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.	Appeal No. 68346

Respondent's Answering Brief

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Statement of the Issues Presented

1. Does substantial evidence support the District Court's finding, after trial on the merits, that Iliescus had actual notice of architectural services and Mark Steppan's identity?

2. Alternatively, does substantial evidence support an implied finding, after trial on the merits, that Iliescus had constructive notice of Steppan's identity, which was actually known by Sam Caniglia (Iliescus' agent for obtaining development entitlements) and Hale Lane (Iliescus' attorneys for protecting the property against liens)?

3. Did the District Court abuse its discretion by denying a Rule 60(b) motion raising, for the first time, the absence of a 15-day notice of intent to lien as a defense to foreclosure of Steppan's lien?

4. If Steppan was licensed to perform the entire design contract, and it is undisputed that he maintained "responsible control" over all of the work, does the lien statute preclude a lien for work that was provided, through Steppan, by an out-of-state firm?

5. If it is impossible to know whether the proceeds from the sale of land to satisfy a lien will be sufficient to fully pay the lien amount, should a Court give an advisory opinion about personal liability for a

potential "deficiency" or wait until the foreclosure sale is complete in order to determine whether personal liability is a justiciable issue?

Statement of the Case

Nature of the Case. Steppan sued Iliescus to foreclose a mechanics lien.[1] Iliescus answered, and sued their attorneys for legal malpractice for failing to protect their land against liens, among other things.[2] They also sued several developer entities and individuals to enforce express agreements to indemnify Iliescus against liens.[3]

Course of Proceedings. Iliescus filed an Application for Release of Mechanics' Lien alleging that Steppan had failed to serve a pre-lien notice before recording his lien.[4] After a hearing, the District Court did not immediately adjudicate the Application, but ordered discovery on whether Iliescus had received actual notice under *Fondren v. K.L. Complex Limited Co.*, 106 Nev. 705, 800 P.2d 719 (1990) ("*Fondren*").

1 Appellant's Appendix ("AA") 172-177.

2 AA 213-229.

3 AA 213-229.

4 AA 001-007.

Steppan then filed his complaint to foreclose the lien.[5] Iliescus' application to expunge the lien and the foreclosure case were consolidated.[6] When Iliescus answered Steppan's complaint, they sued Hale Lane for legal malpractice, and other parties for indemnity.[7]

Iliescus filed a motion for summary judgment on the *Fondren* notice issue.[8] Steppan filed a cross-motion.[9] After full briefing,[10] the District Court denied Iliescus' motion and granted Steppan's motion, finding that "[Dr. Iliescu] had actual knowledge that [Steppan] and his firm were performing architectural services on the project."[11]

Steppan filed a motion for partial summary judgment that the lien amount was the contract price due under his written contract for design

5 AA 172-177; 178-180.

6 AA 205-212.

7 AA 213-229.

8 AA 230-340.

9 AA 341-434.

10 AA 435-478, 479-507.

11 AA 508-511, at 509, lines 27-28.

services.[12] After briefing,[13] the District Court granted this motion.[14] Iliescus do not appeal this order.

The four-day bench trial commenced on December 9, 2013. Following post-trial briefing,[15] on May 28, 2014 the District Court entered Findings of Fact, Conclusions of Law, and Decision.[16] On June 12, 2014, the District Court conducted a further hearing to determine the principal and interest due under the lien.[17] Iliescus do not appeal these computations.

Steppan then moved for attorney fees. After the motion was fully briefed, the District Court awarded Steppan's statutory attorney fees. Iliescus do not appeal the award of attorney fees.[18]

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12 AA 520-529. Note that Appellant's Appendix omits the exhibits to the motion. Exhibit 1 to the motion is trial exhibit 5 and 6, Respondent's Appendix (RA) 243-266. Exhibit 2 to the motion is trial exhibit 1, AA 1730-1734. Exhibit 2 to the motion is TE 2, AA 1735-1740.

13 Opposition, AA 530-539; Reply, AA 540-577.

14 AA 578-581.

15 AA 1893-1898; 1899-1910.

16 AA 1911-1923.

17 Steppan filed a hearing brief regarding calculation of the principal and interest. AA 1924-1931. The hearing transcript is reproduced at AA 1933-1963.

18 Following the award of attorney fees, Iliescu filed a Motion for Relief From Court's Attorneys' Fees and Costs Orders and for

Before the District Court entered a final judgment, Iliescus filed a NRCP 60(b) motion for relief from the Findings of Fact, Conclusions of Law, and Decision.[19] The Rule 60(b) motion argued, for the first time in the case, that Steppan and his firm, FFA had violated professional licensing statutes and regulations, and that these violations negated the lien. The motion further argued (as Iliescus argued at trial) that Steppan's role in the design project was *de minimis*, and that he could not properly have a lien for work performed by FFA. The Rule 60(b) motion also complained that Steppan had recorded his lien without first giving a 15-day notice of intent to lien notice under NRS 108.226(6).[20] Iliescus had raised this issue before in their Application for Release of Mechanic's Lien, but never before as a defense to Steppan's foreclosure action. Following briefing[21] and a hearing that spanned two days,[22] the District

Correction, Reconsideration, or Clarification of Such Orders to Comply with Nevada Mechanic's Lien Law. Because it does not appear that Iliescus have appealed the denial of this motion, the briefing is not included in the appendix. It is mentioned here only to explain the time gap between entry of the findings, conclusions, and decision, and the entry of a judgment.

19 AA 1964-2065.

20 See AA 2004, lines 17-21.

21 Opposition, AA 2066-2183; Reply, AA 2184-2208.

22 Day 1 Transcript, AA 2258-2376; Day 2 Transcript AA 2258-2376.

Court denied the Rule 60(b) motion.[23] Iliescus appeal from the denial of their Rule 60(b) motion.

On February 26, 2015, the District Court entered its Judgment, Decree and Order for Foreclosure of Mechanics Lien ("Judgment").[24] Iliescus then filed a Motion for Court to Alter or Amend its Judgment and Related Prior Orders,[25] which merely reargued the same points in the Rule 60(b) motion. The one exception is that Iliescus' reply brief asserted, for the first time in the case, that *Fondren* notice is only valid with respect to work 31 days before actual or constructive notice of the lien claimant's work and identity.[26] After briefing,[27] the District Court denied that motion.[28]

Long before the trial, Hale Lane moved for summary judgment on Iliescus' legal malpractice claims.[29] The District Court granted Hale

23 AA 2425-2431.

24 AA 2381-2383.

25 AA 2384-2420.

26 Undersigned could not find an earlier record reference raising this issue.

27 Opposition, AA 2421-2424; Reply AA 2436-2442.

28 AA 2443-2446.

29 Motion, Respondent's Appendix ("RS") 44-203; Opposition, RS 204-221; Reply RA 222-230.

Lane's motion.[30] Although that ruling is not at issue in this appeal, Iliescus argued points important to this appeal:

> Because the Court has determined on cross-motions for summary judgment that Iliescu had actual knowledge that a designer and his firm were performing architectural services for the Project, Iliescu, as owner of the Property, could not avoid the lien by simply recording a Notice of Non-Responsibility. Further, because Iliescu participated in obtaining Governmental Approvals, he became what is known as a Participating Seller. By the very cases Hale Lane cites in the Motion for Summary Judgment, and cited in the Motion to Amend filed herewith, the Property became lienable. Iliescu was unprotected and unguarded. Because of the fault of the Hale Lane law firm, the Property has been liened and, therefore, the Hale Lane law firm must indemnify Iliescu.
>
> The recording of a Notice of Non-responsibility by a Participating Seller is ineffective. The Hale Lane law firm did not inform Iliescu of this result at the time Addendum No. 3 was drafted, presented to Iliescu and signed.[31]

After entry of the Judgment, post-judgment motions, and Iliescu's notice of appeal,[32] Iliescus moved the Supreme Court to stay execution of the Judgment without a bond.[33] Factual representations contained in that motion demonstrate that it is likely that the proceeds from a sale of the

30 RS 231-240.

31 RS 210, line 12 – 211, line 4.

32 AA 2449 - 2453.

33 RS 784-900.

land will completely satisfy the lien, so that any personal liability would never become a justiciable issue.

Statement of Facts

On July 29, 2005, John and Sonnia Iliescu sold four unimproved parcels to Consolidated Pacific Development ("Developer") for development of a high-rise, mixed-use project. Initially, the transaction was evidenced by an initial Land Purchase Agreement[34] and three addenda.[35] As development progressed, Iliescus renegotiated several terms of the deal. These negotiations resulted in addendums 4 and 5.[36] As finally amended, the agreement promised Iliescus a purchase price of: (a) $7,976,000 cash; (b) an additional $3,000,000 in cash or credit towards a penthouse; (c) 500 square feet of storage; and (d) 51 parking spaces to serve Iliescus' adjacent building, which they contemplated converting to a restaurant and bar.[37]

As the District Court found in its order granting Hale Lane's summary judgment motion,

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34 Trial Exhibit ("TE") 68, RA 558-580.

35 TE 69, RS 581-585; TE 70, RS 586-588; TE 71, RS 589-605.

36 TE 72, RS 606-608; and 73, RS 609-613.

37 TE 71, page 6, §9, RS 589-605.

> [Iliescus] negotiated and signed this contract by themselves. Furthermore, that contract contained language that required [Iliescus] to participate actively in the development of the property. Specifically, the language within the original contract made the offer contingent upon obtaining the necessary government approvals, with which [Iliescus] were required to assist. Moreover, the Court will note that as a result of those negotiations, [Iliescus] were to receive some $7.5 million in payments and a penthouse valued at approximately $2.2 million. Accordingly, these actions clearly demonstrate that [Iliescus] personally contracted for and were to benefit from the improvements to their property, thus making [Iliescus] "interested owners" before [Hale Lane] had any part in the matter.[38]

While the sale was in escrow, Developer and Iliescus applied to the City of Reno for approval of a tentative subdivision map and special use permit. The initial application was filed January 17, 2006.[39] The application was re-filed February 7, 2006,[40] and updated May 7, 2006.[41] Each application includes Iliescus' Owner Affidavit appointing Sam Caniglia (a principal in Developer) "to request development related applications on my property." On October 4, 2006, the Planning Commission approved the tentative map and related special use

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38 Order Granting Third-Party Defendant Hale Lane's Motion for Summary Judgment Regarding Third-Party Claims by John Iliescu, RA 231, at 237.

39 TE 35, RS 306-369.

40 TE 36, RS 370-450.

41 TE 37, RS 451-477.

permits.[42] On November 15, 2006, the City of Reno upheld the Planning Commission's approval.[43] With the development entitlements secured, Consolidated Pacific Development assigned the Land Purchase Agreement to an affiliate, BSC Investments, LLC,[44] which then contracted to sell the project to Wingfield Towers, LLC for $24,282,000.[45]

The development entitlements rest on land planning, engineering, traffic studies, shadow studies, and an architectural design. FFA is a design firm based in the Bay Area. The firm has designed numerous high rise projects in the United States, Canada, Mexico, Japan, and China.[46] The firm won more awards for excellence in housing than any other design firm in the country.[47] FFA had previously designed projects in Las Vegas and Reno.[48] For each of these projects, an individual licensed by the Nevada State Board of Architecture ("Architecture Board") contracted as the "project architect" and maintained "responsible control" for the

42 TE 47, RS 440-489.

43 TE 48, RS 490-498.

44 TE 88, RS 638-648.

45 TE 82, RS 634-637.

46 Trial Transcript, AA 0947.

47 Trial Transcript, AA 0949.

48 Trial Transcript, AA 0955-0956.

project. FFA then served as a design consultant. FFA architect Mark Steppan was licensed in Nevada, and served as the architect of record for FFA.[49]

Working on behalf of Iliescus, commercial real estate broker Richard Johnson drafted the Land Purchase Agreement and the first two addenda.[50] Addendum No. 2 provides that the agreement would need to be "fine tuned" by legal counsel.[51] Iliescus met with attorney Karen Dennison "three times at some length" before she drafted Addendum No. 3.[52] Karen Dennison and Hale Lane drafted Addendum No. 3.[53] Addendum No. 3 provides that the buyer will indemnify seller against mechanics liens. Dr. Iliescu explained:

> Q. Okay. And in your conversations with Karen Dennison you came to understand that people like engineers and architects doing work for this buyer might have a mechanic's lien on your property for the work that they did?
>
> A. Well, that gets to the heart of the problem. That's why we went to see Mrs. Dennison. Yes, we went to her firm for complete coverage, legal coverage, of this whole project….

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49 Trial Transcript, AA 0956-0957.

50 Johnson drafted TE 68 (Transcript, AA 0788:03), TE 69 (Transcript, AA 0788:21) and TE 70 (Transcript, AA 0789:9).

51 TE 70, AA 0586-0588

52 Trial Transcript, AA 1273, line 10

53 Trial Transcript, AA 0790; AA 1269-1270.

> Q. When you signed this Addendum No. 3, you signed it after talking to Karen Dennison about the prospect that the buyer could hire engineers and architects and those engineers and architects could have a mechanic's lien on your property?
>
> A. That's correct.
>
> Q. All right. And is it your testimony that you knew about that possibility before you even went to see Karen Dennison?
>
> A. Yes.[54]

Dr. Iliescu further testified that he relied entirely on Hale Lane to protect against liens and other legal issues related to the subdivision.[55]

Even though Hale Lane represented Iliescus in the Land Purchase Agreement, the same firm represented the buyer with regard to development entitlements, and obtained a written waiver of the conflict.[56] Hale Lane then drafted the key contracts between Developer and Steppan.

On October 25, 2005, Steppan sent an initial proposal that outlined design services and compensation equal to 5.75 percent of the total construction cost.[57] This proposal suggested that the definitive design

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54 Trial Transcript, AA 1284-1286.

55 Trial Transcript, AA 1347-48.

56 TE 8, RS 267-272. Steppan was not a party to this waiver, and takes no position on its legal effect.

57 TE 9, RS 273-293.

contract would be based on a standard AIA form, which was attached. During a months-long process of attorney review and drafting, Hale Lane attorney Sarah Class sent several memoranda discussing the terms of the design contract.[58]

In order to start design work before the AIA contract was completed, Steppan and Developer executed a letter agreement to compensate Steppan based on hourly fees.[59] Steppan billed under this so-called "stop gap" agreement until April 2006, when the definitive design contract based on the AIA form was signed.

The parties agreed that the final design contract would have an effective date of October 31, 2005, when Steppan began work.[60] When the definitive contract was signed in April 2006, Steppan began billing based on the formula in the design contract, and gave a credit for amounts that had been billed and collected under the "stop gap" letter agreement. Under the design contract, the total design fee was 5.75

58 TE 10, RS 294-296; TE 11, RS 297-299; TE 12, RS 300-301.

59 TE 14, AA 1751-1753.

60 TE 6, RS 243-262; TE 7, RS 263-266.

percent of construction costs,[61] which were estimated to be $180,000,000.[62] The agreement provided for progressing billings based on a percentage of completion of five phases of the design work, including 20% of the total fee on completion of "schematic design."[63]

Steppan completed the "schematic design" phase of the work.[64] In order to preserve the right to be paid for the design work that resulted in development entitlements for the Iliescus' land, Steppan recorded a mechanics lien.[65] Pursuant to NRS 108.229(1), Steppan recorded two amendments to the lien.[66]

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61 TE 6, § 1.5.1, RS 252. The $180 million number was used for progress billing purposes. The final fee would be adjusted based on actual construction costs.

62 TE 7, § 1.1.2.5.2., RS 264.

63 TE 6, § 1.5.1., RS 252. Kenneth Bradley Van Woert, III, AIA testified extensively about practices in the architecture profession. See Trial Transcript, AA 0867, et. seq. He outlined the phases of design, including programming, schematic design, design development, construction documents, bidding, and construction administration. Trial Transcript, AA 0871-0873.

64 Van Woert concluded that "the design and technical documents that were produced by Mark Steppan and Fisher Friedman meet or exceed the standards of a schematic design phase package for a project like this." Trial Transcript, AA 877. In this appeal, Appellant does not dispute that Steppan completed the "schematic design" phase, which triggers the 20 percent fee.

65 TE 1, AA 1730-1729.

66 TE 2, AA 1735-1740; TE 3, AA 1741-1750.

Even after the lien was recorded, and this litigation commenced, Iliescus recognized the importance of the development entitlements. The Planning Commission approved the tentative map on October 4, 2008.[67] The City of Reno approved the tentative map on November 15, 2006.[68] Iliescus twice applied to the City of Reno to extend the deadline to file the Final Map, and the city granted both requests.[69]

Summary of Argument

Early in the case, the District Court (Judge Adams) entered summary judgment finding that Iliescus received *Fondren* notice of Steppan and his lien, so that the lack of a pre-lien notice did not invalidate the lien. At the beginning of the trial, the District Court (Judge Sattler) indicated that it would not revisit that ruling. However, the parties presented trial evidence on the *Fondren* notice issue. Following trial, the District Court independently found from the trial evidence that Iliescus had received *Fondren* notice. Therefore, there is no need for this Court to determine whether a genuine dispute of material fact precluded

67 TE 47, RS 440-489.

68 TE 48, RS 491-498.

69 TE 49, RS 499-518; TE 50, RS 519-521; TE 51, RS 522-554; TE 53, RS 555-557.

the summary judgment finding *Fondren* notice. This Court need only determine whether substantial evidence supports the trial judge's findings.

The trial evidence overwhelming supports the finding that Iliescus had actual notice of Steppan's work and identity. Furthermore, the trial record establishes that Iliescus had constructive notice of Steppan's work and identity for two reasons. First, Iliescus made Sam Caniglia their agent for purposes of pursuing development entitlements, and Caniglia signed Steppan's contract.[70] Second, Iliescus engaged Hale Lane to protect the land from liens. Hale Lane represented Developer with respect to development entitlements, and specifically negotiated Steppan's contract. This actual knowledge is legally imputed to Iliescus.

In their Rule 60(b) motion, Iliescus raised issues that were never raised before or during trial. The Opening Brief seems to cast these issues as purely legal issues that must be reviewed *de novo*. This Court must evaluate whether or not the District Court abused its discretion by denying the Rule 60(b) motion. Nevertheless, this brief demonstrates (as

[70] TE 6, at RS 254.

the District Court found) that there is no substantive merit to Iliescus' licensing arguments.

Finally, Iliescus ask this Court to decide an issue that is not ripe. The Judgment follows the lien statute and provides that <u>if</u> the proceeds from the foreclosure sale are insufficient to satisfy the lien, then Steppan <u>may</u> seek a personal judgment against Iliescus for the deficit. In their motion to stay execution of the Judgment without a bond, Iliescus have represented to the Supreme Court that the property is worth much more than the lien, so that Steppan is fully secured. Thus, it is unlikely that a deficit will ever lead to a justiciable claim. The issue is simply not ripe at this time.

Argument

A. Substantial evidence supports the District Court's findings that Iliescus had actual notice that Steppan was providing architectural design services, obviating the requirement for a pre-lien notice.

1. Introduction

A lien claimant contracts directly with an "owner" is not required to give a pre-lien notice. NRS 108.245(5). In other cases, the law requires some form of notice to the owner that work that could result in a lien is or will soon be underway. Service of a statutory pre-lien notice is

the simplest way to demonstrate that notice. But the pre-lien notice is not the exclusive way to accomplish this.

Under *Fondren v. K.L. Complex Limited Co.*, 106 Nev. 705, 800 P.2d 719 (1990), no prelien notice is required if the owner of the property receives actual knowledge of the potential lien claim and is not prejudiced. Steppan did not give a statutory pre-lien notice. Iliescus initiated litigation to establish that they did not receive *Fondren* notice. Following discovery, the issue of *Fondren* notice was submitted in cross-motions for partial summary judgment.[71] The District Court (Judge Adams) denied Iliescu's motion and granted Steppan's motion, finding,

> The Applicants, specifically Iliescu, viewed the architectural drawings as well as attended meetings where the design team presented the drawings. The Court finds even though Iliescu alleges he did not know the identity of the architects who were working on the project, he had actual knowledge that the Respondent [Steppan] and his firm were performing architectural services on the project.

Order, June 22, 2009.[72]

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71 *See* Iliescu's motion for partial summary judgment (AA 0230-0340); Steppan's opposition and cross-motion (AA 0341-0434); Iliescu's reply (AA 0435-0478); and Steppan's reply (AA0479-0507).

72 AA 0508-0511.

Despite the preclusive effect of a partial summary judgment, Iliescus nevertheless made *Fondren* notice a key part of the trial and offered testimony about what Iliescu knew about the architectural services. After trial, the District Court (Judge Sattler, who presided over the trial) made findings that "there is no doubt in the Court's mind that Iliescu was aware of the work being done by Steppan (a third party) on behalf of [the developer]."[73] This finding was supported by other specific findings that go to *Fondren* notice.[74] The District Court entered Conclusions of Law applying *Fondren* and other precedents.[75] Then the District Court held:

> The Court finds by a preponderance of the evidence that Steppan has proven that Iliescu was aware of the third party services he was providing. Iliescu was in attendance during numerous presentations where the instruments of service containing Steppan's name were presented. He personally saw the instruments of service. Iliescu negotiated repeatedly for specific inducements in Wingfield Towers. Further, Iliescu knew that an architect would be employed to design Wingfield Towers. Iliescu signed affidavits giving [Developer] the right to negotiate on his behalf. While there was no pre-lien notice provided, none was required.

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73 Findings of Fact, ¶ 14.

74 Findings of Fact, ¶¶ 14, 15, 17, 18 (AA 1915-1917)

75 Conclusions of Law, ¶¶ 2 – 9, AA 1918-1920.

Conclusions of Law, ¶ 13.[76]

2. Because the issue of *Fondren* notice was further litigated after entry of the partial summary judgment, this Court should review the entire record to review the trial judge's determination that Iliescus had actual notice under *Fondren.*

Iliescus argue that the *Fondren* notice issue was determined by summary judgment, which precluded a trial on the issue. But, notwithstanding the summary judgment, both parties presented trial evidence on the notice issue. On appeal, Iliescus do not attempt to show that genuine issues of material fact rendered the summary judgment erroneous. The Opening Brief instead attacks the trial judge's findings and conclusions that Iliescu received *Fondren* notice.

3. The District Court's determination that Iliescus received *Fondren* notice is supported by substantial evidence.

The District Court's factual findings must be given deference "and will be upheld if not clearly erroneous and if supported by substantial evidence." *Weddell v. H2O, Inc.*, 128 Nev.Adv.Op. 9, 271 P.3d 743, 748 (2012). "'Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.*

[76] AA 1921.

Here, Iliescus insists that they subjectively did not know that Steppan was providing architectural services to design future construction or secure development entitlements. But based on the entire trial record, the District Court concluded otherwise. The Opening Brief does not attack the District Court's factual findings as clearly erroneous or unsupported with evidence.

The District Court ruled that Iliescu knew Steppan's identity.[77] Iliescus suggest that no direct evidence supports the claim that Iliescus had actual knowledge of Steppan's identity. This is incorrect. In the early days of the case, an Affidavit of David Snelgrove (a land planner who coordinated submission of the applications for development entitlements) established that Iliescu had actual knowledge of Steppan's identity.[78] The trial record is replete with testimony about Iliescus signing development applications, reviewing plans, attending meetings, and other exposures to Steppan's work and identity.

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77 Conclusions of Law, ¶ 13, AA 1921.

78 AA 0184-186.

4. Under *Fondren*, constructive notice has the same legal impact as actual notice. The agents' knowledge must be imputed to Iliescus.

Notice to a property owner's agent is constructive notice to the owner for purposes of *Fondren* notice:

> In addition, a property owner has actual knowledge of potential lien claims if the property owner or the property owner's agent regularly inspects the remodeling project. Id. Actual knowledge by the property owner's agent is imputed to the property owner. [] An owner who witnesses the construction, either firsthand or through an agent, cannot later claim a lack of knowledge regarding future lien claims. [] In Fondren, the property owner received regular updates from her lawyer and approved specific construction activities. Id.
>
> We concluded that the property owner in Fondren had actual knowledge of the potential lien claims because the property owner had both knowledge that the property required substantial remodeling and regular updates on the progress of the project from an agent who inspected the premises. "Delivery of any pre-lien notice would have accomplished little or nothing and, therefore, was not required."

Hardy Companies, Inc. v. SNMARK, LLC, 126 Nev. 528, 540, 245 P.3d 1149, 1157 (2010)(citations omitted). Furthermore, NRS 108.22104 defines "agent of the owner" to include…

> every architect, builder, contractor, engineer, geologist, land surveyor, lessee, miner, subcontractor or ***other person having charge or control of the property***, improvement or work of improvement of the owner, or any part thereof.

Here, Iliescus placed Caniglia in charge or control of the property by signing the Owner Affidavits appointing him as an agent for the purpose of presenting applications for development entitlements.[79] Caniglia signed the design contracts with Steppan.[80] Thus, Steppan contracted with an "agent of the owner," whose knowledge may be imputed to the owners.

Constructive knowledge based on the knowledge of Caniglia, whom Iliescus deputized to apply for development entitlements is supported by the trial record. It is an alternative basis for affirming the judgment. *See Hotel Riviera, Inc. v. Torres*, 97 Nev. 399, 403, 632 P.2d 1155, 1158 (1981) ("If a decision below is correct, it will not be disturbed on appeal even though the lower court relied upon the wrong reasons.") This Court will imply findings of fact and conclusions of law so long as record is clear and will support the judgment. *Luciano v. Diercks*, 97 Nev. 637, 639, 637 P.2d 1219, 1221 (1981).

79 Findings of Fact, ¶ 18, AA 1916-1917.

80 TE 6, RS 243-262

5. Iliescus' lawyers' knowledge must be imputed to Iliescus.

"Notice to the attorney of any matter relating to the business of the client in which the attorney is engaged is notice to the client." *Noah v. Metzker*, 85 Nev. 57, 59-60, 450 P.2d 141, 143 (1969). *See also*, *Huckabay Properties, Inc. v. NC Auto Parts, LLC*, 130 Nev. Adv.Op. 23, 322 P.3d 429, 437 (2014)(citation omitted).

Iliescus argue that it would be wrong to impute the lawyers' knowledge to the client in the absence of evidence that the lawyers actually communicate the knowledge to the client. Opening Brief at 35. Iliescus' legal contention is unsupported with precedent, and is contradicted by binding precedent:

> Notice to an attorney is, in legal contemplation, notice to his client. [] The attorney's neglect is imputed to his client, and the client is held responsible for it. The client's recourse is an action for malpractice. []

Lange v. Hickman, 92 Nev. 41, 43, 544 P.2d 1208, 1209 (1976). In fact, Iliescus have recognized this principle, and sued Hale Lane for legal malpractice failing to communicate knowledge of Steppan to Iliescus:

> The Hale Lane law firm never discussed with or advised Iliescu at any time to record a Notice of Non-Responsibility with the Washoe County Recorder to ensure the Property would not be encumbered by mechanics or architect's liens recorded by individuals hired by CPD as contemplated by the

> Purchase Agreement. On October 31, 2005, unbeknownst to Iliescu, an architect, Mark Steppan, AIA, entered into a contract with BSC Financial, LLC in relation to the property subject to the Purchase Agreement.[81]

Constructive knowledge based on the knowledge of Hale Lane, whose representation included protecting against liens, is supported by the trial record.

6. The *Fondren* doctrine applies equally to onsite work and offsite work.

The Opening Brief posits that *Fondren* notice only applies to liens for work or materials "being incorporated into the property." Certainly, *Fondren* happened to involve construction *on* the liened property. But the *Fondren* doctrine is not limited to those facts: the doctrine is based on actual (or imputed) knowledge.

It is also true that, at the time of *Fondren*, Nevada lien law only secured payment for work or materials physically incorporated into physical improvements on the liened land. (Thus, architects had a lien for on-site inspections, but not for designing the improvements.) The 2003 Legislature amended the lien statute to broaden the definition of "lien claimant" to include:

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81 AA 0221, ¶ 21

> any person who performs services as an architect, engineer, land surveyor or geologist, ***in relation to*** the improvement, ***property*** or work of improvement.

2003 NEV.STAT. 2588 (Chapter 427, SB 206, § 12), now codified in NRS 108.2214(1)(emphasis added).

Iliescus cite *J.E. Dunn Northwest, Inc. v. Corus Construction Venture,* 127 Nev.Adv.Op. 5, 249 P.3d 501, 508 (2011)("*Corus*") in support of an argument that *Fondren* notice applies to onsite, but not offsite, work. *Corus* has nothing to do with *Fondren* notice or the validity of Steppan's mechanics lien. *Corus* is simply a battle over the priority of a deed of trust and a subsequently-recorded mechanics lien. A mechanics lien may attach before recordation. NRS 108.225 establishes priority of competing security interests. Under the statute, a mechanics lien's priority is based upon "commencement of construction," which is the date on which "work performed… is visible from a reasonable inspection of the site." *See analysis at Id.,* 249 P.3d at 505.

If this case involved a priority dispute between a deed of trust beneficiary and a lien claimant, NRS 108.225 and *Corus* might be relevant. But there is no such dispute here. When Steppan recorded his mechanics lien, Iliescus' property was not encumbered by a deed of trust or mortgage.

7. The effectiveness of *Fondren* notice is not limited in time.

When required, a pre-lien notice preserves the right to lien with regard to work performed up to 31 days before the notice. NRS 108.245(6). In this appeal, Iliescus attempt to engraft this statutory time limit onto *Fondren* notice. Yet nothing in *Fondren*, *Hardy Companies* or any other precedent suggests that actual or constructive notice is only effective as to work performed 31 days before notice is achieved.

Iliescus never raised this issue before or during trial.[82] It appears that Iliescus first raised the issue in a reply brief in support of a motion to alter or amend the judgment.[83] The reply brief argued a point that was not raised in the motion, and could not be addressed by Steppan:

> Significantly, a pre-lien notice allows a lien claimant to lien solely for any work performed within a time period commencing 31 days prior to the date on which the notice

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82 This Court should note that Iliescus never raised this argument in the cross-motions for summary judgment on *Fondren*. Iliescus' motion (AA0230); Steppan's opposition and cross-motion (AA0341); Iliescu's reply (AA0435); Steppan's reply (AA0479). Iliescus' trial statement does not address the issue. AA 0681. It is not an issue argued in the closing arguments. Trial Transcript, AA1687, et. seq.

83 The motion to alter or amend the judgment was filed March 10, 2015. RS 725-761. Iliescu's motion itself does not raise the issue. Therefore, the issue is not addressed in Steppan's opposition. AA 2421.

> was provided. NRS 108.245(6). Similarly, therefore, if the actual knowledge exception is invoked, then the date of such actual knowledge must be ascertained to determine when the lienable period began, as the value of services provided prior thereto cannot be liened. This Court has upheld the entirety of the Steppan lien without any finding as to when, if ever, Iliescu knew of Stephan's identity as the potential lien claimant.[84]

This was an attempt to reinvent a case that had already been litigated through trial and entry of a final judgment. A motion to alter or amend a judgment may not be used to raise arguments that could have been raised prior to the entry of judgment. *Stevo Design, Inbc. V. SBR Marketing, Ltd.*, 919 F.Supp.2d 1112, 1117 (D.Nev. 2013). Likewise, an appellant may not raise new fact or legal issues that were not presented to the district court. *Einhorn v. BAC Home Loans Servicing, LP*, 128 Nev.Adv.Op. 61, note 3, 290 P.3d 249, 252, note 3 (2012). This Court should decline to address this issue.

Constructive notice of Steppan and his identity would necessarily attach as soon as Caniglia began negotiations with Steppan, and when Hale Lane began work on the design contract. Iliescus have offered no evidence of a time gap lapsing between constructive notice and the first

[84] AA2436, at 2439, lines 11-17.

work that gives rise to the lien. And, as Iliescus point out, the Developer paid Steppan for the earliest work.

B. The District Court did not abuse its discretion by denying Iliescus' Rule 60(b) motion on grounds that Steppan failed to give a 15-day notice of intent to lien before recording his mechanic's lien.

1. Standards of review: a Rule 60(b) motion is not available to make a stronger case. The District Court did not abuse its discretion by denying the post-trial motion.

As set forth below, Iliescus did not raise the 15-day notice of intent to lien before trial, but instead waited until after trial to assert the theory in a NRCP 60(b) motion for relief. "Like a motion to reconsider, a motion under Rule 60(b) is not a second opportunity for the losing party to make its strongest case, to rehash arguments, or to dress up arguments that previously failed." *Kustom Signals, Inc. v. Applied Concepts, Inc.*, 247 F.Supp.2d 1233, 1235 (D.Kan. 2003).[85] *See also Donovan v. Sovereign Security, Ltd.,* 726 F.2d 55, 60 (2nd Cir. 1984).

[85] Because the Nevada Rules of Civil Procedure are modeled on the Federal Rules of Civil Procedure, federal precedents interpreting and applying FRCP "are strong persuasive authority." *Vanguard Piping v. Eighth Judicial District Court*, 129 Nev.Adv.Op. 63, 309 P.3d 1017, 1020 (2013). *See also Executive Management, Ltd. v. Ticor Title Insurance Company*, 118 Nev. 46, 51, 38 P.3d 872, 875 (2002);

"Motions under NRCP 60(b) are within the sound discretion of the district court, and this court will not disturb the district court's decision absent an abuse of discretion." *Deal v. Baines*, 110 Nev. 509, 512, 874 P.2d 775, 777 (1994). A District Court has wide discretion to grant or deny a Rule 60(b) motion, and will not be set aside absent an abuse of legal discretion. *Cook v. Cook*, 112 Nev. 179, 181-82, 912 P.2d 264, 265 (1996). The denial of a Rule 60(b) motion must be affirmed if there is sufficient evidence contained in the record to support the decision. *Smith v. Smith*, 102 Nev. 110, 112, 716 P.2d 229, 230 (1986).

Iliescus' Rule 60(b) motion does not argue that they were precluded, because of fraud or other misconduct from arguing the 15-day notice issue before or during trial. They do not contend that the issue was discovered only after the trial. They do not argue that the failure to raise the issue earlier resulted only from excusable neglect. Indeed, the Opening Brief simply argues the issue as if it is a purely legal issue, timely raised and subject to *de novo* appellate review. The record demonstrates otherwise.

Humphries v. Eighth Judicial District Court, 129 Nev.Adv.Op. 85, 312 P.3d 484, footnote 1 (2013).

2. Iliescu never raised the 15-day notice of intent to lien as a defense to Steppan's lien foreclosure action until long after the trial.

Iliescus knew about the 15-day notice issue before Steppan filed his action to foreclose the lien. In their Application for Release of Mechanics Lien (the "Application"), Iliescus argued that a failure to provide a 15-day notice of intent to lien under NRS 108.226(6) was fatal to enforcement of Steppan's lien.[86] Steppan's counsel informed the District Court:

> The purpose of the 15-day Notice of Intent to Lien is to provide notice to multi-family and single-family residences of an intent to lien. In this case, the project is a mixed use of office, retail and predominantly condominiums. [Citation omitted.] Accordingly, the project does not even require the 15-day Notice of Intent to Lien.
>
> However, even if the Court finds that the 15-day Notice of Intent to Lien is required, this has been remedied. Attached hereto as Exhibit "C" is the 15-day Notice of Intent to Lien and Exhibit "D" is the Notice of Claim of Lien recorded today.[87]

At the end of a May 3, 2007 hearing on Iliescus' Application,[88] the District Court ordered that Steppan was entitled to conduct discovery on Iliescus'

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86 AA 0005.

87 Response to Application for Release of Mechanic's Lien, AA 0016, at AA 0020. The 15 Day Notice of Intent to Claim Lien on Residential Property is at AA 0100. The Amended Notice and Claim of Lien is at AA0103-0108 and TE 3, AA 1741-1750.

88 AA 0109-0167

actual knowledge.[89] The District Court never disposed of the Application for Release of Lien.

Steppan then filed his lien foreclosure complaint.[90] Iliescus' Answer does not raise a failure to comply with NRS 108.226(6) (or any other statute) as an affirmative defense.[91] Iliescu filed a motion for summary judgment based on lack of a NRS 108.245 pre-lien notice, but that motion does not mention the 15-day notice under NRS 108.226(6).[92] Iliescu's Trial Statement does not mention NRS 108.226 or a 15-day notice.[93] Iliescus' closing argument made no mention of NRS 108.226(6) or a 15-day notice.[94]

3. The District Court did not abuse its discretion by denying Iliescus' Rule 60(b) motion insofar as it addressed the 15-day notice of intent to lien.

Nearly a year after the trial, on October 27 2014, Iliescus filed a Rule 60(b) motion attacking the District Court's Findings of Fact,

89 AA 0167. *See also*, Order, AA 0169-0170.

90 AA 0172-0180.

91 AA 0213-0229.

92 AA 0230-0340.

93 AA 0681-0691.

94 Trial Transcript, AA 1687-1703

Conclusions of Law and Decision.[95] The 45-page motion only briefly mentions the issue:

> Furthermore, this lien notice was recorded without first sending the 15 day notice of intent to lien, as required by NRS 108.226(6) for a project, like this one, for "multifamily . . . residences." When this error was asserted in the Application for Release of Mechanic's Lien initiating this case, Steppan attempted a correction, sending a late intent-to-lien notice, received on March 8, 2007 before then filing a subsequent "amended Notice and Claim of Lien" on May 3, 2007. [] However, as a simple matter of logic, failure to provide required *prior* notice, cannot be remedied *after the fact.*[96]

The Iliescus' motion contains no hint of any Rule 60(b) ground for relief with respect to the 15-day notice. This passage appears to be a mere placeholder for a later appeal. It is little wonder that it was not debated during the oral arguments on the motion, and was not specifically addressed in the District Court's Decision and Order Denying NRCP 60(b) Motion.[97] As discussed below, the record demonstrates why Iliescus' argument would have failed had it been presented at or before trial.

95 AA 1964-2011.

96 AA 2004.

97 AA 2425-2431.

4. Even if timely presented, the District Court would have justifiably rejected Iliescus' argument on the merits.

The 15-day notice is not required for any "nonresidential construction project." NRS 108.226(7). The statute does not define "nonresidential construction project." The project in this case is a mixed-use project, which includes office, commercial, retail, and residential condominiums. There is no clear-cut statute or precedent that makes NRS 108.226(6) applicable to a mixed-use project.

The reason for both a 31-day pre-lien notice and a 15-day pre-lien notice is unclear. No legislative history is available to explain the purpose of the notice.[98] The 15-day notice is not the subject of any precedent. Presumably, *Fondren* analysis would apply to both the 31-day notice and the 15-day notice.

Finally, Steppan cured the alleged problem by giving the 15-day notice, and then recording a new lien. The amended lien states that it was recorded within 90 days of the last work performed.[99] There is no

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98 NRS 108.226(6) was enacted in 2003. *See* 2003 NEV.STAT. 2599 (Chapter 427, SB 206, § 30). Undersigned can find no legislative history that discusses this subsection.

99 TE 2, AA 1735-1740.

contrary evidence in the record. Thus, the Court must consider that the amended lien would have been timely as a new lien, and treat it is a new lien.

The Nevada Supreme Court has often said that

> [T]he mechanic's lien statutes are remedial in character and should be liberally construed; that substantial compliance with the statutory requirements is sufficient to perfect the lien if the property owner is not prejudiced.

Hardy Companies, Inc. v. SNMARK, LLC, 126 Nev. 528, 536, 245 P.3d 1149, 1155 (2010).[100] Iliescus did not attempt to identify any prejudice flowing from the lack of a 15-day notice. It is just one of many hyper technical arguments designed to evade the purpose of the lien statute.

C. The mechanic's lien secures payment for work provided by or through the lien claimant.

NRS 108.222(1) provides in relevant part,

> [A] lien claimant has a lien upon the property … for: (a) if the parties agreed, by contract or otherwise, upon a specific price or method for determining a specific price for some or all of

[100] "The mechanic's lien statutes are remedial in nature and should be liberally construed to protect the rights of claimants and promote justice." *I. Cox Construction Company, LLC v. CH2 Investments, LLC*, 129 Nev. Adv.Op. 14, 296 P.3d 1202, 1204 (2013). "The purpose of the statute is to protect the rights of all lien claimants, and procedure should be extremely liberal to that end." *Daly v. Lahontan Mines Co.*, 39 Nev. 14, 158 P. 285, 287 (1916).

> the work… ***furnished by or through the lien claimant***, the unpaid balance of the price agreed upon for such work…

(Emphasis added). Clearly, the lien claimant is not required to personally perform all of the work. A lien claimant is one who organizes and "furnishes" or "provides" work, services, materials, equipment, and tools. In the construction context, a prime contractor can assert a lien for work performed by subcontractors, as well as self-performed work. Indeed, some general contractors are "paper" contractors, who hold a license with an appropriate monetary license limit and subcontract all of the work. The prime contractor remains contractually obligated to an owner to fulfill the terms of the prime contract, and therefore bears the risk that a subcontractor will default. The prime contractor has lien rights for the entire contract price.

The same is true of design services. One individual architect can contract for design services that would require 100 architects and engineers to complete. From a regulatory standpoint, that individual must maintain "responsible control." From a contract and professional standpoint, that individual is legally responsible to the client for all of the work. Like the "paper" contractor, that individual architect has lien

rights protecting payment of the contract price for the entire design, including those portions provided by sub consultants.

In this case, Steppan has asserted a lien for design services he was contractually obligated to provide. Iliescus argue that the statute should be construed narrowly in order to limit the lien to the value of services that Steppan personally rendered or for which he can show a written subcontract.

Steppan was (and is) a Nevada licensed contractor. As an individual, he contracted to provide design services. Obviously, one individual could not supply all of the design services for a 40-story, mixed use development with an estimated construction cost of $180,000,000. From the beginning, it was clear that FFA, as design consultant, would provide the design while the licensed architect, Steppan, would maintain "responsible control" as required by the licensing statutes and regulations. As the person with contractual and professional liability to deliver the entire design, Steppan was entitled to a lien for the entire contract price for all of the design work.

D. In the contemplation of the lien statute, Steppan was "employed" by the developer, not Fisher Friedman Associates.

A notice of mechanics lien must include certain essential elements, including a description of the property encumbered and the owner's name. The notice must also include: "The name of the person by whom the lien claimant was employed or to whom the lien claimant furnished the material or equipment." NRS 108.226(2)(c). Steppan's lien disclosed:

> That the name of the person by whom lien claimant was employed and to whom lien claimant furnished work, labor, materials and/or services in connection with the project is: BSC Financial, LLC, c/o Consolidated Pacific Development, Inc., 932 Parker Street, Berkley, CA 94710....[101]

Iliescus insist that Steppan defrauded the District Court because he did not identify FFA as his "employer."

NRS 108.226(2)(c) is disjunctive, requiring the lien claimant to identify his employer **or** the person to whom he furnished the work. The term "employ" is not limited to a payroll, employer-employee relationship. "Employ" is a transitive verb that means:

> 1. To make use of. 2. To hire. 3. To use as an agent or substitute in transacting business. 4. To commission and

[101] TE 1, AA 1730-1734

> entrust with the performance of certain acts or functions or with the management of one's affairs.

Black's Law Dictionary (9th ed. 2009).[102]

The person who "employed" the lien claimant may be a person who pays the lien claimant's wages or salary. But it may also be somebody who does not. In the context of the lien statute, the person who "employed" the lien claimant is the person who requested the services from the lien claimant either as an employee or an independent contractor, like Steppan.

E. Steppan was licensed to perform his contract with the developer, and violated no licensing statute or regulation by providing designs or work product created by Fisher Friedman Associates.

1. Introduction: It is undisputed that Steppan was licensed in Nevada, and maintained "responsible control" over the project.

NRS 108.222(2) provides in relevant part:

> If a … professional is required to be licensed pursuant to the provisions of NRS to perform the work, the … professional will only have a lien pursuant to subsection 1 if the … professional is licensed to perform the work.

[102] *See Douglas v. State*, 130 Nev.Adv.Op. 31, 327 P.3d 492, 494 (2014)(use of Black's Law Dictionary).

Steppan was an executive vice president and director of FFA.[103] He was a licensed architect in California, Nevada, Oregon, Texas, and New Jersey.[104] For the Wingfield Towers project, Steppan provided executive management, including oversight of the project, attending meetings, overseeing the design staff, and reviewing the work product (or "instruments of service").[105] Steppan maintained "responsible control," which he characterized thus:

> Responsible control is really about your supervision of the project as it's approaching a time for sealing and signing to make sure that what is presented to the agency for permitting review, in essence, in my mind, is what – is what that's talking about.
>
> In the broader sense it is the responsible control or oversight that an architect in the standard of care would provide by overseeing the production and creation of a project from the design through construction documents.[106]

Steppan's testimony that he exercised "responsible control" was not contradicted. Steppan and Rodney Friedman both testified that FFA had previously designed Nevada projects. In each case, an individual licensed

103 Trial Transcript 636-637, AA 1382-1383.

104 Trial Transcript 632, AA 1378.

105 Trial Transcript 639, AA 1385

106 Trial Transcript 639-640, AA 1385-1386; Trial Transcript 785, AA 1531.

in Nevada would sign the contracts, act as the project architect, and maintain "responsible control." FFA would provide much of the design work as a "design consultant." Although it was not an issue at trial, the evidence submitted after the trial demonstrated that this procedure was vetted by the Architecture Board.

2. Iliescus did not raise the licensing issue until long after the trial. In post-trial hearings, the District Court made clear that it considered all of the trial evidence.

Iliescus' answer to Steppan's complaint to foreclose the mechanics lien does not allege that Steppan sought to enforce a lien performed by unlicensed architects.[107] In pretrial discovery, Iliescus probed the relationship between Steppan and FFA, the formation of the design contract, and billing for the design services. Four months before trial, Iliescus sent the Architecture Board a "Consumer Complaint Form" [108] along with deposition transcripts and a binder containing 66 exhibits. The regulatory complaint contained a number of factual inaccuracies, but essentially argues the same licensing issues raised in post-trial motions in the District Court, and in this appeal. The Architecture Board

[107] AA 0213-0229.

[108] AA 2102-2114.

investigated the complaint.[109] Following the investigation, the Architecture Board determined that Iliescus' complaint was unfounded.[110]

Steppan was always transparent with the Court (and the Architecture Board) in dealing with the licensing issues. The trial testimony disclosed that FFA had designed a number of projects in Nevada. In each case, the licensed individual architect signed the contracts with the client, and supervised the work of FFA to deliver the design.[111] Trial testimony disclosed that Steppan and FFA followed this same template with respect to the Wingfield Towers project.[112] Iliescus clearly knew about the license status of Steppan and FFA long before the trial. It was discussed at length during the trial.

Yet, During closing arguments, Iliescus' counsel specifically did not argue the license issue:

> Now, I am not advancing the proposition that [Steppan] lacks standing to file the lawsuit. I'm not there yet, because I haven't looked into that issue. But that ties to my

109 AA 2116-2117.

110 AA 2119.

111 Trial Transcript, 219-220, AA 0956-0957.

112 Trial Transcript, 734-736, AA 1480-1482.

> examination of Mr. Steppan as to what his particular involvement was.[113]

In short, Iliescus had all of the information and evidence they need to present their licensing issues at trial, but failed to do so.

Nearly ten months after trial, Iliescus filed their Rule 60(b)(3) motion alleging that Steppan had engaged in fraud by entering into the design contract, then seeking payment and a lien for work performed by other FFA professionals.

Iliescus did not prove any fraud.[114] In this appeal, Iliescus pay no heed to the appellate standard of review for the District Court's denial of the Rule 60(b)(3) motion: it must be affirmed if there is sufficient evidence contained in the record to support the decision. *Smith v. Smith*,

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113 Trial Transcript 945, AA 1691.

114 Rule 60(b) relief is an extreme remedy to be employed only under exceptional circumstances. *Reynolds v. Reynolds*, 516 So.2d 663, 664 (Ala.App. 1987). Any alleged fraud or other misconduct must prevent the losing party from fully and fairly presenting his case. *E.g. Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1339 (5th Cir. 1978). Further, the alleged fraud must "not [have been] discoverable by the due diligence before or during the proceeding, and [it must have been] materially related to the submitted issue." *Pacific & Arctic Ry. & Navigation Co. v. United Transp. Union*, 952 F.2d 1144, 1148 (9th Cir.1991). To obtain relief based on alleged fraud under Rule 60(b)(3), the movant must establish fraud by clear and convincing evidence. *Ervin v. Wilkinson*, 701 F.2d 59, 61 (7th Cir. 1983).

102 Nev. 110, 112, 716 P.2d 229, 230 (1986). The District Court's denial of the post-trial motion was plainly based on the trial record. At the hearing on Iliescus' Rule 60(b) motion, the District Court addressed this contention:

> MR. ALBRIGHT: * * * * And that's why I don't think polite fictions fly. I think there needs to be substantial evidence of what was really going on here.
>
> THE COURT: Mr. Albright, there wasn't – this wasn't a nod-and-a-wink case. Certainly I didn't review the evidence with the polite fiction analysis that you've suggested. I listened to the entirety of the testimony, reviewed all of the exhibits that were admitted, considered not only the rulings in the case that I made, but the rulings in the case that Judge Adams had made before me, so I made a finding that there was substantial evidence.
>
> It wasn't that I just kind of looked at it and said, oh yeah, you know, I get it, Mr. Friedman and Mr. Steppan just had this canard going, but I'll just go along with it. I reviewed the entire thing.
>
> Mr. Pereos zealously advocated on behalf of his client, I believe and at the conclusion of the trial itself, I commented on both the level of advocacy on both sides and on the level of professionalism that both sides exhibited during the course of the trial.
>
> So the argument somehow that this was just a polite – nod and a wink is what I call it, to the law, I found was actually not true. I found that there was that appropriate level of evidence presented during the trial. So I was just

> wrong, is the argument. With all due respect, I understand.[115]

In sum, Iliescus failed to raise the licensing issue by pleading or at trial. In the post-trial Rule 60(b)(3) motion, they failed to establish the elements of fraud or some other basis for relief under Rule 60(b). The District Court's original ruling, as well as the denial of the Rule 60(b) motion, was based on the trial evidence. Accordingly, this Court cannot find that the District Court abused discretion by failing to grant the Rule 60(b) motion with respect to the license issue.

3. Fisher Friedman Associates is not required to register in Nevada in order to provide design services as a sub-consultant to Steppan

Iliescus contend that Steppan has no lien for work performed by other FFA architects. Appellants' analysis rests entirely on *DTJ Design, Inc. v. First Republic Bank*, 130 Nev. Adv.Op. 5, 318 P.3d 709 (2014)("*DTJ Design*"). But that case has no impact on Steppan's lien rights.

DTJ Design, Inc. is a Colorado corporation. One firm principal, Thomas Thorpe, applied to the Architecture Board for individual registration. The Architecture Board approved his application. Thorpe claimed that he also filed an application for DTJ Design, Inc. to practice as

115 Trial Transcript, AA 2221-2222.

a foreign corporation in Nevada. However, there was no evidence that the Architecture Board ever received or approved the corporate application.

In July 2008, DTJ Design, Inc. recorded a mechanics lien on property that was previously encumbered by a deed of trust securing a loan from First Republic Bank ("Bank"). Bank conducted a non-judicial foreclosure – by trustee's sale – of its deed of trust. DTJ Design then sued Bank to determine that its lien was prior to the deed of trust.

DTJ Design, Inc. could not hold or foreclose a lien for several reasons: (1) the corporation did not registered under NRS 80.010(1); (2) the lien claimant (the corporation) was not licensed as required to record a lien as required by NRS 108.222(2); and (3) the plaintiff (the corporation) was not licensed as required by NRS 623.349(2) to commence a civil action. The individual architect could have signed contracts, recorded the lien in his own name, and sued to foreclose the lien. The holding under *DTJ Design* is that the corporation could not do those things. Under *DTJ Design*, FFA could not contract, record a lien, or sue to foreclose the lien. *DTJ Design* has no impact on Steppan's ability to do those things.

The Opening Brief also cites *Nevada National Bank v. Snyder*, 108 Nev. 151, 826 P.2d 560 (1992) for the proposition that Steppan could not properly be the individual "front" for FFA in the lien or in the litigation. In Snyder, the unlicensed, out-of-state business entity recorded the lien, commenced litigation to foreclose the lien, and even took an appeal in the business name. When questions arose about the business entity's standing, an individual architect moved to substitute himself, as a sole proprietor, for the business. The Supreme Court ruled that the lien claimant had always done business as a corporation, not as a sole proprietor. Therefore, substitution of the plaintiff was improper. This ruling has no bearing on this case: FFA has never asserted that it had standing to record a lien or sue to foreclose the lien. Again, because of the regulatory landscape, it was proper for Steppan, as a licensed individual, to make the contract with the developers, record the lien, and sue to foreclose the lien.

4. Steppan may properly sign and seal technical submissions prepared by other individuals and firms, so long as he maintains "responsible control" over the design

The Legislature granted the Architecture Board authority to enact regulations for the interpretation and application of NRS Chapter 623.

NRS 623.140(2). As part of its regulation, the Architecture Board adopted the National Council of Architectural Registration Boards ("NCARB") Rules of Conduct. NAC 623.900. The Rules of Conduct permit Steppan to stamp drawings prepared by unlicensed designers if he maintained "responsible control" over the process.[116]

At trial, Steppan verified that he had exercised "responsible control" as the term is used in the architecture profession. No record evidence suggests otherwise.

5. NRS 623.349 only requires registration of business entities which maintain offices in Nevada.

As originally enacted, NRS Chapter 623 addressed only licensure and discipline of individual architects. As the statute evolved, the State required registration of business entities practicing architecture in Nevada offices. The business entity registration requirement does not apply to a firm that maintains no Nevada office. Further, an individually licensed architect can utilize unlicensed individuals and out-of-state firms to complete design work. Steppan's contract, performance of his

[116] NCARB Rules of Conduct, Rule 5.2. Again, this issue arose only after trial. The NCARB rules are part of the post-trial record. AA2181.

contract, and his lien are all proper within the regulatory framework of NRS Chapter 623.

NRS 623.017 provides: '"Architect' means any person who engages in the practice of architecture and holds a certificate of registration issued by the Board." Chapter 623 does not define "person" to be a natural person or to include business entities. However, professional registration clearly applies only to natural persons:

> Any person who is at least 21 years of age and of good moral character and who meets the requirements for education and practical training established by the Board by regulation may apply to the Board for registration pursuant to the provisions of this section as an architect.

NRS 623.190. The interpretative regulations prescribe educational requirements, practical experience, passing a written examination, and a personal oath.[117] Individuals (not corporations) must obtain continuing education credits.[118] Only individual licensees can seal drawings.[119]

Chapter 623 separately provides for issuance of a certificate of registration to design firms with offices in Nevada:

> ***Each office or place of business in this State*** of any [business entity] practicing pursuant to the provisions of

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117 NAC 623.400.

118 NAC 623.630, *et. seq*.

119 NAC 623.185; NAC 623.750.

> NRS 623.349, must have an architect … who is a resident of this State and holds a certificate of registration issued pursuant to this chapter regularly working in the office or place of business and having responsible control for the architectural work ... conducted in the office or place of business ....

NRS 623.350(1)(emphasis added). In 1997, the Legislature amended NRS 623.350 and added NRS 623.349(1), which permits Nevada individual registrants to "join or form" a business entity that practices architecture in Nevada.[120] For a business entity practicing architecture from Nevada offices, individual registered by the Architecture Board (or the Professional Engineers Board) must own at least two-thirds of the company.

Iliescus argue that the two-thirds ownership requirement applies to Steppan and FFA. Because Steppan does not own stock in FFA, they insist, he cannot assert a lien for design work supplied for a Nevada project. This Court should reject this leap of logic for several reasons. First, the requirement to register business entities plainly applies only to firms with Nevada offices. Second, the requirement that an individual can only "join" (or be employed by) a design firm if two-thirds of the firm is co-owned by Nevada licenses could only apply to Nevada firms. Third,

[120] 1997 NEV. STAT. 1406

FFA only worked as a design consultant to Steppan, and is therefore exempt from NRS Chapter 623. NRS 623.330(1)(a).

Finally, assuming that Steppan somehow violated NRS 623.349 by "joining" (as an employee) FFA, that might subject him to discipline, but does not mean he was unlicensed and therefore lacked power to assert a lien under NRS 108.222(2). Steppan individually held a professional license. Steppan individually contracted to provide design and planning services. Steppan was the licensed individual with professional responsibility for the design. FFA was not. Nothing in NRS Chapter 623 or NAC Chapter 623 suggests that this supervising architect, who exercised "responsible control," may not engage unlicensed individuals or firms from another state.

6. Iliescus promote an interpretation of NRS 623.349(1) that would conflict with the statutory and regulatory grant of reciprocal licensing of out-of-state architects.

The Motion suggests that any Nevada licensee who "joins" – as an employee or part owner – any design firm in any jurisdiction runs afoul of NRS 623.349(1) if less than two-thirds of the firm is owned by individuals who are not licensed design professionals in Nevada. That interpretation would make it impossible for individuals working for

firms in other states to become licensed in Nevada. That interpretation would not only render the statute unconstitutional (as discussed below) but is also at odds with the clear statutory mandate to grant reciprocity to architects licensed in other jurisdictions.

The National Council of Architectural Registration Boards ("NCARB) was created to standardize educational and testing requirements for the professional registration of architects. The Architecture Board adopted the NCARB test as Nevada's written examination. NAC 623.400(1). Further, Nevada grants reciprocal registration to architects registered in other states and who hold an NCARB certification. NAC 623.410.

This Court must "interpret provisions within a common statutory scheme 'harmoniously with one another in accordance with the general purpose of those statutes' and to avoid unreasonable or absurd results, thereby giving effect to the Legislature's intent." *Southern Nevada Homebuilders Association v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005). Iliescus' interpretation brings conflict, not harmony, to the overall regulatory scheme in NRS Chapter 623.

If NRS 623.349(1) applies to out-of-state firms, no employee of an out-of-state firm could ever receive an individual registration in Nevada.

Steppan could never accept employment with FFA or any other firm that is not at least two-thirds owned by Nevada-licensed design professionals. This plainly conflicts with reciprocal registration provisions, and the purpose behind the NCARB certification in Nevada and most other states.

Furthermore, the mere fact that the Architecture Board has granted Steppan a license even though he is employed by a design firm that is not two-thirds owned by Nevada licensees, suggests that Iliescus' interpretation is faulty:

> We have previously held that "(a]n agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action" and that "great deference should be given to the agency's interpretation when it is within the language of the statute." []While not controlling, an agency's interpretation of a statute is persuasive.

State v. Morros, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988)(citations omitted)(state water engineer interpretation). Further, when the Legislature acquiesces in a regulatory interpretation by failing to amend the statute, courts deem that the regulatory interpretation accords with legislative intent. *Silver State Electric Supply Company v. State ex rel. Department of Taxation*, 123 Nev. 80, 85, 157 P.3d 710, 713 (2007). In other words, under Iliescus' proposed interpretation, the mere fact that Steppan works for FFA, and that firm is not owned two-thirds by

Nevada registered architects, Steppan could never be individually registered in Nevada. Yet the Architecture Board, which is knowledgeable about Steppan's employment with FFA, granted Steppan the individual license.

7. Steppan is not required to contract for sub-consulting services in writing, or provide the Architecture Board with a copy of any sub-consulting agreements.

Iliescus are particularly focused on the absence of a written subcontract between Steppan and FFA. They claim that, because the prime contract between Steppan and the developer contemplated a 32-month term, that any subcontract between Steppan and FFA must be in writing to satisfy the statute of frauds in NRS 111.220(i). As between Steppan and FFA, that may well be true: if FFA defaulted, Steppan might not be able to sue FFA in contract. But that analysis misses the point here. Steppan is obligated to provide a complete design to the developer, and Steppan can self-perform the contract, or use FFA or any other design firms he wants, to fulfill the contract.

Iliescus also argue that NRS 623.325 mandates that any sub-consulting agreement between Steppan and FFA be in writing. The statute is plainly limited to a design contract between a licensed architect

and client. Nothing in the statute suggests that it applies to the architect's sub-consulting agreements with engineers or other designers.

8. As interpreted by Iliescus, NRS 623.349 would be unconstitutional.

When possible, courts must reject a statutory interpretation that would render legislation unconstitutional. *Ford v. State*, 127 Nev. Adv. Op. 55, 262 P.3d 1123, 1130 (2011). Iliescu's proposed interpretation of NRS 623.349(1) would mean that Steppan's Nevada license would be void because he was employed, out-of-state, by a firm that was not owned at least two-thirds by Nevada registered design professionals. Such a construction would render the statute unconstitutional on several different grounds.[121]

Privileges and Immunities. Nevada statutes once required that insurance policies procured by out-of-state brokers must be "countersigned" by an insurance agent licensed by Nevada. There was no reason for this "countersignature" requirement other than to protect local agents from competition. The Ninth Circuit found that the statute

[121] Note: Iliescus never raised the ownership requirements of NRS 623.349(1) until long after the trial. As a consequence, Steppan never raised the constitutionality of the statute as Iliescus would apply it until the post-trial motion practice.

was unconstitutional under the Privileges and Immunities Clause because it discriminates against citizens of other States for no substantial reason beyond protectionism. *Council of Insurance Agents & Brokers v. Molasky-Arman*, 522 F.3d 925, 936 (9th Cir. 2008). Iliescus' interpretation of NRS 623.349(1) would likewise constitute an improper discrimination against out-of-state design firms. Although Steppan was qualified by Nevada as an individual architect, he could never "join" (as an employee or otherwise) any firm unless two-thirds of the firm ownership was held by Nevada-licensed design professionals.

Commerce Clause. The "dormant" Commerce Clause denies states the power to unjustifiably discriminate or burden interstate commerce, and prohibits states from advancing their own commercial interests by curtailing the movement of commerce. A statute violates the Commerce Clause when it discriminates on its face, in practical effect, or by purpose. *Douglas Disposal, Inc. v. Wee Haul, LLC*, 123 Nev. 552, 560-61, 170 P.3d 508, 514-15 (2007). Thus, the Nevada Supreme Court invalidated NRS 80.120(1)(b), which required that foreign corporations register with the Nevada Secretary of State in order to gain access to Nevada courts, at least with respect to an Oregon firm engaged mostly in interstate sales and which had not "localized itself into the Nevada community." *Sierra*

Glass & Mirror v. Viking Industries, Inc., 107 Nev. 119, 123, 808 P.2d 512, 514 (1991).

Similarly, FFA has not "localized itself into the Nevada community." Thus, NRS 623.349(1) cannot properly apply to FFA. Any attempt by Nevada to limit FFA's ability to employ Nevada-licensed architects (whether resident in Nevada or not) necessarily violates the Commerce Clause. Any attempt by Nevada to force members of an out-of-state design firm to register with the Architecture Board as a condition of employing Nevada architects obviously violates the Commerce Clause.

Equal Protection. NRS 623.349(1) effectively discriminates between firms owned by individuals who are licensed by Nevada and firms whose individual owners are not. There appears to be no rational basis for this discrimination. The regulatory scheme for architecture and engineering has always focused on the professional responsibilities of the individual licensees, who must complete a course of education, practical experience, written testing, and professional liability for stamping drawings, specifications, calculations, and other "instruments of service." There is no rational basis for a regulation that bars architects from working in a firm that is not two-thirds owned by Nevada licensees.

E. Because a determination of personal liability for any "deficiency" under NRS 108.239(1) can only be determined after a foreclosure sale, that issue is not ripe. The District Court properly declined to determine the issue on that ground.

The lien statute sets forth the procedure for a lien foreclosure sale. NRS 108.239. The sales proceeds are paid first to satisfy mechanics liens. If the sales proceeds exceed the lien amount, then the surplus is paid to the owner. NRS 108.239(11). If the sales proceeds are not sufficient,

> 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 if that person has been personally summoned or has appeared in the action.

NRS 108.239(12). The Judgment, Decree and Order for Foreclosure of Mechanics Lien ("Judgment")[122] exactly follows the statute:

> If the Net Sale Proceeds are less than the Lienable Amount, then all of the Net Sale Proceeds shall be disbursed to Mark B. Steppan. Within 30 calendar days after the sale, Steppan may by motion seek additional relief pursuant to NRS 108.239(12). Defendants reserve all rights regarding any additional relief including, but not limited to, the arguments in Defendants' Motion for Relief from Court's Attorneys' Fees and Costs Orders and for Correction, Reconsideration, or Clarification of Such Orders to Comply with Nevada's Mechanics Lien Law (filed September 15, 2014, e-Flex Transaction 4606433)

[122] AA 2378

Iliescus contend that Steppan can never obtain a "deficiency" against them, and ask that this Court reverse this part of the Judgment.

The District Court and counsel all agreed that the issue of a deficiency does not ripen until the foreclosure sale has been conducted.

> THE COURT: ... But let's just assume for the sake of argument that the value of the property is about $800,000 today, and I order something in excess of that. My understanding, and Mr. Pereos' argument is that, you know, sell the property, that's it, there's no personal responsibility towards the trust, the [Iliescus'] trust or towards either one of them individually. That's how I took it.
>
> MR. HOY: That's – I take that to be the issue. And I don't think that that issue is ripe at this time. I mean, the statute is pretty clear what happens. The Court hears the evidence, decides upon a monetary amount that is secured by the lien, orders a foreclosure sale.
>
> If the proceeds are enough to satisfy – if the proceeds are more than enough to satisfy the lien, then the surplus goes back to the property owner.
>
> If [they] are exactly the amount of the lien, then the plaintiff is satisfied, and that's that.
>
> But there is a statutory procedure that takes place after the foreclosure sale if there is a deficiency. ***We're simply not there yet.***
>
> THE COURT: ***I agree, it wouldn't be ripe at this point to discuss.***
>
> MR. PEREOS: ***I agree. That's fine***.

Trial Transcript, pp. 959-960 (emphasis added).[123] After trial, Iliescus switched counsel (for the sixth time). After entry of judgment, new counsel filed a motion for reconsideration of attorney fees, costs, and including any mention of the deficiency procedure in NRS 108.239(12).[124] The District Court properly declined the invitation to determine, before the issue of a deficiency became ripe, whether Iliescus could be personally liable:

> Nevada has a long history of requiring an actual justiciable controversy as a predicate to judicial relief. Moreover, litigated matters must present an existing controversy, not merely the prospect of a future problem.

Doe v. Bryan, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986). Because no foreclosure sale has occurred, the issue of a deficiency is not ripe.

Iliescus' varying positions on the value of the land demonstrates precisely why the issue of deficiency is not ripe. At trial, Dr. Iliescu testified that the current value of the land encumbered by the lien was $700,000 to $800,000.[125] However, when Iliescus moved the Supreme Court for a stay of execution pending appeal – without a supersedeas

123 AA 1705-1706.

124 Motion, RS 678-691; Opposition, RS 692-707; Reply, RS 708-724.

125 Trial Transcript, AA 1311:5-6; AA 1368:17-21.

bond – they argued that Steppan's lien was fully secured because the land is worth more than the amount of the judgment, $4,536,263.45. As Iliescus put it,

> In the present case, adequate alternative collateral and security does already exist, namely the very liened Property at issue herein. If that Property is worth more than the Judgment (as Exhibit "I" hereto would indicate), then Steppan would be fully secured as to even a traditional judgment.

Motion for Stay of Execution, etc. [126] Exhibit "I" is an August 4, 2015 appraisal report by Joseph Campbell indicating that the property was worth between $6,640,000 and $9,960,000. Mr. Campbell's October 10, 2013 report, admitted at trial, said that the retail value of the completed project was worth less than the construction cost.[127] This demonstrates the volatility (at least in Iliescus' mind) of the value of the property and the security of the lien.

This is precisely why the issue of personal liability for a "deficiency" under NRS 108.239(12) is not yet ripe, and should not be the subject of a substantive ruling by this Court. Finally, the District Court

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126 See Supreme Court Motion for Stay of Execution, August 6, 2015, (E-Flex Transaction 15-23785), at page 7, lines 15-18.

127 TE 132, RS 649-677.

never ruled on the substance of the issue. If this Court is going to take any action on this issue, the only possible course is to reverse the District Court's decision not to decide the matter, with instructions to make findings, conclusions, and judgment on the potential, hypothetical personal liability for a "deficiency."

Summation and Request for Relief

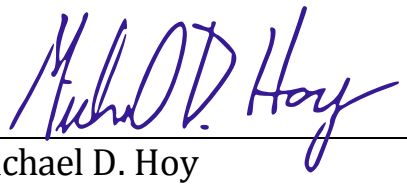
Three District Court judges presided over this case. Each was careful to enter findings and conclusions based on evidence and law, and only after extensive briefing, oral arguments, and evidentiary hearings. Iliescus were given every opportunity to raise hyper technical objections and to argue the evidence. The colloquy between the Court and counsel regarding Iliescus' contention that Steppan's role as contracting architect, lien claimant, and plaintiff was merely a fraudulent "sham" perfectly demonstrates how careful the District Court was in its consideration of the evidence.

The District Court's findings of fact are all supported by substantial evidence. Rulings on the post-trial motions were no abuse of discretion. And the legal rulings were coherent, and based on clear-cut statutory authority and judicial precedent. There is no ground for this Court to reverse the Judgment.

Accordingly, Steppan requests that this Court affirm the Judgment and all related rulings by the District Court.

Dated July 12, 2016.

HOY CHRISSINGER KIMMEL VALLAS, PC



Michael D. Hoy
Attorneys for Plaintiff/Respondent,
Mark B. Steppan

NRAP 26.1 Disclosure Statement

Pursuant to NRAP 26.1, I certify:

1. The sole respondent, Mark B. Steppan, is a natural person.

2. The attorneys who have appeared on behalf of Respondent in the District Court and This Court are:

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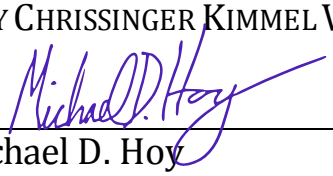
Dated July 12, 2016

HOY CHRISSINGER KIMMEL VALLAS, PC



Michael D. Hoy
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NRAP 28.2 Certification

1. I hereby 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

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac Version 15.23.2 (160624), Product ID: 02985-010-000001 in Cambria Regular 14 point.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7 because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is

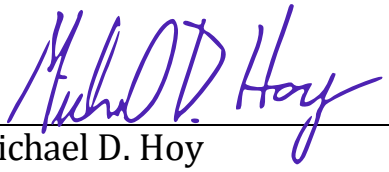
[X] Proportionally spaced, has a typeface of 14 points or more, and contains 12,536 words.

3. Finally, I hereby 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 and volume number, if any, 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.

Dated July 12, 2016

HOY CHRISSINGER KIMMEL VALLAS, PC



Michael D. Hoy
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Certificate of Service

Pursuant to NRAP 25, I certify that on July 12, 2016, I served Respondent's Answering Brief on Appellants' counsel, G. Mark Albright and D. Chris Albright by filing the brief with the Nevada Supreme Court's electronic filing system, which will provide an electronic notification of service to all counsel in the case.

Dated July 12, 2016

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