IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN ILIESCU, JR., individually, JOHN ILIESCU, JR. and SONNIA SANTEE ILIESCU, as Trustees of the JOHN ILIESCU, JR. AND SONNIA ILIESCU 1992 FAMILY TRUST AGREEMENT,

Appellants,

vs.

MARK B. STEPPAN,

Respondent.

Supreme Court No. 68346
Washoe County Case No. CV07-00341
(Consolidated w/CV07-01021)

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APPELLANTS' OPENING BRIEF

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RULE 26.1 DISCLOSURE STATEMENT

I certify that the following are persons and entities described in NRAP 26.1, that must be disclosed:

The Appellants are JOHN ILIESCU, JR., individually, and JOHN ILIESCU, JR. and SONNIA SANTEE ILIESCU, as Trustees of the JOHN ILIESCU JR. AND SONNIA ILIESCU 1992 FAMILY TRUST AGREEMENT (the "Iliescus").

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These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 12th day of May, 2016.

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JURISDICTIONAL STATEMENT

This is an appeal from a final Judgment. The basis for appellate jurisdiction herein is NRAP 3A(b)(1). Notice of Entry of the final Judgment was served on February 27, 2015. X AA2381-2383. A Motion to Alter or Amend under NRCP 52 and 59 was then filed on March 10, 2015 (X AA2384-2420), delaying the Notice of Appeal deadline under NRAP 4(a)(4)(B) and (C). Notice of Entry of an Order denying this Motion was served on May 28, 2015. X AA2447-2448. Notice of Appeal was then filed within thirty (30) days on June 23, 2015. X AA2449-2453. Finality of the Judgment and appellate jurisdiction was recognized by prior Order of this Court. XI AA2490-2492.

ROUTING STATEMENT

This case is presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(3).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the district court erred in excusing mechanic's lien claimant Steppan's failure to provide the Iliescus, as property owners, with the Pre-lien Notice required by NRS 108.245, by relying on the "actual notice" exception to that statute, established in *Fondren v. K.L. Complex Limited Co.*, 106 Nev. 705, 800 P.2d 719 (1990), even though no actual notice by the Iliescus of the *identity* of lien claimant Steppan was demonstrated, and the lien was solely for *offsite* design services, with no construction commencing "upon" the property, as had occurred in *Fondren*.

II. Whether the district court erred in failing to identify the

date on which actual notice purportedly occurred, while still upholding the entirety of the lien, without addressing whether any of the allegedly lienable work had occurred after 31 days before that date, pursuant to NRS 108.245(6).

III. Whether the district court erred in excusing Steppan's other numerous failures to substantially comply with Nevada's lien statutes.

IV. Whether the district court erred in upholding Respondent Steppan's mechanic's lien, which was manifestly not for services performed "by or through" Steppan, as required by NRS 108.222(1)(a) and (b), but was a lien for the unpaid invoices of, and alleged value of services provided directly for the customer by, Steppan's employer, Fisher Friedman Associates ("FFA"), a foreign architectural firm not registered to provide licensed architectural services in Nevada, working directly for the customer and not as a subprovider of Steppan, which had not been hired by Steppan, and whose unlicensed services were in any event not legally provided.

V. Whether the district court erred by including language in its Judgment suggesting that the Iliescus might be personally liable to Steppan for amounts beyond the value of their liened Property.

STATEMENT OF THE CASE

This is the Iliescu property owners' appeal from a Judgment upholding a $4,536,263.45 mechanic's lien in favor of Mark Steppan against their property, for the unpaid invoices of Steppan's employer, a non-Nevada licensed California architectural firm, for offsite architectural services performed for a would-be purchaser and developer of the liened property, during an escrow which never closed.

On November 7, 2006, a mechanic's lien notice was recorded in Steppan's name against the Iliescus' "Property" as described therein. VIII AA1730-1734.

The Iliescus filed an Application for Release of Mechanic's Lien on February 14, 2007 (I AA0001-0007) initiating the first of these two consolidated cases, and arguing that Steppan had failed to provide the required pre-lien notices under the mechanic's lien statute. Steppan's initial lien was replaced by an amended lien (VIII AA1735-1740) and a separate lawsuit, to foreclose thereon, was then filed in Steppan's name on May 4, 2007. I AA0172-0177. The two suits were then consolidated. I AA0205-0212.

On June 22, 2009 the district court issued a partial summary judgment Order (III AA0508-0511), which excused Steppan from his failure to ever serve the Iliescus with the pre-lien notice required by NRS 108.245(1), ruling that such notice was not required due to the Iliescus' having actual notice of architectural work being performed. On May 9, 2013, another partial summary judgment Order issued (III AA0578-0581) holding that the amount of Steppan's lien would be based on a flat fee percentage-based AIA Agreement signed by the customer, claimed as controlling by lien claimant Steppan. Steppan later filed a "Second Amended Notice and Claim of Lien" (VIII AA1741-1750) prior to a four day bench trial held in December 2013, which trial did not allow for any possible reconsideration of the prior Summary Judgment Orders. III AA0643; IV AA0770 ll. 3-20, VI AA1468 ll. 15-18. Six months after trial, the district court entered its Findings of Fact, Conclusions of Law, and Decision (hereinafter the "Decision") in

favor of Steppan. VIII AA1911-1923. No Judgment having yet been entered on this Decision five months thereafter, a motion to set aside this Decision was filed under Rule 60(b) (IX AA1964-2065), but denied (X AA2425-2431), and the district court entered its final Judgment on February 26, 2015 (X AA2378-2380). A motion to alter or amend this Judgment (X AA2384-2424; X AA2436-2442) was then filed, which was also denied (X AA2443-2446). This appeal followed.

SUMMARY OF THE ARGUMENT

Steppan's lien should have been repudiated due to his failure to abide by NRS 108.245 requiring a right to lien notice to be sent, within 31 days of any work for which a lien is later sought.[1] The Iliescus were deprived of their statutory protections to such notice on the basis of their alleged awareness that offsite design work was being performed, without any finding as to when such knowledge on their part had allegedly occurred, for purposes of allowing a lien for only such work as was performed after 31 days before said date (pursuant to NRS 108.245(6)), and without any finding that the Iliescus knew of the *identity* of the lien claimant who would pursue a lien for the performance of this work, as required by Nevada case law.

Steppan also failed to substantially comply with Nevada's lien perfection

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[1] As this section of the brief is intended solely as argument, citations to the record on appeal are not included, but are set forth below, in the more detailed recitation of facts.

statutes in other regards, beyond his failure to serve an NRS 108.245 Notice.

Furthermore, a mechanic's lien claimant may only lien for the value of services provided "by or through" the lien claimant. NRS 108.222(1)(a) and (b). Thus, a Nevada mechanic's lien claimant may lien for moneys owed to him for his own work, or for the work of his employees or of his subcontractors, but not for money owed to another party, for that party's and its employees' and its subproviders' work, or for such other party's unpaid direct invoices to its customer. The "Steppan" lien was, however, not for Steppan's work, or for that of his employees or his subcontractors, but was for unpaid invoices sent by his employer, a foreign architectural firm, Fisher Friedman and Associates ("FFA"), which was not licensed to perform work in Nevada, for the services provided by it and by its employees, and its subcontractors, directly to the customer, under its own direct relationship with that customer. There was no evidence, let alone the substantial evidence required, to reasonably support the court's finding that Steppan had hired this foreign architectural firm to work as Steppan's subprovider. The Judgment based on that finding, and the other Orders based on that inaccurate ruling, must therefore be set aside. Furthermore, even if Steppan had retained FFA to work under Steppan, the unlicensed work performed by FFA was not lienable as part of Steppan's lien, and its claims to be exempt from Nevada's architectural licensing statutes, because it acted as a mere "consultant," are preposterous.

The Judgment is also erroneous in that it suggests the possibility that, following any lien foreclosure sale of the Iliescus' Property, by Steppan, the Iliescus may be personally liable for amounts unable to be satisfied by the value of the Property, which is directly contrary to Nevada's mechanic's lien statute and the Nevada case law explaining the same.

STATEMENT OF FACTS

A. The Iliescus Agreed to Sell their Property, and the Purchaser Retained FFA.

The Iliescu Appellants are the owners of vacant and unimproved real property in downtown Reno, as described in the mechanics lien at issue herein (the "Property"). VIII AA1748-1749. Appellants entered into a Land Purchase Agreement and Addendums (I AA0024 *et seq.*) to sell the Property to a purchaser, Consolidated Pacific Development, which, unbeknownst to the Iliescus (I AA0008) eventually assigned its rights to purchase the Property to an entity known as BSC. VIII AA1913. (Consolidated Pacific Development and BSC are jointly hereinafter referred to as "BSC," and are sometimes described as the "purchaser" or "developer"). BSC planned to develop a multi-use high-rise development to be known as the "Wingfield Towers" at the Property. *Id.* IV AA0957-0958.

During escrow (which would never close), BSC negotiated with Rodney Friedman ("Friedman"), to have his California architectural firm, Fisher Friedman Associates ("FFA") design the Wingfield Towers. IV AA0948 at ll. 14-16; 0957 at

l. 24; AA0962-0966. Friedman was the sole owner of FFA (Fisher having retired). V AA1003-1004; 1085; IX AA2029. FFA was not registered to perform licensed architectural services in Nevada (VI AA1481-VII AA1482), nor could it be, as its sole owner Friedman was not licensed in Nevada (VIII AA1913, at ¶9), such that it lacked the 2/3 Nevada licensee ownership required by NRS 623.349 to become so registered. IX AA2044. *See also*, *DTJ Design Inc. v. First Republic Bank*, 318 P.3d 709, 711, 130 Nev. Adv. Op. 5 (2014) (foreign architectural firm, not registered in Nevada, and not 2/3 owned by Nevada licensees, could not lien for its improperly performed unlicensed Nevada work).

B. <u>FFA Directed Steppan to Sign the Initial Contract on its behalf and Work Began, Without Any Pre-Lien Notice Being Provided.</u>

Steppan, who was Friedman's son-in-law, and had worked for FFA in California his entire career, was the only FFA employee with a Nevada architectural license. VIII AA1913, at ¶9; IX AA2030; III AA0698;VI AA1377-1378; IX AA2029. Thus, Friedman had Steppan sign the contract(s) for FFA's services to BSC (V AA1089 at l. 23 thru 1090 at l. 2) beginning with an hourly fee letter agreement dated November 15, 2005 (VIII AA1751-1752), which the FFA firm decided to enter into (IV AA0978 at ll. 2-5), as an initial "stop-gap" until a later AIA Agreement would be signed. VIII AA1914 at l. 26 - 1915 at l. 8.

It is undisputed that, as work began, neither FFA nor Steppan sent any Notice to the Iliescus that rights to lien their Property were being created due to

offsite architectural work being performed, as required by NRS 108.245. I AA0004; AA0019-0020; VIII AA1916, at ll. 9-11. Pursuant to NRS 108.245(3), where no such notice is provided, "[n]o [mechanics] lien for . . . work or services performed . . . may be perfected or enforced." If notice is given, then a lien may be pursued for work performed commencing 31 days prior to the date on which the notice was provided. NRS 108.245(6).

Dr. Iliescu was aware that architectural work would take place during escrow, but understood that the purchaser had an in-house architect. VI AA1277. He was never told (prior to receiving the lien)[2] that Mark Steppan was the architect and did not know of his identity. VI AA1311; 1347.

C. Steppan Did Not Retain FFA to Work for Him, but FFA Provided Its Services Directly to BSC, Under a Direct Relationship with BSC, and Was Paid Directly by BSC, until Payments Ceased, Whereupon "Steppan's" Lien Was Recorded and this Suit Pursued for *FFA's* Unpaid Invoices to BSC.

A key question for this Court will be to determine whether it was appropriate to allow Steppan to lien for FFA's and its employees' work product. It is anticipated that Steppan will argue that this was appropriate because FFA was retained by Steppan, who employed FFA to work as a subprovider to him on his work for BSC (such that FFA's work was provided "by or through the lien claimant" Steppan, and is therefore lienable by him, under the language of NRS

[2] Trial testimony regarding subsequent communications with the architect are in regard to later events, after the initial, November 2006 lien. VI AA1350.

108.222(1) (a) and (b)). This is the position taken by Steppan in post-trial filings (IX AA2082 at ll. 9-11) and accepted by the district court in an oral post-trial statement. X AA2363 at l. 20 – AA2364 at l. 4. However, as will be shown herein, this position is completely unsupportable: FFA was not retained by Steppan (who remained FFA's employee), but, rather, FFA had its own direct contractual relationship with BSC, worked directly for BSC, communicated directly with BSC, and was paid directly by BSC until payments ceased, at which point FFA sent invoices to BSC, on FFA letterhead, which *FFA* invoices are the basis of the "Steppan" lien, and of this suit to foreclose thereon. Thus, the district court's oral finding at a hearing on a post-trial motion that Steppan was employing FFA during the project, was clearly erroneous as a matter of law, as shown by the following demonstrated facts:

(i) The Contract Facts. Evidence of three types of contract with BSC were presented at trial, and will be discussed herein: an hourly fee agreement, pending the later execution of an AIA Agreement; various side or add-on agreements (some of them never signed) for miscellaneous extra-contractual work; and, finally, the AIA Agreement. As to the relationship between Steppan and FFA, **no written agreement was ever entered into between Steppan and FFA**, by which Steppan hired FFA, either as his design consultant or in any other capacity. IX AA2045. This fact alone is legally fatal to the claim that Steppan retained FFA as his client,

because: (a) the AIA Agreement was to be in effect for at least 32 months (II AA0259 at § 1.5.9 and II AA0274),[3] such that any oral subcontract for FFA to sub-provide services to Steppan thereunder would be void under Nevada's statute of frauds for contracts to last more than one year (NRS 111.220(i)). (b) NRS 623.325, would also require any such architectural services contract (for FFA to act as a sub-architect to Steppan), to be in writing.

The hourly agreement. Although the initial hourly agreement which Friedman had negotiated was signed by Steppan, as the purported "Contract Architect", this document listed 28 categories of the Contract Architect's employees (VIII AA1752-1753). Steppan, however, continued to be employed by FFA (VIII AA1913 at ll. 16-20), and therefore had no employees of his own, such that these 28 categories of employees were in fact FFA employees/employee categories, and FFA was the contract architect in all but name, whose employees were billing under this hourly agreement. Indeed, Friedman testified that the initial hourly agreement authorized not Steppan, but Friedman ["you"] to proceed with the work, after "the firm decided to proceed" on that basis. IV AA0978 at ll. 3-9, and 22.

The side agreements. As the work was being performed, certain extra-

[3] The time parameters under the AIA Agreement were "negotiated between Fisher-Friedman and the client" and the 32 month time frame was the "expected" duration "pending normal situations" for this project. VI AA1461-1462.

contractual work allegedly came to be requested of or volunteered by FFA such as responding to city staff questions, reviewing information as to an adjacent church parking lot, etc., and letter proposals for this side work were generated, including as presented to BSC by Nathan Ogle of FFA (VIII AA1771), some of which were never signed by BSC. VIII AA1758-1771; VIII AA1743. Steppan has verified (under questioning by his own counsel) that "Fisher Friedman" performed this side work, and "Fisher Friedman" billed the client for it, and did not receive any objections about its invoices for the same. VI AA1404, 1408. Based thereon, the district court understood, and Steppan confirmed, that the question before the court was whether "Fisher Friedman Associates" would be "reimbursed" for the work performed under these side add-on agreements. IV AA1402, 1405.

Friedman also acknowledged that these side agreements were between FFA and BSC, testifying for example, as to one of these agreements, that the purchaser BSC asked *Friedman* ["you"] to go study city staff questions and his firm FFA ["your firm"], billed BSC for doing so. V AA0986 at l. 19, and 0988 at l. 11. Nevertheless, the district court upheld the entirety of the Steppan lien (compare VIII AA1742-1750 with X AA2378-2380) which included a lien claim for these side projects (VIII AA1747-48), and thereby allowed *Steppan*, rather than FFA, to lien for these FFA side agreements, which FFA was asked to perform, and which were performed by FFA, and which were invoiced by FFA. XI AA2557-2571.

The AIA. This final form AIA Agreement (II AA0250-0274), calling for a flat fee tied to the anticipated cost of construction (which never commenced), was ultimately signed on April 21, 2006 (II AA0265; 0271) but was allegedly to be treated as effective October 31, 2005 (II AA0250; III AA0524, AA0528) in order to supplant the earlier hourly fee agreement. FFA employee Nathan Ogle, rather than Steppan, would have been involved in negotiating the language of this AIA Agreement. VII AA1520. Steppan cannot remember any communications with BSC, regarding the language of the AIA Agreement. VII AA1527-1528. This Agreement allowed flat fee invoices to be sent, but apparently no work was performed under this document after it was signed. IX AA2052. The Iliescus were not parties to any of these contracts, which each listed BSC as the "owner" based on an anticipated closing. VIII AA1914 ll. 4-5.

FFA was not listed in the AIA Agreement as a subcontracting consultant to Steppan, the location for such a designation being left blank (II AA0252 at § 1.1.3.3.), but was instead listed in the Addendum to the AIA, as a direct party thereto (II AA0272) (namely as BSC's "Design Consultants"), such that the AIA was between BSC, on the one hand, and both Steppan and FFA, on the other. This conforms with Steppan's testimony, that "both" he and FFA were working for BSC (IX AA2053-2054), and with Friedman's testimony, that "the **developer agency** or entity with respect to the Wingfield Towers project in Reno [*i.e.*, BSC] did actually

commit to pay a fee" not to Steppan but "**to [his, Friedman's] firm** based on a percentage" flat fee as called for in the AIA Agreement. IV AA0973 at ll. 3-7 (emphasis added). Friedman repeatedly confirmed his position that FFA (and or he, himself) was a direct party to the AIA Agreement, which he repeatedly described as "our" or "my" agreement, which "we" had "signed" under which "I would be entitled to my compensation" based on the terms thereof. V AA1063, 1081-82, 1155, 1165. Friedman also acknowledged the identity of his "client" as "the developer" [*i.e.*, BSC] which developer was not the Iliescus, as owners of the property. V AA1111 at ll. 13-15. Thus, FFA's client, who employed FFA, was not Steppan, but BSC.

(ii) <u>The Work Performance Facts.</u> As the district court noted in its initial post-trial Decision, rather than FFA performing its work by or through lien claimant Steppan (as required by NRS 108.222(1)(a) and (b)), the work product the court attributed to Steppan was provided "at or through FFA." VIII AA1916 at ll. 2-3. The district court did not however correctly apply the law to this factual finding. Moreover, Steppan did not himself create the designs or the drawings attributed to him by the district court's Decision, which were FFA's work product, primarily created by FFA sole owner Friedman and FFA employee David Tritt. IX AA2053-2054. Friedman admitted that the work product belonged to FFA and could not be obtained without FFA's –"our"– permission. V AA1107.

Steppan's hourly involvement in the project was minimal, his counsel conceding that almost ninety-five percent (95%) of the work thereon was performed by FFA employees other than Steppan, including over 90% of the architects' work. X AA2339 at ll. 5-12. It is respectfully submitted that this work, performed by non-Nevada licensed architects, employed by a non-Nevada registered architectural firm, was, however, illegal, under NRS 623.180(1) and NRS 623.360(1)(c) for the reasons set forth at IX AA1988-1992, and at IX AA2199-2203. Nevertheless, Steppan admitted in post-trial briefs that *FFA's* employees, including its "unlicensed designers" performed the vast majority of the design work for which Steppan now liens. IX AA2079, ll. 8-13; IX AA2083 at ll. 11-13; IX AA2084 at l.1; IX AA2201.

Steppan did not treat his work on this project any differently from his other work for and as an employee of FFA, but handled himself "the same way" as on other FFA projects (VI AA639), even though this was the first time he had ever signed as the purported architect for FFA's work. VI AA1481; IX AA2038 at ll. 19-21. Steppan presented no evidence that he obtained any local business license, or registered with the State's taxation department, or took any other steps to fulfill the purported role of a Nevada independent contractor, reaching out to and subcontracting with other entities such as FFA. Instead, Steppan remained an FFA employee throughout the project (IX AA2017), receiving his regular salary, and

not anticipating any special bonuses or profit sharing on this job. IX AA2040-2041.

Steppan maintained no independent project files for this project, but rather, FFA maintained all such files, and the "Steppan" bates-labelled file documents produced during discovery were provided by FFA, as Steppan had no separate files of his own. IX AA2057. Steppan did not seek out and hire the other subcontractors, which was done by Friedman/FFA. V AA0999-1000.

Although Steppan had only two real roles, to sign the contracts and to someday sign and stamp the final architectural renderings (VIII AA1526), he never performed the second role, as the day for doing so never arrived. VIII AA1531; V AA1006. This is important because Steppan did not believe his own involvement as the person with alleged responsible control over the documents he would sign and seal would need to become more substantive until shortly before the time approached for signing and sealing the documents (VI AA1385) (a claim which is inaccurate under uniform architectural regulations --IX AA2197-2198-- but which for present purposes further confirms Steppan's own lack of material involvement in comparison to others at FFA).

Contrary to the district court's finding (VIII AA1913 at 11.21-21), FFA's employee Nathan Ogle, not Steppan, was listed on the invoices as the Project Manager (VIII AA1781; 1783; 1785; 1787; 1789; 1791 *et seq.*), which Ogle role

Steppan confirmed. IX AA2031, at 11. 23-25. Although they had no Nevada license, submissions to local Nevada entities, such as use permit applications, listed FFA and Ogle as the architectural contacts for this Nevada project, and Friedman as an applicant. I AA00189; 0195; VIII AA1851; 1862; 1867; 1879; IV AA0919; 1058; VII AA1510. Steppan did not contest the accuracy of such submissions, based on Ogle and Friedman's primary involvement as designer and project manager. VII AA1512. FFA and Ogle were so listed because they had done the primary work. V AA1192, at ll. 21-24.

Steppan did not attend the Reno City Council Planning Commission meetings at which these applications were addressed. VII AA1515. Steppan could not remember if he, Steppan, even reviewed such applications, but recognized Nathan Ogle's handwriting on the drafts. VII AA1490-1491. "Fisher Friedman" worked with another BSC contractor (David Snelgrove of Woods Rogers) (V AA1187) to prepare submittals to the City of Reno, and Snelgrove testified that "Fisher Friedman" did a "substantial portion" of this work (V AA1198), including architectural elevations provided by "Fisher Friedman" (V AA1199) and fly over visuals and power-points created by "Fisher Friedman." V AA1202.

Friedman testified that he, Friedman, supervised the work (V AA0995), and Steppan would only have played such a supervisory role on this project if Friedman were to have become unavailable, due to illness or vacation. V AA1006-

1007. Given that Friedman's time on the project far exceeded Steppan's (IX AA1985; AA2059), this obviously did not occur. Steppan also acknowledged that the project, like every FFA project, was done under Friedman's ultimate purveyance. IX AA2033. Nathan Ogle, of FFA, rather than Steppan, was present during Reno, Nevada meetings to present information about the project, where either Nathan Ogle or FFA would be identified as the "project architect." V AA1206. Nor was it even anticipated that Steppan would necessarily have been the one to move from California to be the on-site supervising architect had construction ever commenced at the Nevada site. V AA1159, ll. 16-19.

(iii) The Communication Facts. Steppan may not have sent a single e-mail communicating with anyone external from FFA, such as Reno, Nevada governmental entities or the client BSC, about the project. VII AA1503. Friedman, on the other hand, communicated directly with BSC's principals, such as Cal Bosma, including even to orally amend the contract (V AA1173 at l. 20 through AA1174 at l. 2) which Friedman obviously could not have done if his company FFA was not a direct party thereto. Nathan Ogle of FFA also communicated directly with BSC, not necessarily bothering to even copy Steppan. VIII AA1771. Ogle sometimes signed letters on Steppan letterhead (VIII AA1755), and when such an Ogle-authored letter was instead signed by Steppan, this was simply because Ogle, was "not around" to sign it instead. VI AA1390 at ll. 21-22.

The City of Reno "cc-ed" its communications with BSC (or its predecessor) not to Steppan, but to FFA and Ogle (II AA0385), as Reno officials had apparently been told to do (such that, when the Iliescus were also copied thereon, they would not thereby have learned Steppan's identity). Sam Caniglia (of developer BSC), rather than Steppan, was "the main contact person between Fisher-Friedman and Associates and the developer on the other hand" (VII AA1530 at ll. 3-6) and if Steppan ever had a phone conversation with Caniglia, it would only have been with Friedman also on the line. VII AA1529 at l. 24 - AA1530 at l. 2.

FFA was the party BSC was to contact with disputes over invoices. IV AA0968.

(iv) <u>The FFA Invoices and Direct Payment Facts.</u> No evidence was provided that any invoices were ever delivered from FFA to its purported customer, Steppan. Nor were any payments ever claimed to have been made by Steppan to his purported retained subprovider FFA. Nor were any W2's or 1099s from Steppan, to FFA or its employees, ever produced or claimed to exist. No demands or suits for payment were ever shown to have been asserted by FFA against Steppan for non-payment to his purported vendor FFA. Rather all of the invoices were sent directly to BSC, by FFA, and all of the payments from BSC were made directly to FFA, as shown below:

Four types of invoices to BSC were provided at trial; namely, \$380,870.00

in Hourly Fee Invoices through May of 2006 (Trial Exhibit –"TE"- 24, VIII AA1779-1796); Post AIA-execution Flat Fee Invoices, treated as cumulative up to $2,070,000.00 allegedly superceding and replacing the hourly invoices, based on FFA having signed the AIA Agreement and allegedly completed the "Schematic Design" (or "SD") phase of the work (TE 25, VIII AA1797-1815); Reimbursable Expense Invoices (TE 26, VIII AA1816-1843) in the amount of $37,411.50 (VIII AA1745) (admitted by the court in order to determine whether "Fisher Friedman" was entitled to payment thereunder (VI AA1423)); and, finally, invoices for claimed add-on side agreements (XI AA2555-2571). A review of these exhibits demonstrates that, initially, the hourly fee and reimbursables invoices were sent on phonied-up "Mark A. Steppan" letterhead, rather than FFA, letterhead, but eventually these invoices were sent on FFA letterhead, beginning in February of 2006. VIII AA1789; 1799; 1824. This was more accurate, based on Friedman's testimony that the invoices were in fact sent by his firm (IV AA0968), that BSC assisted FFA by locating mistakes in its invoices (IV AA0968-0970) and that FFA never received any complaint or objection that its invoices were too high, or to the billing methodology employed therein. IV AA0970 at ll. 13-15; V AA1071.

Steppan admits that use of the "Steppan" letterhead on the initial hourly and reimbursable invoices was merely to maintain **"the form"** that Steppan was the

Contract Architect. VI AA1419 at ll. 2-4. The truth, as opposed to the form, is shown by the Steppan letterhead invoices being sent from FFA's address, shown (together with FFA's phone and fax number) at the bottom thereof (VIII AA1781-1788), which match the address and numbers of FFA as shown on its own letterhead invoices. VIII AA1789-1796. The billing number on all of the invoices was an FFA invoice numbering system number (IX AA2036) and the invoices were generated internally at FFA based on its employees' work, and the "FFA general time" which was tracked for these billings. VI AA1413-1416; VI AA1397. Steppan provided no testimony, to support "his" lien, with respect to how "he" calculated "his" invoices, but testified instead on the system utilized by FFA for that "firm to generate invoices for the company." VI AA1412-1416. Nevertheless, the district court accepted this testimony as somehow upholding a Steppan, rather than an FFA lien. VIII AA1917 at ll. 18-22.

Significantly, **$480,000 in payments were made by BSC on the hourly fee invoices. V AA1081. Thus, more than the entirety of the hourly invoices and more than the entirety of the reimbursables invoices, combined, was paid. <u>All of these payments all of which BSC payments were made directly to FFA</u>**, and not to or through Steppan, it being understood from the outset that *FFA* would receive all BSC payment moneys directly from BSC. VI AA1416-1417, 1419; V AA1080-1081; IX AA2040.

Nor was FFA treated as a subprovider to Steppan on the invoices. For example, moneys owed or paid to actual consultants or subproviders (such as landscape architects or renderers) who did not have a direct relationship with BSC, were referenced and treated as a separate cost to be reimbursed by BSC, primarily, but not solely, on the reimbursables invoices. *See, e.g.*, VIII AA1793, AA1822, 1827; VI AA1421-23. Tellingly, Steppan had "no personal knowledge" and could not say whether or not these subproviders had or had not been paid (VI AA1422-1427) even though a lien in his name was upheld by the trial court, which included reimbursable expenses, as though he was the one who had incurred these subprovider bills, which was clearly not so. Indeed, had the subprovider not been paid, any complaint in that regard would have been as likely to be made to Ogle or to Friedman or to the FFA accounting department, as to Steppan (VI AA1425-1426) further verifying that these were FFA subproviders not Steppan subproviders. No evidence was presented at trial that *Steppan* had paid these subproviders himself, nor was any suggestion that he might have done so even made. Nor could he have, as he was not receiving the payments to do so from BSC, but rather FFA was.

Unlike the actual subproviders, FFA was not treated on the invoices as a subprovider to a contract architect, whose billings were shown as a "reimbursable" expense on that entity's invoices. In other words, Steppan did not receive invoices

from FFA, which were then shown as a cost or reimbursable advance on the Steppan invoices to BSC; rather, the hourly invoices to BSC (whether on Steppan or FFA letterhead) like the initial letter agreement, listed several categories of FFA employees performing the work whose time was billed directly to BSC, pursuant to the FFA firm titles and hierarchy (VIII AA1781-1788; IX AA2031). Thus, by way of illustration, on hourly Invoice No. 22282 (VIII AA1783), Steppan, who was the Executive Vice President and second highest ranking official of FFA (IX AA2030 at ll. 7-17), billed 11 hours to BSC at $200.00 an hour (the second highest rate billed, even on his own letterhead), under that title, whereas the "Principal/Officer" (*i.e.* Friedman) billed 124 hours at $220.00 an hour, the highest rate billed, and other FFA employees similarly billed in accordance with their FFA titles and rates, none of which were however separately called out or treated as a reimbursable sub-cost to or advance from Steppan, being forwarded to the client. *See also*, VI AA1413-1416; VI AA1397.

Steppan's final lien, upheld by the Court's Judgment was based on (1) the unpaid reimbursable invoices, (2) the unpaid side-agreement invoices, and (3) the post-AIA flat fee invoices. VIII AA1742-1750. **Significantly, all of the unpaid invoices, for which Steppan claimed "his" lien were on FFA letterhead.** (1) For example, only $4,802.49 of the $37,411.53 in reimbursable invoices was not paid. VIII AA1745. Thus, only post February 2006 reimbursable invoices (on FFA

letterhead) would have been involved. Specifically (if one does the math from the invoice list in the final lien notice), those sent after, and including part of, the April 19, 2006, invoice. VIII AA1744-1746; AA1827-1843. (2) The add-on agreement invoices included in the lien were likewise all after February of 2006, commencing no earlier than June 2006 (VIII AA1747-1748) and were all on FFA letterhead. XI AA2555-2571. (3) *All* of the post-AIA Agreement TE 25 flat-fee invoices were also sent **solely** on FFA letterhead. VIII AA1797-1815.

The vast majority of the lien was for unpaid amounts due and owing on these flat-fee Trial Exhibit 25 invoices: When FFA procured BSC's April 21, 2006 signature on the AIA Agreement (II AA0329, IX AA2052) this document called for flat fee payments on a percentage basis, which were to accrue as various design phases were completed. FFA avers that, before ceasing its design work, it first completed the "schematic design" phase thereof, so as to reach the "SD" milestone in order to seek flat fee compensation up to that phase. III AA0525, 0597; VIII AA1914-1915. The post-AIA Agreement flat fee invoices were to supplant the much lower hourly fee invoices, based on the SD phase completion. IV AA0762-0765; VIII AA1797-1815. As shown by the notation on the cover sheet (VIII AA1798) of TE 25 ("% SD complete"), this exhibit was provided at trial to establish that 100% of the Schematic Design was allegedly completed and that the amounts shown in the flat fee invoices (rather than the lower earlier hourly

invoices) were owed based thereon.[4]

The amount of the lien claim pursued and upheld after trial was therefore not based on any of the hourly fee invoices (some of which were on Steppan letterhead), but was based on a ruling that this SD phase had been completed (VIII AA1914; 1920), together with the earlier second Summary Judgment Order that the (flat fee) AIA Agreement controlled the calculation of the lien amount (III AA0578-0580) such that the flat-fee invoices were treated as supplanting the earlier hourly fee invoices, as controlling,[5] and as allowing a flat fee through the SD phase, although BSC was given credit for the payments it had made to FFA under those earlier invoices.

Thus, **all of the invoices** <u>being liened for in the "Steppan" lien</u> **are on FFA letterhead**, including all of the relevant reimbursable invoices, side agreement

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[4] It should be noted that the expert witness who testified that the SD work had been completed did not differentiate between Steppan and FFA in his testimony, that "Steppan and FFA" had completed the work to this phase (IV AA0877; 0883; 0910; 0912-13; 0938-39) and had no opinion as to whether FFA was licensed to perform the work (IV AA0919) such that his opinion did not support the district court's finding (VIII AA1915, at ¶13) referencing this testimony, and giving credit solely to Steppan for this work based thereon.

[5] The correspondence between the TE 25 flat fee FFA invoices and the vast majority of the final lien (other than the reimbursables and side agreement invoices) is also demonstrated by a comparison of (i) the final flat fee invoice (VIII AA1814-15), showing the total fees for "Professional Services" earned standing at $2,070,000.00 before add-ons and deductions, with (ii) the final Steppan amended lien (at VIII AA1745) which likewise shows the "Fee earned" before other add-ons or deductions, as $2,070,000.00.

invoices, and flat fee invoices, such that the **entirety of the "Steppan" lien amount ultimately upheld was based on moneys owed to FFA, for unpaid FFA invoices, sent from FFA, on FFA letterhead**, with the invoices also showing the prior payments that had been made directly **to FFA** by BSC.

(v) The Facts that the Lien and the Suit Were on Behalf of FFA. Although recorded in Steppan's name (because it would be illegal for the non-Nevada licensed FFA to lien for Nevada architectural work under NRS 108.222(2) and NRS 623.360(c)), the "Steppan" lien, as amended, was in fact filed by and on behalf of FFA, as was this suit to foreclose thereon. Indeed, Steppan admitted that, notwithstanding the use of "Steppan" letterhead (and even Steppan business cards) by some FFA employees working on the project, FFA was the firm expecting payment, and which was hurt by nonpayment (IX AA2052-2056). Steppan further admitted that, when the sham Steppan letterhead was utilized by Friedman, to write payment demand letters to BSC, he was actually writing on behalf of FFA. IX AA2054-2055; including AA2055 at ll. 6-9. It was FFA, not Steppan, which caused the "Steppan" lien to be recorded (V AA1074, AA1081-1088) because FFA's owner, Friedman, came to fear that FFA might not be paid by BSC. V AA1073.

Steppan, in trial testimony, did not refer to BSC as "my" client, but as "our" client, and did not refer to the architect as "I" or "me" but as "we" and "us" or the

"firm," clearly referring to FFA. VI AA1393, 1394, 1396, 1397 *et seq*. VI AA1444 *et seq*. Nowhere in his testimony did Steppan suggest that FFA was working for him, as opposed to his employer firm, FFA, working for the client BSC. *See, e.g.*, VI AA1402 at ll. 11-20. Steppan, for example, testified as to whether FFA had billed separately for the add-on side-work, and whether FFA had received any objections to those billings from its client, rather than testifying as to whether he had billed BSC separately, or whether he (as FFA's purported client, who the district court found had been employed by Steppan) had ever objected to bills from FFA that he received. VI AA1408.[6]

While this suit was pending, but two years before trial, FFA was sold to a new owner, but Friedman retained the mechanic's lien rights at issue in this suit *from FFA* (not from Steppan) as part of that sale. V AA1086. Therefore, Friedman understood all along that FFA, not Steppan, was the owner of the lien rights, and non-Nevada licensed architect Friedman is the person financing this suit (*id.*), as the real party in interest with a financial stake herein, having retained that interest from non-Nevada registered architectural firm FFA. Steppan confirmed Friedman's testimony regarding FFA's retention of the lien foreclosure lawsuit claims at the time of the sale of FFA (VI AA1383 ll. 12-21) even though that sale

[6] All evidence at trial regarding BSC never objecting to the FFA invoices, and/or asking FFA to do certain add-on work, is hearsay. No one from BSC testified on Steppan's or FFA's behalf at trial.

of FFA should have been irrelevant, and no such retention from FFA of the lien claims needed, if Steppan were the true lien claimant, as "Steppan" was never sold, and "Steppan" was the purported Plaintiff.

D. The Steppan Lien Was Not Properly Recorded or Pursued.

Financing for the project was never obtained, escrow never closed, and no on-site improvements ever commenced. VIII AA1913 at ll. 8-11. Thus, when the Iliescus received their completely unimproved Property back out of escrow, it was now subject to Steppan's multi-million dollar lien claim, for the unpaid FFA invoices to BSC, and the moneys owed to FFA thereon, leading to the instant litigation.

Although the Wingfield Towers was to include residential condominiums, no notice of intent to lien was provided 15 days before the November 7, 2006 lien's recordation, as required by NRS 108.226(6). Steppan attempted to remedy this failure after the fact, by sending a subsequent 15-day lien notice, followed by an amended lien. I AA0100-0107. However, failure to send a required *prior* notice cannot, by definition, be remedied *after* the fact. The district court ignored this failure without explanation, although it was referenced in the Iliescus' original lien expungement application. I AA0005. Steppan's lien, as amended, also violated numerous other provisions of NRS Chapter 108 (IX AA2003-2008) which were also ignored.

ARGUMENT

A. The District Court's Decisions and Orders and Judgment Should Be Reversed, Based on the Applicable Standards of Review.

The key elements of Steppan's claims were treated as established based on Summary Judgment rulings (III AA0508-0511, and III AA0578-0581) which the district court indicated it would not upend or reconsider during or as the result of trial, leaving the same for appellate review (IV AA0770; VI AA1468), such that the trial was of uncertain purpose, with a predetermined outcome. Based thereon, this Court should review at least the summary judgment rulings, as well as the final Judgment which was based thereon, *de novo*. *MB America Inc. v. Alaska Pacific Leasing Co.*, 132 Nev. Adv. Op. 8, 367 P.3d 1286, 1287 (Nev. 2016) (a district court's order granting summary judgment is reviewed *de novo*).

Furthermore, both the first Order for Summary Judgment (III AA0508-510) and the second (III AA0578-580), should be reversed because they failed to "set forth" a recitation of "the undisputed material facts and legal determinations" on which they were based, as required by NRCP 52(a), as they instead merely described the parties' arguments and counterarguments, and the court's ultimate ruling, without clearly indicating whether certain arguments were accepted as the grounds for the same.

These orders prejudiced the Iliescus, by creating ambiguity as to what the purpose of the trial even was, and by foreclosing for review at trial, certain issues

on which genuine issues of material fact existed. For example, in opposing the second Motion for Summary Judgment, the Iliescus argued that Steppan was actually trying to lien for FFA's unlicensed work (III AA0532) which contention was ignored when the second summary judgment was granted. This issue was then raised again in the Iliescus' opposition to a motion to strike their jury demand (III AA0588-0589) and the district court treated this argument as an attempt to re-litigate a matter which had been adjudicated in the prior summary judgment rulings. III AA0626 at ll. 12-15. It was therefore understood that review of the propriety of Steppan liening for FFA's unlicensed work had been cut off by the second summary judgment ruling and would not be considered at trial. III AA0632-33. (Indeed, Steppan claimed that the *first* Summary Judgment Order precluded any further adjudication of the validity of the lien. II AA0540.)

Given this broad scope, the summary judgment rulings were obviously premature, as there were in fact substantial genuine issues of material fact regarding the propriety of Steppan liening for FFA's unlicensed work. *Tom v. Innovative Home Systems, LLC*, 132 Nev. Adv. Op. 15, __ P.3d __ (2016)(genuine issue of material fact as to whether mechanic's lien claimant's lien should have been stricken due to work being performed without a license should have precluded summary judgment in his favor). The Iliescus were prevented during trial from providing expert witness testimony that the AIA Agreement upheld by

the second summary judgment ruling (allowing for much higher-than-hourly flat fee bills) would not have been considered effective, pursuant to industry standards, until entitlements had been received and financing for the project was obtained. VII 1629-31. However, the testimony which would have been presented on that point (VIII AA1898-1892) demonstrates that there was a genuine issue of material fact with respect thereto, such that summary judgment should not have been granted, and this testimony not precluded (especially as no one from BSC testified at trial as to what BSC understood about its own contractual obligations). Despite the existence of the second summary judgment, however, Steppan was allowed to provide evidence of additional amounts due and owing for extra-contractual work, outside the AIA Agreement, which the Iliescus understood to have been cutoff by the second summary judgment ruling. VI AA1428-1430.

To the extent that the court's final Judgment rulings were also based on trial evidence, beyond the Summary Judgment rulings, this Court reviews the same, in a mechanic's lien case, to determine whether the findings were supported by "substantial evidence" meaning evidence "which a reasonable mind might accept as adequate to support a conclusion." *Simmons Self Storage Partners, LLC v. Rib Roof, Inc.,* 130 Nev. Adv. Op. 57, 331 P.3d 850, 855-56 (2014). As set forth above, the district court's post-Decision oral finding, that Steppan "employed" FFA was not based on any such substantial evidence, on which any such reasonable

conclusion could be drawn, as there simply is no such evidence of any agreement by which Steppan hired FFA to work under him, or that the parties acted as though he had done so in their dealings. Instead, voluminous truckloads of evidence exist that FFA worked directly for BSC, was a party to the contract with BSC, invoiced BSC directly, communicated directly with BSC, and was paid directly by BSC, for work performed by FFA's employees and FFA's subcontractors, none of whom were paid by or treated as employees of Steppan.

To the extent that this Court bases its decision to reverse on a review of the post-trial motion for relief under NRCP 60(b), an abuse of discretion standard would apply, under which however some "competent evidence" must exist "to justify the court's decision" *Stoecklein v. Johnson Electric, Inc.*, 109 Nev. 268, 272, 849 P.2d 305, 307 (1993). In this case, the district court's decision to find, at the hearing on the motion for NRCP 60(b) relief, that Steppan had "employed" FFA, is not based on any competent evidence of any such agreement having been reached pursuant to which Steppan hired FFA. As to the second of the two post-trial motions, to alter or amend the Judgment, including under NRCP 59(e) (X AA2384) it should be noted that, "although not separately appealable as a special order after judgment" and therefore stricken from the Notice of Appeal herein (XI AA2491) the order denying this NRCP 59(e) motion "is reviewable for abuse of discretion on appeal from the underlying judgment." *AA Primo Builders, LLC v.*

Washington, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010). Because the motion to alter or amend clearly demonstrated a manifest error in law and fact by the district court, it should have been granted, and its arguments are therefore submitted to this Court for this Court's review on an abuse of discretion standard, if the Judgment is not simply set aside on its face without the need to reach these post-Judgment motions. *See* X AA2384-2420 and X 2346-2442.

B. Steppan's Failure to Provide the Requisite NRS 108.245 Notice Should Have Been Fatal to His Claims.

(i) The *Fondren* actual notice exception does not apply to off-site work, nor to unknown information.

It is undisputed that Steppan failed to abide by NRS 108.245 and never sent the Iliescus any 31-day right-to-lien notice, so as to advise them of potential lien rights against their Property arising due to FFA's California work. The first Summary Judgment ruling determined that no such notice was needed, because the Iliescus allegedly had sufficient actual knowledge that an architect was performing work, to qualify Steppan for the exception to NRS 108.245 created by *Bd. of Trustees v. Durable Developers*, 102 Nev. 401, 724 P.2d 736 (1986) as further set forth in *Fondren v. K.L. Complex Ltd.*, 106 Nev. 705, 800 P.2d 719 (1990).

Three primary arguments were advanced to support this claim: first, that Dr. Iliescu was aware of his purchaser's plans to seek approval for a development at the project, which would necessitate architectural work, because the contract

indicated that this would occur; secondly, that the Iliescus attended certain meetings where the architectural work product was shown; and, finally, that certain lawyers at the Iliescus' law firm were also representing BSC, and knew of BSC's retention of FFA/Steppan, which knowledge should be imputed to the Iliescus. III AA0509.

However, the district court erred in accepting these arguments. *Fondren* should be strictly construed, given that it strips property owners of the protections afforded them by NRS 108.245, the language of which requires a notice not only that work has been performed, but that a "RIGHT TO LIEN" may have arisen, and that a lien claimant may therefore "record" a lien in the future. In this case, where the work was being performed offsite, such that there was no reason for the Iliescus to even be aware of when it commenced or to be focused on its legal implications (VI AA1264-1265), they were entitled to the notice.

Moreover, given the off-site nature of the work, *Fondren* does not apply. As footnote 2 of the *Fondren* decision states, the reason a pre-lien notice is even important, is because, within three days of an owner becoming aware of construction work being performed *upon* her property, if she does not take steps to protect herself by recording a notice of non-responsibility (under NRS 108.234(2)), then, under NRS 108.234(1) the "improvement **constructed, altered or repaired <u>upon</u> property** shall be deemed to have been constructed, altered or repaired **at**

the instance of each owner having or claiming any interest therein." [Emphasis added.] This, in turn, matters, because work must be performed "at the instance of the owner" in order for lien rights to arise. NRS 108.222(1). However, the subject work herein was *off-site* design work, not performed "upon" the property. (By contrast, in *Fondren*, there was "construction on [owner *Fondren's*] property" of which she was aware, as it was regularly "inspected" for her. *Id.* at 709, 721.) Based thereon, NRS 108.234(1) does not even apply to this case, and the *Fondren* rationale collapses, since, even if Iliescu did have notice of architectural services, those services did not involve on-site construction, and therefore the services were not statutorily deemed to have been performed "at the instance" of the Iliescus, absent timely action to avoid that result. Based thereon, the Iliescus' Property did not suddenly become statutorily subject to a lien upon either of the Iliescus developing an alleged awareness of the work being performed *off-site*, in any case. Indeed, the lien may be expunged on this additional basis: that the value of FFA's services did not become lienable, as the work was not performed at the Property owners' real or constructive instance.

As noted in *Fondren*, "The purpose underlying the notice requirement is to provide the owner with knowledge that work and materials are being *incorporated into the property*." *Fondren*, 106 Nev. at 710, 800 P.2d at 721-22 [emphasis added]. Recognition of this distinction between offsite and on-site work for

purposes of the *Fondren* actual notice exception to NRS 108.245, would be in line with other cases which have differentiated between the effect of on-site construction and off-site design work under the lien statutes. *See, e.g., J.E. Dunn Northwest, Inc. v. Corus Constr. Venture*, 49 P.3d 501, 508, 127 Nev. Adv. Op. 5 (2011) (rejecting architect's argument that its lien's priority vested, vis-a-vis a lender's deed of trust, before on-site construction work had occurred, even where the bank had actual knowledge of the offsite work, given statutes' indication that a lien vests upon commencement of visible **on-site** construction.) Thus, the *Fondren* exception to the requirements of NRS 108.245, should not have been applied herein. NRS 108.245(3) *does* therefore apply, which indicates that "[n]o [mechanic's] lien for ... services performed . . . may be perfected or enforced pursuant to [the mechanic's lien statutes] unless the [right to lien] notice has been given [by the potential lien claimant]." This dispositive point requires reversal.

It is also troubling that the district court apparently accepted an argument that the Iliescus should be treated as having notice of the architectural work because some lawyers at the Iliescus' law firm were aware of Steppan or FFA being hired (III AA0509; VII AA1557-1560), which knowledge, it was argued, should be imputed to the Iliescus, in order for this "imputed" knowledge to be treated as "actual" knowledge by the Iliescus. II AA0356-0359. However, there is no evidence that any of their lawyers ever shared this information with the Iliescus,

but, instead, just the opposite testimony exists. VII AA1558 at l. 24; VIIAA1560-1561, 1618. Indeed, the Steppan Summary Judgment briefs admitted that Iliescu had not been provided with this information by his attorneys. II AA0358 at l. 10.

By contrast, as noted by the Nevada Supreme Court in *Hardy Companies, Inc. v. SNMARK, LLC*, 126 Nev. 528, 540, 245 P.3d 1149, 1157 (2010): "In *Fondren,* the property owner received regular updates from her lawyer and approved specific construction activities" such that it was appropriate to impute the lawyer's knowledge to the client. However, where no such facts exist, "we will not impute knowledge when there is no evidence that [the property owner] knew of both the existence and the identity of" the third party who will assert the lien. *Id.*

Based thereon, the summary judgment ruling should not have been issued before trial on this issue.

(ii) The District Court failed to make the necessary finding to uphold the Steppan lien despite the violation of NRS 108.245, under Nevada case law.

After Summary Judgment on this issue was entered in this case, this Court issued its *Hardy Companies, Inc. v. SNMARK, LLC*, 126 Nev. 1149, 245 P.3d 1149, 1157 (2010) decision. That case clarified that, in addition to notice of work being performed, the *Fondren* actual notice exception to NRS 108.245 requires the owner to be "made aware **of the identity** of the third party **seeking to record and enforce a lien** [*i.e.*, in this case, Steppan]." *Id.* 126 Nev. At 1157, 245 P.3d at 540.

[Emphasis added.] This requires "more than mere knowledge of construction occurring on [the owner's] property" but "requires . . . knowledge as to the identity" of the potential lien claimant. *Id.* at 542, 1158. Indeed, "mere knowledge of construction" without knowing "of **both** the existence **and the identity** of" the third party who will be liening for the work, is insufficient. *Id.* at 542, 1159 [emphasis added]. Otherwise, "the exception would swallow the rule." *Id.* Moreover, whether such actual knowledge exists is "a question of fact" such that Summary Judgment is inappropriate. *Id.* at 542, 1158.

In the present case, given the lack of involvement by Steppan in the work actually being performed by FFA, and its owner Friedman, and its employees Tritt, Ogle, and others, it should come as no surprise that no persuasive evidence exists that the Iliescus ever learned of Steppan's identity as the party who would someday "seek to record and enforce a lien." Steppan admitted he had no basis to assert any such knowledge of his identity by the Iliescus. II AA0464 at p.69 ll. 24-25. Indeed, the key testimony which was repeatedly utilized against Dr. Iliescu (II AA0464 at p. 69 ll. 1-2; III AA0481, 0486) to claim he would have had knowledge of Steppan's identity, namely a July 30, 2007 affidavit from David Snelgrove, regarding Iliescu seeing plan documents which had Steppan's name on them (III AA0572-0574), was ultimately shown to be meaningless, when Mr. Snelgrove was deposed on November 18, 2008, and admitted he had no knowledge of whether Dr.

Iliescu ever saw the relevant pages of the documents in question, and he did not discuss Steppan's name with Dr. Iliescu. II AA0468-0470; XI AA2524-2525. Based thereon, the original summary judgment ruling was issued despite serious questions of fact as to the basis thereof, and certainly should have been overturned on the basis of the *Hardy Companies* ruling, decided thereafter, such that it was error for the district court to instead insist that said ruling would not be reconsidered as part of the trial, which is the only explanation for the district court's Decision, which does not comport with *Hardy Companies*.

Indeed, Snelgrove's trial testimony, as to certain of the meetings which the Iliescus allegedly attended [another point emphasized in his assertions], such as an Arlington Towers HOA meeting, at which architectural plans were allegedly discussed,[7] indicated that Nathan Ogle of FFA, rather than Steppan, was the architect's representative in attendance. V AA1206-1209.

Nevertheless, the district court upheld the earlier summary judgment, despite acknowledging the lack of evidence as to when, if ever, either of the Iliescus knew of Steppan's identity, as follows: "Iliescu was aware that . . . instruments of service were being produced. **Iliescu may not have known**, at all times, **Steppan's name**; however, there is no doubt in the Court's mind that Iliescu was **aware of the work being done** by Steppan" (VIII AA1915) Decision at ¶ 14. This

[7] Dr. Iliescu does not recall whether he actually attended such meeting, more than momentarily. VI AA1299-1301.

finding (of awareness that work was being done, without a clear finding of when, if ever, Dr. Iliescu [let alone Mrs. Iliescu],[8] knew *the identity* of the potential lien claimant performing the work) is precisely what the *Hardy Companies* decision repeatedly indicated was **insufficient** to invoke the *Fondren* exception! Indeed, the district court's finding on this point almost reads as an illustrative example of the type of finding which *Hardy Companies* explicitly deemed insufficient, and expressly warned against: stripping a property owner of his NRS 108.245 rights by a finding of awareness of work being performed (which in this case is not even the type of on-site *construction* work that *Fondren* and *Hardy* discuss), without any determination that the property owner knew the identity of the person performing the work! As such, the district court's decision must be overturned, and the Steppan lien revoked, under the plain language of *Hardy Companies*.

Similarly, and significantly, a pre-lien notice allows a lien claimant to lien only for any work performed within a time period commencing 31 days prior to the date on which the notice was provided (NRS 108.245(6)). Therefore, the district court's failure to indicate when, if ever, the Iliescus may have learned of Steppan's identity (as a judicially created substitute for the statutorily required Notice

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[8] Where property is owned by more than one owner, NRS 108.245 must be satisfied as to both, and notice "to one owner is not sufficient to affect the interest of other owners." *DTJ Design*, at 1159, 543. No competent evidence was provided at trial to suggest that Mrs. Iliescu was aware of Steppan's identity. *See* VII AA1561-1571.

Steppan failed to give, despite the legislature's clear indication that this is a prerequisite to his statutory rights) means that the court erred when it nevertheless upheld the entirety of the Steppan lien, for **all of the unpaid work,** without making any finding as to how much of the liened work was performed after 31 days before that knowledge was received (if ever). Nothing in the district court's Decision or Judgment explains how the court determined that all of the unpaid invoices were entirely lienable under NRS 108.245(6), where no date of the "actual notice" event has been provided. The district court's rulings must also be set aside on this basis, and should be vacated with prejudice, given Steppan's failure (as the lien claimant with the burden of proof on his claims) to produce sufficient evidence to allow a determination of the date on which the alleged knowledge of Steppan's name, if any, ever occurred.

For example, much was made in the Summary Judgment briefs regarding Dr. Iliescu's attendance at an October 4, 2006 Reno City Planning Commission meeting, at which a single power point slide containing Steppan's name was apparently presented. II AA0344; IV AA0733-34. A November 15, 2006 Reno City Council meeting has also received much attention IV AA0734; VIII AA1916 even though, by that date, the first "Steppan" lien had already been recorded (VIII AA1731), such that any information learned at that meeting is irrelevant. (Steppan, of course, did not attend these meetings. VII AA1515.) However, David

Snelgrove, who was retained by BSC in early 2006 (XI AA2500-2501), testified that by the time of his involvement (for February 2006 submissions by his firm Wood Rogers VIII AA2519) FFA's architectural work was already substantially completed (VI AA1246) with only "tweaks" later that year, in May (VI AA1254).

Thus, long before the October 2006 date of the first of these Reno City government meetings, the vast majority of FFA's work was complete. Indeed, the flat fee invoices show 77.69% completion of the Schematic Design phase prior to October 25, 2006, and 100% completion before November 21. VIII AA1813; VIII AA1810. Thus, even assuming for the sake of argument that these invoices were accurate, if the Iliescus had learned of Steppan's identity at one of these meetings, this would not have entitled Steppan to lien for the vast majority of the work, which had been completed more than 31 days before said meeting, such that the vast majority of the work was not lienable. However, there is no reason to assume that even these invoices bore any relation to reality. Expert testimony was presented at trial indicating that no further work was done by FFA, and its instruments of service were essentially complete, before the April 2006 execution of the AIA Agreement. VII AA1619-28; 1636-1638. (*See also*, VIIIAA 1889-91 for a further written explanation of the expert's position on this issue which was not however admitted at trial.) This analysis accords with certain of Snelgrove's and Steppan's testimony cited above. On cross-examination of this expert,

Steppan's counsel suggested that further work may have been done in May of 2006, based on amendments to the earlier use permit applications. VII AA1640. However, even if this claim were accepted, work which was completed in May of 2006 still wouldn't be lienable if the Iliescus only learned of the identity of the lien claimant in October or November of 2006. No such analysis was however performed by the district court, as it didn't bother to identify whether the Iliescus ever learned of Steppan's identity before the lien was recorded, or, if so, when.

It was therefore error for the district court to uphold the earlier summary judgment, and enter a Judgment upholding the entire lien, without even reaching and addressing these questions of fact and law, as to when the Iliescus (if ever) learned of Steppan's identity as a potential lien claimant, and how much work had been completed 31 days prior to said date, so as to be lienable under NRS 108.245(6) (assuming it was otherwise lienable, which it was not, for other reasons). To the extent that the court's inability to reach this determination was based on a failure by Steppan to sufficiently plead and prove this element of his claim, on which he bore the burden of proof, the Judgment must be reversed and vacated with prejudice.

C. Steppan's Other Failures to Abide By the Lien Statutes Should Also Have Been Fatal to His Claims.

The Iliescus argued that Steppan's failure to provide the 15 day notice required by NRS 108.226, before recording his initial lien, was fatal to his claims. I

AA0005. This argument has never been directly addressed in any of the court orders. Further failures to properly comply with the lien statutes were also presented to the court in the Rule 60 Motion, including verification failures, violation of the timing requirements for the suit to foreclose, mis-timed amendments, etc. IX AA2004-2008. These arguments were likewise simply ignored in the Order denying the motion. X AA2425-2433. This was an abuse of discretion.

D. Steppan Also Failed to Meet His Burden to Prove the Key Element of His Case, That He Was Liening for Work Performed By or Through Him.

(i) Steppan failed to demonstrate that his lien was in compliance with NRS 108.222.

Under NRS 108.222, a mechanic's lien claimant may only lien for the value of services provided "by or through" the lien claimant. Thus, a mechanic's lien claimant may lien for his own work, or that of his employees, or that of his hired subcontractors, but he cannot lien for someone else's work, or for that of someone else's hired employees or hired subcontractors. This is simply axiomatic and self-evident: If Jack's Framing Company and Jill's Framing Company both provide framing to a project under their own direct relationship with the customer, Jack cannot lien for Jill's work. In this case, likewise, Steppan cannot lien for FFA's work, which FFA was performing directly for the customer.

For example, in *Nevada National Bank v. Snyder*, 108 Nev. 151, 157, 826

P.2d 560, 562-64 (1992) (partially abrogated on other grounds by *Executive Mgmt. Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 38 P.3d 872 (2002)) a district court was reversed after it allowed an individual member of a foreign architectural firm to act as the plaintiff foreclosing the firm's mechanic's lien, including because the relevant "invoices were submitted . . . on behalf of the corporation; the construction drawings for the proposed project were prepared by the corporation; [and] the individuals who worked on the drawings were employees of the corporation" not of the individual lien claimant, who thus had no right to prosecute the corporation's lien. *Id.* Similarly, herein, each of these facts is also true, together with dozens of other factors demonstrating that Steppan is liening for a foreign firm's work, not his own, as demonstrated above. *See also, DTJ Design, Inc. v. First Republic Bank*, 318 P.3d 709, 711, 130 Nev. Adv. Op. 5 (2014) [which was decided after the Steppan trial] (rejecting mechanic's lien of unlicensed foreign architectural firm for unlicensed work performed in Nevada, and noting that it could not substitute its Nevada licensed employee as the lien claimant to overcome this ruling, where he owned less than 2/3 of the company, as would be required for the company to become licensed in Nevada).

"Lien claimant" Steppan failed, in this case, to prove up a valid lien at trial, in that he failed to demonstrate that the lien was for unpaid amounts owed *to Steppan* for *his* services (as alleged in Paragraph 9 of "Steppan's" Complaint) (I

AA0174) "furnished by" him or furnished by *his* employees or *his* subproviders, acting "through" him as their customer or employer. As the *DTJ* decision notes, Steppan had a duty to "plead and prove" his *prima facie* case under the lien statutes. *DTJ*, at 318 P.3d at 710. Steppan's failure to demonstrate any basis for being allowed to lien for FFA's work, therefore requires the district court's Judgment upholding the lien to be overturned. (For further legal analysis on this point see, IX AA1992- 2008; VIII AA2190-2203; X AA2387-2398.)

The district court's oral finding that Steppan had retained FFA, to work under Steppan, was not based on substantial evidence, or any real evidence, with both FFA owner Friedman, and Steppan, instead conceding repeatedly that the lien was being pursued on behalf of FFA, who had interacted directly with BSC. At the very least, given the substantial evidence that FFA's work was performed directly for the customer, any Steppan lien should have been limited to the value of his own performance, exclusive of the performance of FFA and its other employees.

Moreover, given the substantial evidence that Steppan's involvement in the project was *de minimis*, the lien in his name should not have been allowed under *DTJ*, which noted that, even had the Colorado architectural firm in that case done what FFA did here, and had its one Nevada licensed employee put the contract and the lien claim in his name, this would have been inappropriate where the work was actually performed by others: "to the extent that DTJ argues that Thorpe should

individually be able to foreclose on the lien as a registered architect, we disagree" including because Thorpe was not truly involved as a co-principal on the project for much of the time it was underway, "until nearly a year after the development contract was signed." *DTJ Design*, 318 P.3d at 711. *See also, Snodgrass v. Immler*, 194 A.2d 103 (Md. Ct. App. 1963) (refusing to enforce architectural services contract where the "evidence shows that in reality it was [the unlicensed party] that performed the functions of an architect, and [the licensee] was used as a mere strawman to allow [him] to do indirectly what he could not do directly."); *Dalton, Dalton, Little, Inc. v. Mirandi*, 412 F. Supp. 1001, 1004) (D. N.J. 1976) (Maryland architect could not provide architectural plans for a New Jersey building merely by utilizing its New Jersey licensed employee to seal and certify the plans; "subterfuge, pretense, or improper circumvention of the law" warrants "penetration of the form to reach the substance.").

(ii) FFA's Work Was in any event Illegally Performed, and Could Not Be the Basis for a Steppan Lien.

Even if it were hired by Steppan as his subcontractor, FFA was not authorized to perform architectural work in Nevada, in any event, for any customer, including Steppan. NRS 623.180(1)(a) (only Nevada registered architects may practice architecture in Nevada); NRS 623.360(1)(c) (practicing architecture without a license is prohibited). *DTJ Design Inc.*, 318 P.3d at 710-712, 130 Nev. Adv. Op. 5 (2014) (foreign architectural firm which was not registered in

Nevada and [like FFA] was not owned by 2/3 Nevada licensees so as to become so registered, could not legally provide and lien for architectural services in Nevada). In order to overcome this problem, FFA asserts that "FFA only worked as a design consultant to Steppan and is therefore exempt from NRS Chapter 623" pursuant to NRS 623.330(1)(a), which exempts from Nevada licensure "a consultant retained by a registered architect." VIII AA2086 at ll. 2-4. FFA's invocation of this exemption, because it claims to have acted as a "design consultant" (although accepted by the district court (VIII AA1915 at ¶12)) is preposterous. A "design consultant" is not even a category of design professional recognized by NRS Chapter 623; and FFA should not have been treated below as though it were providing mere "consulting" services, just because of what it called itself. *See*, AGO 19 (4-1-1963) [VIII AA2207-2208] (a party "cannot legally" exempt itself from the requirements of NRS Chapter 623 "merely by refraining from calling [itself] an architect, if [it], in fact, accepts work which falls within the purview" of the practice of architecture). The State Architectural Board may only issue prescribed certificates, not make up its own. AGO 305 (11-24-1953). *See also* VIII AA2200 at n. 5.

NRS 623.023 defines the practice of architecture as "rendering services . . . embracing the scientific, esthetic and orderly coordination" for the "production of a completed structure [for] human habitation or occupancy" including by

producing "plans [and] specifications". A consultant, by contrast, is a person who merely gives advice to the professional actually performing substantive work, whereas a person actually producing the essential work product is acting as more than a consultant. *See, e.g.*, the New Webster's Encyclopedic Dictionary of the English Language (1992) at p. 210 ("con·sult·ant . . . a person (engineer, doctor etc.) giving expert or professional advice."); *Gleeson M.D. v. State Bd. of Medicine*, 900 A.2d 430, 437-38 (Penn. 2006)(unlicensed out-of-state medical doctor did not merely "consult" and, thus, was not statutorily exempt from licensure requirement, where he physically touched patient and performed a procedure); *Bilazzo v. Portfolio Recovery Assoc., LLC,* 876 F.Supp.2d 452, 462-465 (D. N.J. 2012)(unlicensed attorneys from another state were not acting merely as "consulting attorneys" to licensed lead attorney who signed the pleadings, where they billed far more hours than he, worked independently, and had substantial direct contact with opposing counsel and agency); *Gsell v. Yates*, 41 F. Supp. 3d 443 (E.D. Penn 2014) (out-of-state attorney wishing to fulfill a "consulting" role must refrain from direct contact with client, from significant contact with opposing counsel, and should not draft substantial portions of pleadings, but may only engage in advisory activities such as editing motions prepared by lead counsel, while recording only a modest number of hours compared to the licensed attorneys). FFA clearly fails all of these tests, or any other reasonable test for being

able to claim it was acting as Steppan's or BSC's mere consultant, as shown by the statement of facts above, which demonstrate that FFA and its owners and employees produced the work product, billed the vast majority of hours, and maintained all contact with the client and Nevada officials, directly, rather than did Steppan.

Indeed, Steppan repeatedly admitted, in post-trial briefs, **that FFA and its employees were engaged in the direct production of architectural designs and plans and work product**, and were not merely providing advice. *See, e.g.*, VIII AA 2079 ll. 9-13 (purported Contract Architect "Steppan could not accomplish" the services he was to provide without the help of "other designers" because the scope of the project was "much too large to expect" a "single architect [to] design it" instead requiring more than "3,396 billable hours" recorded, from all of FFA's other architects and designers.); 2081, l. 10 (FFA's work described as "design services") 2083-2084 (Steppan was merely to "sign and seal technical submissions **prepared by Fisher Friedman Associates**" including "drawings **prepared by unlicensed designers**.") [Emphasis added.] Clearly, by Steppan's own admission, FFA and its employees were not acting as mere "consultants" but as designers and providers of architectural instruments of service and work product including technical submissions and drawings and instruments of service, etc.

Because FFA's work was performed improperly without the requisite

Nevada license, and in violation of NRS 623.160(1)(c) and NRS 623.180(1), Steppan cannot lien for the same, even if the district court's unsupportable finding that Steppan employed FFA were upheld. *See, e.g., Holm v. Bramwell*, 67 P.2d 114 (Cal. Ct. App. 1937) (prime contractor's mechanic's lien claim could not include advances which had been paid by prime contractor to an unlicensed subcontractor).

E. Paragraph 6 of the Final Judgment should be reversed and rejected, to prevent any future misapplication of Nevada Law.

The district court's final Judgment indicates in Paragraph 6 that, upon some future lien foreclosure sale of the subject Property, which does not result in sale proceeds sufficient to pay off Steppan's multi-million dollar lien, Steppan retains the right to ask the court to rule on theories he asserted in his pre-trial statement, that he should be allowed to collect any deficiency from the Iliescus personally. X AA2380; X AA2369-2371; 2374. This provision of the Judgment should be stricken, as no such possibility of personal liability against the Iliescus exists, beyond Steppan's claim to foreclose on the Mechanic's Lien in his name for FFA's work (if the district court's Judgment were to be upheld after this Appeal, which it should not be).

Steppan claims that the Iliescus might be subject to personal liability beyond the value of their liened Property (III AA0709), based on a misinterpretation of NRS 108.239(12), which Plaintiff contends means that "[if] the proceeds from the [Mechanic's Lien foreclosure] sale do not satisfy the amount of the judgment, then

the judgment creditor is entitled to personal judgment against the property owner for the deficiency (or 'residue') if the property owner has been personally summoned or appeared in the action" such that, after any lien foreclosure sale, Steppan contends that he may "apply to the court for a personal judgment against Iliescu" if "the net sale proceeds [from the mechanic's lien foreclosure sale] are less than the monetary amount of the judgment." *See*, II AA0709 ll. 16-24. The final paragraph of the Judgment was meant to allow Steppan to preserve this claim, subject to the Iliescus' rights to contend otherwise. In the unlikely event the lien is upheld (which it should not be), the Iliescus should not then have to also face this uncertainty as to the result of any foreclosure sale.

Steppan's contentions are simply untrue, and no Nevada case law or statute supports the same. To claim otherwise, Plaintiff's above-quoted Trial Statement misconstrued NRS 108.239(12) by omitting its key passage. That statute actually reads, in full, as follows: "12. Each party whose claim is not satisfied in the manner provided in this section is entitled to personal judgment for the residue **against the party legally liable for it** [*i.e.*, the defaulting customer of the lien claimant, with whom it had privity of contract in this case BSC] *if* that person has been personally summoned or has appeared in the action [which Steppan did not do, as to BSC, herein, although most mechanic's lien lawsuits also name the defaulting customer for breach of contract]." [Bracketed language added.]

The fact that a mechanic's lien proves insufficient to pay the contractor does not prevent the contractor from nevertheless seeking personal judgment for any post-foreclosure residue or deficiency still owed, as against the party with whom he contracted, as the person who is and has always been "legally liable for" payment to the contractor, or as against other liable parties, such as the contractor's guarantor. This simple principle was clarified by subsection 12 of the statute merely in order to avoid any confusion or any claim that mechanic's lien rights somehow supplant a contractor's other rights to seek other more traditional remedies, such as by simply suing for a money judgment against his or her breaching contract customer. This simple principle is also clarified by NRS 108.238, with NRS 108.239(12) providing further procedural instruction, that the party legally liable to the lien claimant for the debt, such as the claimant's customer, should also be named and sued for breach of the underlying contract, as part of the lien foreclosure suit, which Steppan did not do here.

NRS 108.239(12) does not magically transform the owner of liened real property into defendants who are themselves now legally and personally liable for any amounts owed the lien claimant, and unable to be satisfied from the Property's sale, simply by being summoned and appearing in the lien foreclosure action. This is not what the statute says, on its face, or by any reasonable construction.

Nor does the relevant case law support this contention. *See, e.g., Didier v.*

Webster Mines Corp., 49 Nev. 5, 234 Pac. 520 (1925) (property owner was not personally liable for any amount of a miner's lien claim which could not be satisfied from the property, in the absence of privity of contract between the real property owner and the lien claimant.); *Milner et al. v. Shuey,* 57 Nev. 159, 179, 69 P.2d 771, 772 (1937) (there must be a contractual relationship regarding the furnishing of labor and materials between the party foreclosing the lien and the party against whom personal liability is sought. "[S]uch a relation is essential to establish personal liability against the owner of the property in addition to a judgment foreclosing a lien...."); *Nevada National Bank v. Snyder,* 108 Nev. 151, 157, 826 P.2d 560, 563-64 (1992) (partially abrogated on other grounds by *Executive Mgmt Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 38 P.3d 872 (2002)("The district court judgment stated that [the mechanic's lien claimants] were entitled to a 'personal judgment for the residue against [the property owner].' The [property owner] asserts that the remedy to enforce a mechanic's lien is to force a sale of the property and that it is not liable for any deficiency if the monies from the sale do not cover the amount of . . . [the] liens. We agree. . . . It is unjust to hold the [property owner] personally liable for a deficiency when it was not a party to the contract, and because [it] is not the person liable for the debt under NRS 108.238."). *Reeder Lathing Co., Inc. v. Allen*, 425 P.2d 785, 786 (Cal. 1967)("The part of the judgment that defendant is personally liable to plaintiff is clearly

erroneous. In the absence of a contract between a lien claimant and the property owner, the right to enforce a mechanic's lien against real property does not give rise to personal liability of the owner.")

The Nevada Supreme Court in *Snyder* also rejected the argument that the owner of liened real property could be held liable for the residue beyond the value of the liened property on an "unjust enrichment" theory, even where the work had benefitted the property, and therefore its owner. *Snyder*, 108 Nev. at 157, 826 P.2d at 563. In the present case, Steppan's complaint contains but one cause of action, for the foreclosure of a mechanic's lien against the Iliescu Property, and does not assert any unjust enrichment theory (or any other claims) against the Iliescus in any event, such that allowing such a claim at this late date would be a violation of due process. This is especially true given that **Steppan *successfully* struck the Iliescus' Jury Demand, on the grounds that his suit was solely for foreclosure of a mechanic's lien, on which no jury is allowed**. III AA0582-0584; III AA0625-627. Steppan is not entitled to have his cake and eat it too, and, having successfully insisted that his case was solely for a non-jury mechanic's lien claim, should not now be heard to contend that he has other personal claims against the Iliescus as well.

Moreover, the Property was not improved to the unjust enrichment of the Iliescus, as it is now just as vacant and unimproved as it was the day it went into

escrow, at which time it was not subject to a seven figure Mechanic's Lien claim.

F. **Summation.**

The court erred in ruling, on a summary judgment basis, that Steppan could be excused for his failure to comply with a statutory prerequisite to his lien claims, namely, providing notice of his right to lien under NRS 108.245, where there remain genuine issues of material fact with regard to the Iliescus' alleged notice of Steppan's identity as the party who would lien for the work, which remained unresolved even after trial. The court therefore erred in upholding this earlier summary judgment ruling, while simultaneously acknowledging that Steppan's identity may not have been known to the Iliescus, as expressly required by Nevada case law to invoke the subject statutory exception. The district court further erred by declining to identify a date on which any notice occurred, and to then analyze whether any work had been performed within 31 days prior to that date, instead allowing the entirety of the lien claim to stand, for all of the unpaid work performed, even while acknowledging insufficient basis to determine at what times, if any, the work became lienable. Because Steppan had the burden of presenting evidence which would have allowed the necessary rulings on these issues, the court's inability to make complete findings prevents any award in his favor.

Furthermore, the court erred in determining that Steppan had "retained"

FFA, even though no evidence exists of any such retention, in the form of any written agreement (as would have been required under Nevada law) or in the form of any course of dealing, payments or invoices between Steppan and FFA to even suggest that FFA was working for Steppan as its client, and given the volumes of evidence that in fact FFA was working directly for the customer, such that Steppan's lien should have been invalidated, or at the very least restricted to the value of his own services, as opposed to that performed by the unlicensed FFA. The court also erred in accepting an argument that FFA's architectural services for this Nevada project were appropriate under the "consultant" exemption to Nevada's architectural licensing statutes, where FFA's own testimony clearly admits that FFA was doing far more work than Steppan was, and was not merely a consultant to Steppan, or to BSC, under any stretch of the imagination. The court also erred in upholding a lien in Steppan's name which was entirely for unpaid FFA invoices, on FFA letterhead, crediting prior direct payments to FFA, and which included claimed payments (not from Steppan but from FFA) to FFA's subproviders, which were not substantiated by Steppan, except by reference to *FFA's* invoicing procedures, and which also included invoices for add-on work performed by FFA, for which the customer agreed to pay FFA.

Finally, the district court erred in retaining language in its Judgment which suggests the possibility that the Iliescus may somehow be personally liable for

some portion of the Judgment beyond the value of their Property, should the Property be foreclosed upon and not sell for a price adequate to fully satisfy the lien, given that the only cause of action claimed against the Iliescus was for foreclosure of a mechanic's lien, and the lien statutes do not allow for any claim against the Property owner in these circumstances (where no privity of contract exists) beyond the value of the Property itself.

CONCLUSION

Based on the foregoing, the court's pre-trial Summary Judgment Orders should be reversed, and its Judgment entered after trial (at which those Orders were not subject to reconsideration) should also be reversed. The district court's post-trial Orders denying an NRCP 60 Motion for relief and an NRCP 52 and 59(e) Motion for relief, should likewise be reviewed and reversed, as not based on evidence and as legally erroneous, and therefore an abuse of discretion.

DATED this 12th day of May, 2016.

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ATTORNEYS' RULE 28.2 CERTIFICATE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

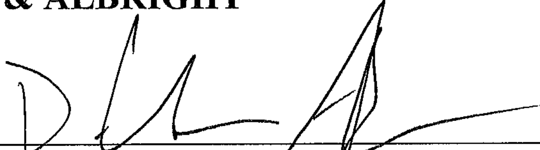
2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 13,873 words.

3. Finally, I certify that I have read this appellate 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 NRAP 28(e)(1), 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 the

accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 12th day of May, 2016.

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT



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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c), I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT, and that on this 12th day of May, 2016, service was made by the following mode/method a true and correct copy of the foregoing **APPELLANTS' OPENING BRIEF**, to the following person(s):

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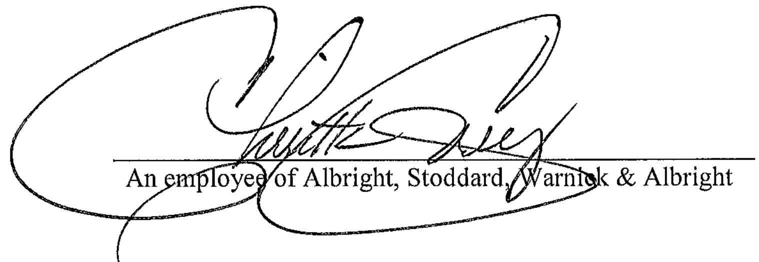

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