not statutory, the bond language must be examined in order to determine who can make a claim and the procedure for making that claim. *Norquip Rental Corporation v. Sky Steel Erectors, Inc*., 175 Ariz. 199, 202 (Ariz. Ct. App. 1993); *see also Robinson Explosives, Inc. v. Dalon Contracting Co*., 209 S.E.2d 264, 266 (Ga. App. 1974) (where a bond is a private, voluntary bond, the issue of who can make a claim on the bond must be determined by the intent of the parties).

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2. The District Court Correctly Determined That Cashman Is A Claimant On The Bond, Has Standing To Bring A Claim And Is Owed $683,726.89 For Materials Supplied To The Project.

The district court found that "Cashman has standing to bring a claim on the Payment Bond given the language of the Payment Bond, which states, on page 2, that the principal and surety agree the bond shall inure to the benefit of all persons supplying labor, materials, rental equipment, supplies or services in the performance of Mojave's contract." JA 31:7738-39, ¶ 6. Cashman supplied materials to the Project which were used by Mojave in the performance of the Contract, and, at the time of trial, the district court found Cashman was owed $683,726.89. JA 31:7743-44, ¶ 33.

The district court further found that strict application of the terms of the Payment Bond requiring Mojave to promptly make payments to all persons supplying labor, material, rental equipment, supplies or services in the performance of Mojave's subcontract "would stand for the proposition that, all payments to Cashman were not made…" JA 31:7738, ¶ 3. However, instead of enforcing the Payment Bond and awarding Cashman the amount it is owed for the Materials it supplied to the Project, the district court erroneously applied the defense of impossibility due to Cam's failure to pay Cashman. Mojave's performance was not impossible, nor was Cam's failure to pay an unforeseen contingency. Mojave

simply chose not to honor its contractual obligation to Cashman under the Payment Bond.

3. The District Court Erred In Finding That Mojave's Performance Of Its Obligations To Cashman Under The Payment Bond Are Excused By The Defense Of Impossibility As Mojave Did Not Prove Its Performance Was Impossible And Cam's Failure To Pay Cashman Was Not An Unforeseen Contingency.

The defense of impossibility is not available to Mojave as Mojave did not present evidence or argument at trial that it could not pay Cashman as required by the Payment Bond, nor did it allege or prove that its performance was impossible. Further, Cam's failure to pay Cashman was not an unforeseen contingency, and the defense of impossibility requires an unforeseen contingency that renders performance impossible. Mojave's performance was not made impossible or commercially impracticable; Mojave simply chose not to discharge its obligation under the Payment Bond to Cashman, despite fully understanding and contracting for the obligation, accepting the risk of responsibility for nonpayment of its downstream subcontractors and suppliers and having to ability to issue a joint check to easily ensure payment to Cashman.

The defense of impossibility is only available where the promisor's performance is made impossible "by the occurrence of unforeseen contingencies but if the unforeseen contingency is one which the promisor should have foreseen, and for which he should have provided, this defense is unavailable to him."

Nebaco, Inc. v. Riverview Realty Co., 87 Nev. 55, 57, 482 P.2d 305, 307 (1971) (*citing* Restatement of Contracts s 454, s 457 (1932); Williston on Contracts s 1932 (rev. ed. 1938)). When the defense is raised, the court "is asked to construct a condition of performance based on the changed circumstances, a process which involves at least three reasonably definable steps. First, a contingency-something unexpected- must have occurred. Second, the risk of the unexpected occurrence must not have been allocated either by agreement or by custom. Finally, occurrence of the contingency must have rendered performance commercially impracticable. Unless the court finds these three requirements satisfied, the plea of impossibility must fail. *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 315-16 (D.C. Cir. 1966).

"Facts which may make performance more difficult or costly than contemplated when the agreement was executed do not constitute impossibility." *Kashmiri v. Regents of University of California*, 156 Cal.App.4th 809, 839, 67 Cal.Rptr.3d 635, 658 (2007) quoting *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.*, 66 Cal.App.3d 101, 154, 135 Cal.Rptr. 802 (1977). Fiscal problems experienced by a contracting party do not excuse performance on a contract. *Id*.

Mojave did not present any evidence, testimony or argument at trial that it could not pay Cashman as required to discharge its obligation under the Payment

Bond; instead, it asserted that its payment to Cam should be enough. The plain language of the Payment Bond proves this argument wrong. JA 16:3783-86. Mojave did not contract for a Payment Bond that discharged its obligation by payment only to parties with which Mojave directly contracted. *Id*. It contracted for a Payment Bond that required it to ensure payment to "all persons supplying labor, material, rental equipment, supplies or services in the performance" of its contract. *Id*. It bargained for the risk associated with ensuring payment to all of its downstream subcontractors and suppliers, including those with which it did not contract.

Mojave understood the requirements of the Payment Bond and specifically that it was responsible to ensure that Cashman received payment for the materials Cashman supplied to the Project. Mojave's representative, Brian Bugni ("Bugni") testified:

> Q: So Mojave was contractually obligated to take steps to ensure that Cashman received payment for these materials, right?
> A: Yes.
> Q: Both by its contract with Whiting Turner and by the payment bond you had gotten for the project?
> A: Yes.

JA 28:6823. Mojave acknowledged that paying only the party it contracted with could be insufficient to discharge its obligations under the Payment Bond. *Id*.

Mojave did not raise the defense of impossibility at trial. Mojave did not argue at trial that its performance under the Payment Bond was impossible, which is the first element that must be presented in proving the defense. None of Mojave's witnesses offered testimony that Mojave could not perform its obligation under the Payment Bond and make payment to Cashman. Mojave did not present any evidence that it could not make payment to Cashman as required by the Payment Bond. Because Mojave did not present evidence that its performance was impossible or even impracticable, the trial court erred in applying the defense of impossibility and ruling in Mojave's favor on this claim.

Even if the defense of impossibility is considered despite Mojave's failure to argue and present evidence that its performance was impossible, the facts as determined by the district court do not satisfy the remaining requirements of the defense. The defense only applies where an unforeseen contingency occurs that makes performance impossible. Cam's failure to pay Cashman was not an unforeseen contingency. Mojave contracted for this contingency when it obtained the Payment Bond. The Payment Bond was in force to ensure that Mojave and its surety would be responsible to make payment to "all persons supplying labor, material, rental equipment, supplies or services" in the performance its contract. JA 16:3784. Mojave contracted to accept this liability, which means it agreed that if any of those persons were not paid, Mojave would make payment. Mojave

specifically contracted for the risk of nonpayment and accepted that responsibility. Cam's failure to pay Cashman and Mojave's responsibility to Cashman that arises due to the nonpayment cannot be considered an unforeseen contingency under the requirements set forth in *Nebaco*.

In addition to contracting to accept the responsibility of payment for all of its downstream subcontractors and suppliers, Mojave was specifically aware that Cam may not pay Cashman, further evidencing that nonpayment was a foreseeable contingency. Bugni testified that Mojave paid Cam and then relied upon Cam to make payment to others, including Cashman. JA 28:6812, lns. 18-21. Mojave understood that Cam did not independently have the funds to pay Cashman for the Materials and that Mojave had to pay Cam in order for Cam to make payment to Cashman. *Id*. at 6816, lns. 5-12. Cashman contacted Mojave several times before the payment was issued to Cam concerning payment. JA 27:6655, lns. 16-23. Cashman requested that the payment for the Materials be issued as a joint check, made payable to Cam and Cashman. JA 31:7735-36, ¶ 27.

Mojave refused to issue a joint check, even though doing so would have ensured payment to Cashman and actually discharged Mojave's obligation under the Payment Bond. *Id*. at ¶ 28. A subcontractor failing to pay a supplier after receiving payment is not an unforeseen contingency, as the practice of issuing joint checks was developed to specifically address this issue, and ensure payment to

downstream subcontractors and suppliers. This Court has adopted the joint check rule, which sets forth a simple procedure to ensure payment to suppliers like Cashman.

> The use of joint checks is well established by custom and practice in the construction industry.
>
> When a subcontractor and his materialman are joint payees, and no agreement exists with the owner or general contractor as to the allocation of proceeds, the materialman by endorsing the check will be deemed to have received the money due him. Inclusion of the materialman as payee makes clear that the maker of the check intends to discharge obligations owed to the materialman.
> …
>
> The materialman may protect himself by simply refusing to endorse the check until assured by escrow or other arrangement that he will recover his rightful share of the check. Because the materialman is positioned to demand immediate payment in exchange for his endorsement, the custom and use of joint checks is beneficial to materialmen.
>
> The joint check rule is likewise beneficial to owner and general contractor. They have contracted with the subcontractor—not the materialman—and are usually unaware of the nature and size of the materialman's claim against the subcontractor. **The joint check rule provides a simple yet expeditious method for owner and general contractor to pay debts to the person with whom they have contracted while eliminating the risk the subcontractor will not pay the person with whom he has contracted.**

Henry Products Inc. v. Tarmu, 114 Nev. 1017, 1020, 967 P.2d 444, 445-46 (1998), (citing141 Cal.Rptr. 28, 569 P.2d at 135 (citations omitted)) (emphasis added).

Not only was Cam's failure to pay Cashman *not* an unforeseen contingency, it is a known contingency for which the practice of issuing joint checks was developed to the point that it has been incorporated into law. Mojave was contractually bound to ensure payment to Cashman, as it acknowledged at trial. Instead of tendering payment and discharging its performance by joint check or other means, Mojave chose to pay Cam and rely upon Cam to pay Cashman. JA 28:6812-16. Mojave's performance of its obligations to Cashman was not impossible. Mojave understood the risk of paying Cam and relying upon Cam to pay Cashman. The risk is well known in the construction industry and is the reason why joint checks are issued by higher tiered contractors and owners. A joint check ensures payment to the parties included on the check, and is a simple and expeditious method to ensure payment to those parties.

The district court erred in applying of the defense of impossibility as Mojave did not prove its performance was impossible nor was Cam's failure to pay Cashman an unforeseen contingency. The district court focused solely on Cam's failure to pay Cashman as an intervening cause, instead of analyzing Mojave's obligation to Cashman under the Payment Bond from the inception of the Project, and the ways in which Mojave could have discharged that obligation in light of the

well-known risk in the construction industry that a subcontractor may not pay its supplier. In addition, Mojave contracted for the risk that one of its subcontractors may not pay a supplier in obtaining the Payment Bond, further evidencing that such nonpayment cannot be characterized as an unforeseen contingency. The Payment Bond anticipates such nonpayment and provides protection for the general contractor and additional incentive to Mojave to ensure that payment is made to its downstream subcontractors and suppliers.

For the defense of impossibility to apply to discharge Mojave's obligation to Cashman under the Payment Bond, performance must have been rendered impossible by the occurrence of an unforeseen contingency. As set forth herein, Mojave failed to present evidence or argument at trial that its performance was impossible. Further, Cam's failure to pay Cashman was not an unforeseen contingency, but is instead a known risk in the construction industry. Mojave contracted to accept the risk of nonpayment, and had the ability to ensure payment but simply chose not to do so. Because Mojave did not prove at trial that its performance was impossible, and given that Cam's failure to pay Cashman is not an unforeseen contingency in the construction industry, the district court erred in finding that the defense of impossibility discharged Mojave's obligation to Cashman.

The district court found that Cashman has standing to bring a claim on the Payment Bond, and that strict application of the language of the Payment Bond would stand for the proposition that all payments to Cashman were not made and Cashman is owed $683,726.89; therefore, this Court should reverse the district court's judgment in favor of Mojave on this claim, and enter judgment in favor of Cashman in the amount of $683,726.89.

D. THE DISTRICT COURT ERRED IN APPLYING A COMPARATIVE FAULT ANALYSIS IN REDUCING THE CONTRACT DAMAGES AWARDED TO CASHMAN ON ITS CLAIM TO ENFORCE ITS SECURITY INTEREST.

The district court erred in reducing the contract damages it awarded to Cashman by finding that Cashman was equitably at fault for having entered into a contractual agreement with Cam, as it is improper to engage in a comparative/equitable fault analysis when a damages recovery is based upon a valid and enforceable contract. The district court found after trial that Cashman had properly taken a security interest in the Materials which were supplied to the Project under agreement with Cam and that Cashman properly perfected its security interest in the Materials provided. JA 31:7740, ¶17 - 18. The district court then affirmatively found that Cashman's security interest constituted a "legally binding security instrument establishing a security interest inuring to the favor of Cashman in the Materials provided hereto, or in this case, the value or proceeds derived from the Materials." *Id.* at ¶19. The district court found that the

value of the materials provided by Cashman, as determined in the contract between Mojave and Whiting Turner, amounted to a total of $1,254,992.00 ("957,433 for the core and shell emergency generator and $297,559.00 for the UPS system"). *Id.* at ¶20. As seen, pursuant to the district court's findings, Cashman's security interest attached to the entirety of the $1,254,992.00 value, and the damages awarded to Cashman should not have been reduced as they are set by contract.

Despite finding that Cashman had properly perfected its security interest in the materials provided pursuant to the Application for Credit executed by Cam, the Court erroneously engaged in a comparative fault analysis, reducing the specific dollar amount of damages awarded to Cashman. The district court recognized that Cashman was in a position to be awarded the full amount found due and owing at trial, totaling $683,726.89. JA 31:7743-44, ¶33. In determining fault for Cam's failure to make contractually required payments to Cashman, the district court then apportioned 67% to Cashman, and the remaining 33% of the fault attributable to Mojave. *Id.* at ¶34.

The Court erred in engaging in a comparative fault analysis as the security interest foreclosed upon is based on a valid and enforceable contract. It is well established that it is improper to allocate damages based upon alleged comparative fault in actions based on contract. The Court made no finding that Cashman failed to mitigate its damages, but rather, placed fault upon Cashman for entering into a

contract with Cam, who ultimately failed to make required payments to Cashman for Materials supplied to the Project. *Id.* at ¶34 – 36.

The determination of damages to be awarded to Cashman arising out of the secured transaction between Cashman and Cam was one of economic damages arising from a contractual agreement. When the resultant damage alleged "is simple economic loss, liability and damages are governed by breach of contract principles." *Hayesville USD No. 261 v. GAF Corp.*, 666 P.2d 192, 201 (Kan. 1983); *see also Sadler v. PacificCare of Nev.*, 130 Nev. Adv. Op. 98, 340 P.3d 1264, 1268 (2014) ("economic loss doctrine marks the fundamental boundary between contract law, which is designed to enforce the expectancy interests of the parties, and tort law, which imposes a duty of reasonable care and thereby [generally] encourages citizens to avoid causing physical harm to others.").

In addressing the applicability of comparative fault in the context of cases which are based on breach of contract, the use of comparative fault has been uniformly rejected. The Supreme Court of New Mexico observed that "contract law is, in its essential design, a law of strict liability, and the accompanying system of remedies operates without regard to fault." *Allsup's Convenience Stores, Inc. v. North River Ins. Co.*, 976 P.2d 1, 11, 127 N.M. 1, 11 (1998). The Supreme Court of Kansas is in accord:

> The decisions construing our comparative negligence statute have a common thread running through them – all

> involved death, personal injury or property damage. ***No case applies the statute to purely economic loss resulting from a breach of contract.***

Haysville, 666 P.2d at 643-644 (emphasis added). "It is well settled that contributory negligence is no defense to a breach of contract." *Id., citing*, *Carter v. Hawaii Transportation Co.*, 201 F.Supp 301 (D. Hawaii 1961); *Trinity Universal Insurance Co. v. Fuller*, 524 S.W.2d 335 (Tex.Civ.App 1975); *Rotman v. Hirsch*, 199 N.W.2d 53 (Iowa 1972); 17A C.J.S., Contracts §525(1), p. 1018; *see also Lawyers Title Ins. Corp. v. New Freedom Mortg. Corp*., 645 S.E.2d 536, 543 (Ga. App. 2007)("As an initial matter, principles of contributory and comparative negligence generally have no application in contract disputes.")(citation omitted). In holding that comparative fault does not generally apply to actions based upon contract, the Court of Appeals of Arizona found that it is well settled that it is improper to apply the concept of comparative fault to reduce damages in contract actions:

> Other jurisdictions have reached similar conclusions. *Haysville U.S.D. No. 261 v. GAF Corp.*, 233 Kan. 635, 666 P.2d 192, 199 (1983) ("The use of the comparative negligence theory is not proper in breach of contract actions."); *Klingler Farms, Inc.*, 121 Ill.Dec. 865, 525 N.E.2d at 1176 (declining to extend comparative fault principles to causes of action in contract); *Lesmeister*, 330 N.W.2d at 101–02 (concluding that Minnesota's comparative fault statute did not apply generally to contract cases); *Bd. of Educ. of the Hudson City Sch. Dist. v. Sargent, Webster, Crenshaw & Folley*, 71 N.Y.2d 21, 523 N.Y.S.2d 475, 517 N.E.2d 1360, 1364 (1987)

> (stating that permitting apportionment of liability in actions arising from breach of contract would "do violence" to settled principles of contract law); *Sassen v. Tanglegrove Townhouse Condo. Ass'n,* 877 S.W.2d 489, 493 (Tex.App.1994) ("[R]eduction in damages under comparative negligence is applicable to negligence actions only and not to recoveries for breach of contract.").

Fid. & Deposit Co. of Maryland v. Bondwriter Sw., Inc., 263 P.3d 633, 638 (Az. Ct. App. 2011).

Although this Court has not addressed the specific factual situation in which comparative fault is used as a defense to a contract based claim, this Court, like the jurisdictions cited herein has held that when the sole damage at issue is economic, it is improper to interject negligence concepts. Concerning the application of the economic loss doctrine this Court has stated:

> The economic loss doctrine draws a legal line between contract and tort liability that forbids tort compensation for "certain types of foreseeable, negligently caused, financial injury." *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 52 (1st Cir.1985). The doctrine expresses the policy that the need for useful commercial economic activity and the desire to make injured plaintiffs whole is best balanced by allowing tort recovery only to those plaintiffs who have suffered personal injury or property damage. *Public Service Ent. Group v. Philadelphia Elec.*, 722 F.Supp. 184, 211 (D.N.J.1989). And it has been reasoned that such useful commercial activity could be deterred if those involved in it were subject to tort liability. *Id.* Instead, when economic loss occurs as a result of negligence in the context of commercial activity, contract law can be invoked to enforce the quality expectations derived from the parties' agreement.

Terracon Consultants W., Inc. v. Mandalay Resort Group, 125 Nev. 66, 75, 206 P.3d 81, 87 (2009). In describing the public policy underlying the economic loss doctrine this Court has clearly articulated that contract liability and tort liability are separate concepts, which, barring exceptions that are inapplicable in this matter, serve different purposes and should not be intertwined.

In this matter that is precisely what the district court did when it acknowledged that Cashman had fully performed its contractual duties, had properly perfected its security interest in the equipment provided by virtue of its contractual agreement with Cam and was owed $683,726.89 for the Materials supplied. Despite finding that Cashman had fulfilled all of its obligations pursuant to the contract entered into between Cashman and Cam, the Court reduced the damages awarded to Cashman based upon a comparative fault analysis:

> However, it is my finding that in this case and especially because of what I've already talked about, this idea of the impossibility defense, the equity thought that has been all over the case, ***I think it's important for me to distribute an award, a financial award consistent with what I think is some responsibility of fault for what Mr. Carvalho did***, not fault as far as him stealing the money. I mean, you know, that was his fault completely.
>
> ***But as far as equitable fault having to do with putting the situation in place*** which did occur I'm going to tell you that I'm finding that Cashman is about two thirds responsible, and Mojave is a third responsible, and I used numbers because we're going to have to use numbers to come up with a judgment award.

JA 29:7081, lns. 6-19 (emphasis added). In explaining its decision, the district court addressed Cashman and stated that "[Y]ou are a great company, and you supplied all this stuff just like you were supposed to, and our City Hall has an operational benefit because of your involvement." JA 29:7082. Thus, the district court reiterated the fact that Cashman had performed exactly as it was contractually required. Nevertheless, the district court reduced Cashman's damages award because it determined that both Cashman and Mojave bear some responsibility of fault for Cam's failure to pay Cashman. JA 31:7744, ¶ 34. Such an equitable fault analysis ignores the evidence at trial, the contractual liabilities of the parties, the structure put in place by those contracts and the bargained for expectations. It also ignores well settled law put in place to protect material suppliers like Cashman. The district court determined that Mojave had provided Cashman with alternative subcontractors with whom it could have done business. *Id.* at ¶36. The district court did not fully address the fact that Mojave had likewise contracted with Cam on two separate occasions, including prior to the Project at issue. JA 31:7734, ¶10.

The Court further erred in applying its comparative fault analysis by reducing the damages awarded to Cashman by the sum of $86,600.00. This amount represents the amount of funds remaining in an escrow account held by the owner of the Project. 31:7742, ¶28 and 7745, ¶39. As previously noted the Court

found that Cashman had fully performed and was owed the amount of $683,726.89. In finding in favor of Cashman's claim for unjust enrichment against the owners, the Court limited its award to the amount held in escrow of $86,600 and conditioned the release of this amount upon Cashman, completing its work and providing the codes which were the subject of the preliminary injunction on appeal, as discussed below. The Court erred reducing Cashman's contractual award by this amount and further in conditioning payment upon Cashman returning to the Project to complete its scope of work, which had previously been earned. The damages awarded to Cashman should not be reduced by amounts that have not been received; the award against the owner should not reduce the award against Mojave on this claim or any other claim.

It should also be noted that the Court's reduction of damages in favor of Cashman is inconsistent with its finding that the value of the security interest is measured by "the value or proceeds derived from the Materials." JA 31:7740, ¶19. There has been no challenge to the district court's finding that the value of the equipment provided by Cashman was $1,254,992 ("957,433 for the core and shell emergency generator and $297,559 for the UPS system"). *Id.* at ¶20. As this amount constitutes the proceeds received by Mojave for the Materials supplied by Cashman to the Project, Cashman is entitled to judgment for the full amount due, which was found by the district court to be $683,726.89.

E. THE PRELIMINARY INJUNCTION PREVIOUSLY ENTERED BY THE DISTRICT COURT WAS ISSUED IN ERROR AND SHOULD BE REVERSED AS THE ISSUE HAS BEEN RENDERED MOOT BY THE DISTRICT COURT'S FINDINGS AFTER THE TRIAL UPON THE MERITS.

As this Court is aware, prior to commencement of the trial, the district court issued a preliminary injunction in favor of Defendants, Mojave, Western, Whiting Turner and Fidelity And Deposit Company Of Maryland, which required Cashman to provide certain programming codes for the Materials which it supplied to the Project. JA 2:417-22. The district court's order granting the preliminary injunction was made in error as no finding was made that Mojave was likely to succeed upon the merits of the case, nor that it would suffer an irreparable injury in the absence of such relief. Likewise, the district court's order granting the preliminary injunction has largely been mooted by the fact that at the time of trial the district court found in favor of Cashman on all claims which Mojave had asserted against it and found that Cashman was justified in ceasing to provide work after payment to it had stopped. JA 31:7745-46, ¶42. Accordingly, even if justifiable grounds existed for the issuance of the Preliminary Injunction at the outset of the action, by virtue of Cashman having prevailed upon all counterclaims asserted against it, such grounds no longer exists and the injunction would necessarily have to be dissolved.

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1. The District Court Erred In Issuing A Preliminary Injunction.

A preliminary injunction is ***only*** appropriate when "an applicant can show a likelihood of success on the merits and a reasonable probability that the non-moving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory damages is an inadequate remedy." *Dangberg Holdings Nevada, LLC v. Douglas County and its Board of County Commissioners*, 115 Nev. 129, 142-43 (1999); *see also State, Bus. & Indus. v. Nev. Ass'n Servs.*,128 Nev. Adv. Op. No. 34 (2012). (emphasis added). The requirements for an injunction are also provided for by statute. NRS 33.010 provides that an injunction may be granted:

> 1. When it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief or any part thereof consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.
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> 2. When it shall appear by the complaint or affidavit that the commission or continuance of some act, during the litigation, would produce great or irreparable injury to the plaintiff.
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> 3. When it shall appear, during the litigation, that the defendant is doing or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual.

In other words, injunctive relief is available if there exists a reasonable probability that real injury, loss or damage will occur if the injunction does not issue. *Berryman v. International Brotherhood of Electrical Workers*, 82 Nev. 277, 280 (1966). Defendants did not meet its burden in requesting the Court to issue a preliminary injunction, and instead relied upon vague allegations of harm to a nonparty to justify their request.

a. The Court Did Not Find That Defendants Have A Likelihood Of Success On The Merits Of Their Claims, Which Is Required To Issue A Preliminary Injunction.

The Findings of Fact and Conclusions of Law regarding Defendants' Motion to Procure Codes did not contain a finding that Defendants have a likelihood of success on the merits of their claims in this matter. JA 2:417-22. In order to show a likelihood of success on the merits, Defendants are not required to prove that they would ultimately prevail in this lawsuit; however, Defendants *are required* to establish "a reasonable probability of success on the merits." *Clark County Sch. Dist. v. Buchanan, 112 Nev. 1146, 1150, 924 P.2d 716, 719 (1996).* As the Court did not find that Defendants have a likelihood of success on the merits of their claims, the preliminary injunction was issued in error. Additionally, at the time of trial the district court expressly found that Cashman's ceasing work on the Project was justified as it had not been paid.

At the time of this motion, Defendants did not demonstrate a likelihood of success on the merits of their claims. Defendants did not even fully address this requirement in their Motion, merely offering conclusory statements instead of demonstrating a reasonable probability of success, likely because Mojave should have been looking to Cam, the party Mojave contracted with to supply the Materials for the requested relief. JA 2:332-58

Defendants have brought claims against Cashman for Breach of Contract, Breach of Implied Covenant of Good Faith and Fair Dealing and Misrepresentation. JA 2:305-31. At the time of trial however, ***the district court ruled in favor of Cashman on all asserted counterclaims***. JA 31:7742, ¶29.

Further, Defendants' Motion for a Preliminary Injunction essentially sought specific performance, not injunctive relief. Specific performance is only available when: (1) the terms of the contract are definite and certain; (2) the remedy at law is inadequate; (3) an appellant has tendered performance; and (4) a court is willing to order specific performance. *Mayfield v. Koroghli,* 124 Nev. 343, 367 (2008). Defendants wanted Cashman to complete performance under Cashman's contract with Cam. However, Defendants could not seek specific performance without tendering performance. In other words, Defendants were required to pay Cashman in order to seek to have Cashman perform under a contract where Cashman's performance was excused due to nonpayment. Simply calling its request a

preliminary injunction did not make it so, when Defendants sought to have Cashman complete performance. Defendants should have been looking to Cam, the party with which Mojave chose to contract for any requested relief.

Finally, the district court, at the hearing on Defendants' Motion, stated that Cashman had a likelihood of success on the merits of its claims, given that it supplied equipment to the Project and had not been paid for the Materials supplied. JA 2:430-32. As previously set forth, Cashman ultimately prevailed upon its claim for payment as well as on all counterclaims asserted against it.

b. The Court Did Not Find That Mojave Will Be Irreparably Harmed If Cashman Is Not Forced To Perform Under A Contract Where Its Performance Has Been Excused.

In addition to Defendants' failure to establish a likelihood of success on their claim, Defendants also failed to establish that they would suffer irreparable injury, another requirement to the issuance of a preliminary injunction. In the district court's Order, it states, "***the City*** will suffer irreparable harm if Plaintiffs are not mandated…" *See* JA 2:417-22, ¶3. (Emphasis added). NRS 33.010(2) calls for Defendants to establish that *they* will be irreparably harmed, and not the City, as the City was not a party to this matter; therefore, the preliminary injunction was issued in error. NRS 33.010(2) clearly states that an injunction is proper:

> When it shall appear by the complaint or affidavit that the commission or continuance of some act, during the litigation, would produce great or irreparable injury to the [***Counterclaimant***].

(Emphasis added). "[A]n injunction should issue only in cases … where irreparable injury to the personal or property rights of the individual will result unless protected by its restraining effect." *Carroll v. Associated Musicians of Greater New York*, 206 F. Supp. 462, 478 (S.D.N.Y. 1962). It is the *movant* who must establish and affirmatively show that the acts sought to be restrained will violate the ***movant's*** rights. *Id*. *See also Swift & Co. v. United States*, 276 U.S. 311, 48 S.Ct. 311, 72 L.Ed. 587 (1928). Further, it must be established with reasonable probability that irreparable harm will be caused to the claimant should the injunction not be issued. *See Carroll*, 206 F. Supp. 462. "Injunctions will not be granted merely to allay fears and apprehensions of individuals." *Id*. at 478. Defendants failed to establish with reasonable probability that they, not the City, would be irreparably harmed and having failed to do so Defendants failed to meet their burden in requesting a preliminary injunction.

Further, "irreparable harm is harm for which compensatory damages would be inadequate." *Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 116 Nev. 650 (2000). Here, Defendants' requested relief against Cashman was solely monetary damages. Defendants' counterclaims were for Breach of Contract, Breach of the Implied Covenant of Good Faith and Fair Dealing and Misrepresentation. Again, Cashman

prevailed on each of these counterclaims and therefore the previously issued preliminary injunction should be reversed.

F. THE TRIAL COURT ERRED IN DENYING RECOVERY TO CASHMAN ON ITS MOTION FOR ATTORNEY'S FEES PURSUANT TO NRS 104.9607 AS CASHMAN WAS THE PREVAILING PARTY AT TRIAL.

Cashman is the prevailing party in this action and is entitled to an award of attorneys' fees. Cashman was awarded damages on its claim against Mojave to enforce its security interest in the Materials sold to Cam and installed at the Project. The Court found there was a valid security interest and entered judgment in favor of Cashman and against Mojave in the amount of $197,051.87 relating to that claim. JA 31:7745, ¶39. Cashman was declared the "prevailing party" in the Trial FFCL. *Id*. at ¶38. The Defendants, including Mojave, were denied all claimed relief. JA 31:7742, ¶29. Given the plain language of NRS 104.9607, the district court erred in denying Cashman's Motion for Attorneys' Fees.

1. The District Court Recognized Cashman As The Prevailing Party, Yet Denied Cashman An Award For Attorneys' Fees.

The district court ruled in favor of Cashman on its claim for Foreclosure of Security Interest against Mojave. The District Court affirmatively found that Cashman's security interest in the equipment provided to the Project constituted a "legally binding security instrument establishing a security interest inuring to the favor of Cashman in the Materials provided hereto, or in this case, the value or

proceeds derived from the Materials." JA 31:7740, ¶19. The Court found that Cashman properly perfected its security interest in the equipment provided to the Project. *Id*. at ¶18. The Trial FFCL also stated that "this Court will address any issues of attorneys' fees, costs, and prejudgment interest through post decision motions that may be filed with the Court. JA 31:7747.

After trial, Cashman and Respondents submitted competing motions for attorneys' fees and costs. JA 29:7099-7112; 30-31:7360-7693. Cashman sought an award for attorneys' fees pursuant to NRS 104.9607, as Cashman prevailed on that claim and was awarded damages arising from the enforcement of its security interest against Mojave. The Court denied Cashman's request and Respondents' request, addressing both in the Order Denying Attorneys' Fees, stating:

> "This Court concludes that based on the outcome of the trial, there is no obvious prevailing party and none of the claims at trial were unreasonable. Therefore, an award for attorneys' fees and costs to either side based on the outcome of the trial is not warranted."

JA 32:7787.

The district court erred in denying Cashman's Motion for Fees by failing to adhere to the plain language of NRS 104.9607, which entitles Cashman, as the prevailing party, to an award of fees against Mojave.

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2. The Award For Attorneys' Fees Sought By Cashman Is Authorized By NRS 104.9607.

District courts may award attorneys' fees "only if authorized by a rule, contract or statute." *Barney v. Mt. Rose Heating & Air Conditioning*, 124 Nev. 821, 825 (2008). Where the language of a statute is not ambiguous, the court will interpret it according to its ordinary meaning. *Id*. at 826. Here, NRS 104.9607(4) authorizes an award for attorneys' fees to the secured party:

> A secured party may deduct from the collections made pursuant to subsection 3 reasonable expenses of collection and enforcement, including reasonable attorney's fees and legal expenses incurred by the secured party.

Section 4 clearly allows for a secured party's recovery of reasonable attorneys' fees and legal expenses incurred when exercising its rights pursuant to a valid security interest. The language of the statute is not ambiguous and therefore the district court should have interpreted it according to its ordinary meaning.

Further, comment 10 of NRS 104.9607 states:

> The phrase "reasonable attorney's fees and legal expenses," which appears in subsection (d), includes only those fees and expenses incurred in proceeding against account ***debtors or other third parties***. This secured party's right to recover these expenses from the collections arises automatically under this section.

(Emphasis added). Accordingly, the plain language of Nevada statutes make clear that as the possessor of property subject to Cashman's security interest, and as

Cashman prevailed on its claim at trial, Mojave is responsible for the attorneys' fees incurred in enforcement and collection of the security interest.

3. Cashman Is The Prevailing Party Because It Was Awarded Monetary Damages and Therefore the Court Erred in Denying Cashman's Motion for Attorneys' Fees.

Cashman was the prevailing party at trial on its claim to foreclose its security interest and it was awarded damages on this claim against Mojave. Specifically, the district court found:

> (38.) Since ***Cashman is the prevailing party*** on its claims for Foreclosure of Security Interest against Mojave (Third Cause of Action) and Unjust Enrichment against the Owners (Fifteenth Cause of Action), Cashman is entitled to a damages amount.

JA 31:7745. (Emphasis added). There is no dispute that the district court found that Cashman was the prevailing party on this claim. The Nevada Supreme Court has made clear that in order to be considered a prevailing party one must be awarded monetary damages. "A plaintiff may be considered the prevailing party for attorney's fee purposes if it succeeds on any significant issue in litigation which achieves some of the benefit it sought in bringing the suit." *Hornwood v. Smith's Food King No. 1*, 105 Nev. 188, 192, 772 P.2d 1284, 1287 (1989) (citing *Women's Federal S & L Ass'n v. Nevada Nat. Bank*, 623 F.Supp. 469, 470 (D.Nev.1985). "To be a prevailing party, a party need not succeed on every issue." *See LVMPD v. Blackjack Bonding*, 131 Nev. Adv. Op. 10, 343 P.3d 608, 615 (2015) (citing

Hensley v. Eckerhart, 461 U.S. 424, 434, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (observing that "a plaintiff [can be] deemed 'prevailing' even though he succeeded on only some of his claims for relief"). Whether or not that party received the full amount it is seeking is irrelevant to determine if it is the prevailing party. *Id*.

Further, Cashman fully prevailed on all claims asserted against it by Defendants and Mojave took nothing by way of its counterclaims. Cashman defeated Mojave's three counterclaims, two of which were abandoned prior to trial and the remaining claim was denied at trial. JA 31:7742, ¶29. Mojave was also denied the offsets it sought at trial as well, further demonstrating that Cashman was the prevailing party. JA 31:7745-46. Therefore, as Cashman is the prevailing party, the district court erred in denying Cashman its Motion for Attorneys' Fees by declaring Cashman was not the prevailing party, contradicting its previous order and judgment. JA 31:7745. This Court should reverse the district court's ruling and remand for determination of the attorneys' fees to be awarded Cashman as the prevailing party pursuant to NRS 104.9607. JA 32:7787

G. THE TRIAL COURT ERRED IN DENYING CASHMAN ITS COSTS AS THE PREVAILING PARTY PURSUANT TO NRS 18.020 AND THE VERIFIED MEMORANDUM OF COSTS WAS UNCONTESTED.

As outlined in the previous section, Cashman is the prevailing party and filed its Memorandum of Costs pursuant to NRS 18.020 on May 13, 2014. There was no challenge or objection made to the filing of Cashman's Memorandum of

Costs. The Court, however, denied Cashman's Request for Costs pursuant to NRS 18.020. The Court issued an Order Denying Costs pursuant to NRS 18.020 on September 2, 2014. JA 32:7797-98. This decision must be reversed, as the plain language of the statute clearly requires the district court to award costs to a prevailing party, such as Cashman.

NRS 18.020(3) states:

> Costs must be allowed of course to the prevailing party against any adverse party against whom judgment is rendered, in the following cases … [i]n an action for the recovery of money or damages, where the plaintiff seeks to recover more than $2,500.

NRS 18.110 states:

> 1. The party in whose favor judgment is rendered, and who claims costs, must file with the clerk, and serve a copy upon the adverse party, within 5 days after the entry of judgment, or such further time as the court or judge may grant, a memorandum of the items of the costs in the action or proceeding, which memorandum must be verified by the oath of the party, or the party's attorney or agent, or by the clerk of the party's attorney, stating that to the best of his or her knowledge and belief the items are correct, and that the costs have been necessarily incurred in the action or proceeding.
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> 2. The party in whose favor judgment is rendered shall be entitled to recover the witness fees, although at the time the party may not actually have paid them. Issuance or service of subpoena shall not be necessary to entitle a prevailing party to tax, as costs, witness fees and mileage, provided that such witnesses be sworn and testify in the cause.

> 3. It shall not be necessary to embody in the memorandum the fees of the clerk, but the clerk shall add the same according to the fees of the clerk fixed by statute.
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> 4. Within 3 days after service of a copy of the memorandum, the adverse party may move the court, upon 2 days' notice, to retax and settle the costs, notice of which motion shall be filed and served on the prevailing party claiming costs. Upon the hearing of the motion the court or judge shall settle the costs.

Costs are awarded as a matter of course to the prevailing party in all actions listed in NRS 18.020. *Campbell v. Campbell*, 101 Nev. 380, 383, 705 P.2d 154, 156 (1985).

The district court erred in denying an award for costs incurred by Cashman pursuant to NRS 18.020. As discussed *supra*, Cashman is the prevailing party after trial in this matter, as Cashman prevailed against Mojave on its claim against the security interest, receiving a monetary award for $197,051.87 and on unjust enrichment against the owner. JA 31:7745. Mojave did not prevail on any of their counterclaims, nor were they awarded any offset damages. JA 31:7742, 45-46. Mojave failed to file a Motion to Retax, required under NRS 18.110(4), within three (3) days after service of the Memo of Costs. Therefore, as Cashman was declared the prevailing party in the FFCL and its Memorandum of Costs was not contested, Cashman is entitled to an award for costs pursuant to NRS 18.020.

This Court should reverse the district court's ruling and order costs to be awarded to Cashman as the prevailing party.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court and enter judgment in favor of Cashman on its mechanic's lien claim, its payment bond claim and its security interest claim in the amount of $683,726.89 and remand for a determination of the attorney's fees and costs to be awarded.

Dated this 18th day of June, 2015.

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ATTORNEY'S CERTIFICATE

I hereby certify that I have read this APPELLANT'S OPENING BRIEF and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure. This brief complies with the formatting requirements of Rule 32(a)(4)-(6), and either the page- or type-volume limitations stated in Rule 32(a)(7).

Dated this 18th day of June, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Pezzillo Lloyd and on the 18th day of June, 2015, a true and correct copy of the foregoing document was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system and by United States First-Class mail to all unregistered parties:

Emily Galante
An Employee of Pezzillo Lloyd

PEZZILLO LLOYD