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In the Supreme Court of the State of Nevada

JOHN ILIESCU, JR.; JOHN ILIESCU, JR. AND SONNIA ILIESCU, AS TRUSTEES OF THE JOHN ILLIESCU, JR. AND SONNIA ILIESCU 1992 FAMILY TRUST AGREEMENT,

Appellants,

vs.

MARK B. STEPPAN,

Respondent.

Case No. 68346

PETITION FOR REHEARING

Pursuant to NRAP 40(c)(2)(A), Respondent petitions for rehearing, and hereby requests withdrawal of *Iliescu v. Steppan*, 133 Nev.Adv.Op. 25, 2017 WL 2303358 (May 25, 2017)("Decision"), and entry of an opinion that affirms the trial court's judgment.

The Decision holds that *Fondren*[1] notice will never apply to a case in which a lien claim has not performed work upon the owner's land. This ruling is flawed in two key ways. First, Iliescu never litigated this issue before or during trial. Ten months after the trial, Iliescu raised the onsite/

[1] *Fondren v. K/L Complex Ltd.,* 106 Nev. 705, 800 P.2d 719 (1990)

offsite distinction at page 40 of a Rule 60(b) motion, which the District Court denied. Thus, this Court can reach the onsite/offsite issue only as a review of the denial of a Rule 60(b) motion. This Court reviews the denial of a Rule 60(b) motion under an abuse of discretion standard, not the *de novo* standard evident in the Decision.

Second, the Decision ignores 2003 statutory amendments, which enlarges the class of lien claimants to include design professionals who perform offsite work including (as in this case) design work for buildings that are never constructed. When the Legislature made these amendments, it was aware of the *Fondren* doctrine and nevertheless broadened the lien statute to protect offsite work. Therefore *Fondren* notice should apply equally to onsite and offsite work: if the property owner had actual notice of offsite work, there is no need to give a prelien notice.

1. **This Court can only review the denial of a Rule 60(b) motion under an abuse of discretion standard.** Before trial, Iliescu never attempted to distinguish *Fondren* based on the onsite/offsite work

distinction.[2] The Findings of Fact, Conclusions of Law, and Decision[3] did not address the onsite/offsite distinction because Iliescu did not make the argument at or before trial. Ten months after the trial, Iliescu first presented the onsite/offsite distinction in an argument that begins on page 40 of a Rule 60(b) motion.[4] The District Court permitted voluminous briefing and two days of oral argument before ruling on the motion.[5] After the District Court denied the Rule 60(b) motion, Iliescu moved, pursuant to NRCP 52(b) and 59(e) to alter or amend the judgment.[6] This motion did not raise the onsite/offsite distinction or any other *Fondren* notice issues.

Because the onsite/offsite distinction is raised only in Iliescu's Rule 60(b) motion, this Court can only review the District Court's ruling as a

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2 See Application for Release of Mechanic's Lien (AA0001-0007); Transcript (AA0109-0168); Answer (AA0213-0229); Motion for Partial Summary Judgment (AA 0230-0340); Reply in Support of Motion for Partial Summary Judgment (AA 0435-0478); Trial Statement (AA0681-0691); Opening Statement (AA 0769-0774); Closing Argument (AA 1687-1704); Post-Trial Argument (AA 1899-1910).

3 AA 1911-1923

4 AA 1964-2065; See also opposition to Rule 60(b) motion (AA 2066-2183) and reply in support of Rule 60(b) motion (AA 2184-2208)

5 AA 2209-2256; 2258-2376.

6 Motion (AA 2384-2420); Opposition (2421-2424); Reply (2436-2442); Order Denying Motion (AA 2443-2446)

denial of the Rule 60(b) motion. "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 77, 777 (1994). The District Court has wide discretion to grant or deny a Rule 60(b) motion, and will not be reversed 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, 12, 716 P.2d 229, 230 (1986). Thus, this Court can only reverse based on the onsite/offsite distinction if it finds that (1) Iliescu properly raised the issue in a Rule 60(b) motion and (2) the District Court abused its discretion in denying the motion.

Iliescu's Rule 60(b) motion focused primarily on a claim of fraud. In its order denying the motion, the District Court rejected Iliescu's fraud claims, and noted that a Rule 60 motion may not raise legal arguments that could have been presented to the Court before or during trial.[7] This ruling is correct: "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*

[7] AA 2425-2431.

Signals, Inc. v. Applied Concepts, Inc., 247 F.Supp.2d 1233, 1235 (D.Kan. 2003).

Even though Appellants' Opening Brief acknowledges the narrow standard of review for the denial of a Rule 60(b) motion,[8] Iliescu nevertheless presented the onsite/offsite distinction as if it was subject to *de novo* review.[9] This Court's Decision does not find an abuse of discretion by the lower court. This Court merely engaged in a *de novo* review of a legal point that was never raised before judgment. In doing so, the Decision violates Nevada precedent limiting the scope of appellate review.

2. **The Court may not conduct de novo review of a legal argument that was not presented to the District Court before entry of judgment.** Parties may not raise new legal theories for the first time on appeal. *Schuck v. Signature Flight Support of Nevada, Inc.*, 126 Nev. 434, 245 P.3d 542 (2010). This rule…

> … is not meant to be harsh, overly formalistic, or to punish careless litigators. Rather, the requirement that parties may raise on appeal only issues which have been presented to the district court maintains the efficiency, fairness, and integrity of the judicial system for all parties.

Id. at 437, 245 P.3d at 544.

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8 Opening Brief at 31.

9 Opening Brief at 32-34

This litigation never focused upon the onsite/offsite distinction. The arguments below focused on whether (1) Iliescu actually knew about Steppan's work directly, (2) Iliescu had imputed knowledge based on actual knowledge of his lawyers and other agents, and (3) Iliescu's property value was enhanced because of the design work that lead to granting of valuable development entitlements for the land.

3. **The Decision overlooks the 2003 amendments to the lien statute.** Assuming this Court can properly reach the merits of Iliescu's onsite/offsite distinction, the Decision engrafts a new legal limitation on *Fondren* notice which ignores the important statutory changes enacted by the Legislature in the 2003 Session. Before the 2003 Session, NRS Chapter 108 only authorized liens for physical improvements to land:

> [A] person who **performs labor upon** or furnishes material of the value of $500 or more, to be used in the construction, alteration or repair of any building, or other superstructure… has a lien upon the premises and any building, structure and improvement thereon for….

NRS 108.222 (historical, current through 2002). Thus, at the time of *Fondren* in 1991, one who did not physically improve land had no lien rights at all.[10] Thus, *Fondren* found substantial compliance with the lien

[10] Before 2003, an architect had a lien for onsite supervision, but not for offsite design work.

statute notice requirements where the land owner had actual (or imputed) "knowledge of the construction ***on*** her property."

In the 2003 Session, the Legislature enlarged the scope of mechanics liens. NRS 108.222 provides:

> [A] **lien claimant** has a lien upon the property, any **improvements** for which the **work**, materials and equipment were furnished or to be furnished….

NRS 108.22128 defines "improvement" to mean more than physical changes. "Improvement" includes "**development**, **enhancement** or addition to property." The 2003 amendments also broadened the class of people entitled to lien rights. NRS 108.2214 defines "lien claimant:"

> "Lien claimant" means any person who provides **work**, material or equipment with a value of $500 or more to be used in or for the construction, alteration or repair of any improvement, property or work of improvement. The term includes, without limitation, every artisan, builder, contractor, laborer, lessor or renter of equipment, materialman, miner, subcontractor or other person who provides work, material or equipment, ***and any person who performs services as an architect***, engineer, land surveyor or geologist, ***in relation to the improvement, property or work of improvement.***

(Emphasis added). NRS 108.22184 defines "work:"

> "Work" means the ***planning, design***, geotechnical and environmental investigations, surveying, labor and services provided by a lien claimant for the construction, alteration or repair of any improvement, property or work of improvement whether the work is completed or partially completed.

(Emphasis added). Thus, the pre-2003 law only provided a lien for labor performed ***upon*** the premises. The post-2003 law applicable to this case provides a lien to architects who provide design and planning ***in relation to*** the premises. Here, Steppan provided a schematic architectural and engineering design needed to obtain development entitlements ***in relation to*** the property.

Legislative history further demonstrates the intention to broaden the scope of the lien statute to include Steppan's work. During the initial hearing by the Senate Judiciary Committee, a lobbyist for the American Institute of Architects said:

> Let me give you the scenario arising in the case of an architect who is called to perform services for someone who owns a piece of land. The architect draws a set of plans with elevations and all that sort of thing showing how a very good commercial project could be developed. The owner does not pay the architect and does not do the improvement. However, the owner uses the architect's plans to show to a potential buyer of that piece of property. This property has been enhanced by those plans.
> * * * *
> I am not finding things in here an architect would have a lien right against a piece of property no dirt had ever been turned upon, but for which he had, in fact, provided services that did enhance the potential value of the property to the subsequent owner. You could look at the agent of the owner, an engineer, a land surveyor. These are also people who could provide services that would improve the value of the land or enhance the value of the land. The original owner may never do anything to move a piece of dirt, but may use those plans to show and enhance the value of property as it is sold. As you

> are considering these amendments, I would like this question on the record. I do not want to slow down the progress of this bill because they have done a lot of work and we would like to see it passed and the architects included.[11]

The bill's definition of "work" (SB 206, § 23, now NRS 108.22184) was then amended to replace "labor" with "planning, design, geotechnical and environmental investigations, surveying."[12] The amendment satisfied the architects' concerns.[13]

When the Court decided *Fondren* there were no lien rights for offsite work.[14] That is the reason *Fondren* references "actual knowledge of construction ***on her property***." That is the reason *Fondren* says, "The purpose underlying the notice requirement is to provide the owner with

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[11] Minutes, Senate Committee on Judiciary (March 11, 2003), pages 10-11. (http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/2003/SB206,2003.pdf)

[12] Amendment 63. (http://www.leg.state.nv.us/Session/72nd2003/bills/Amendments/A_SB206_63.html)

[13] Minutes, Senate Committee on Judiciary (March 14, 2003), page 19.

[14] At page 9, the Decision cites *Kenneth D. Collins Agency v. Hagerott*, 211 Mont. 303, 684 P.2d 487 (1984) for the proposition that an architect has no lien unless the architect's work lead to a structural improvement. That opinion is based on a statute (quoted at West Headnote 5), which provides in relevant part: "Every... person performing any work and labor upon has a lien upon the property upon which the work or labor is done...." That Montana statute (now repealed) is similar to NRS 108.222 as the it existed before 2003. But it also distinguishes *Hagerott* from this case. For this reason, the parties did not cite *Hagerott* in their briefs.

knowledge that work and materials are ***being incorporated into the property.***" That is the reason *Fondren* referenced onsite inspections by the landowner's attorney.

It is clear that the 2003 Legislature substantively changed lien law to include liens for architectural design and planning for improvements never constructed. It is logical, then, that the doctrine that an owner's actual notice of "work" "in relation to" his or her property will substitute for the prelien notice. "[The] lien statutes are remedial in nature 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." *Las Vegas Plywood & Lumber, Inc. v. D&D Enterprises*, 98 Nev. 378, 649 P.2d 1367, 1368 (1982).[15]

In sum, when *Fondren* was decided, actual knowledge of **onsite** work was essential because the Legislature had not provided lien rights for purely offsite work. The 2003 amendments, however, extend lien rights to offsite work, including architectural designs for buildings that are never

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[15] *See also Peccole v. Luce & Goodfellow, Inc.*, 66 Nev. 360, 370-71, 212 P. 2d 718, 723-24 (1949); Sister courts likewise recognize lien statutes as remedial in nature and subject to liberal construction in favor of claimants. *E.g. BMC West Corp. v. Horkley*, 144 Idaho 890, 174 P.3d 399 (2007); *In re Regan*, 151 P.3d 1281 (Colo. 2007, en banc); *Betancourt v. Storke Housing Investors*, 31 Cal.4th 1157, 82 P.3d 286 (2003).

constructed. The logic of *Fondren* applies equally to offsite work. If a land owner has actual knowledge of the work, the land owner must ensure that the party performing the work is paid.

4. **The Court's ultimate goal should be substantial justice.**

This Court once said:

> Underlying the policy in favor of preserving laws that provide contractors secured payment for their work and materials is the notion that contractors are generally in a vulnerable position because they extend large blocks of credit; invest significant time, labor, and materials into a project; and have any number of workers vitally depend upon them for eventual payment. We determine that this reasoning is persuasive as it accords with Nevada's policy favoring contractors' rights to secured payment for labor, materials, and equipment furnished.

Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc., 124 Nev. 1102, 1116, 197 P.3d 1032, 1041 (2008)(footnote omitted). This policy should apply equally to design professionals, and without an artificial distinction between knowledge of onsite versus offsite work.

The District Court found that Iliescu (1) gave the developer authority to expose the land to liens, (2) was aware that Steppan was performing architectural design services in order to obtain valuable development entitlements, (3) signed an affidavit making the developer the owner's agent for the property, and (4) requested that the City of Reno extend the

development entitlements created by Steppan's work.[16] The Decision finds no error in these factual findings. Indeed, this Court's determination that Iliescu could not be a "disinterested owner" makes the point that Iliescu not only knew about the work, but was effectively a joint venturer with the developer.

Iliescu was enriched in several ways. The development entitlements greatly enhanced the value of Iliescu's land. When Iliescu argued for a stay pending appeal without a bond, he argued that the land was worth more than the judgment. That appraisal assumed that the property had development entitlements that did not exist before Steppan's work! Second, Iliescu received more than $1 million in non-refundable deposits to delay close of escrow during the entitlement process.

In sum, the Decision overlooks (1) the applicable appellate standard of review for denial of a Rule 60(b) motion, (2) entertains and decides a purely legal issue that was not presented to the District Court before judgment, (3) overlooks the 2003 amendments to the mechanics lien statute, and (4) results in a grossly unjust result.

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[16] Findings of Fact, ¶¶ 14- 15, 17-18; Conclusions of Law, ¶ 13 (AA 1911-1923)

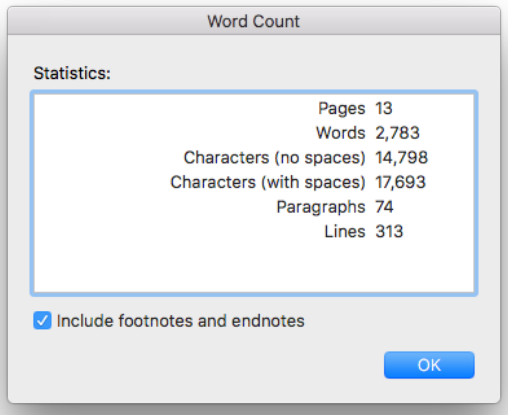
Certificate of Compliance

I certify that this petition for rehearing complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRCP 32(a)(6) because: it has been prepared in a proportionally spaced typeface using Apple Pages in Cambria, 14-point font. I further certify that this brief complies with the page limitations of NRAP 40 because the brief, including footnotes and this certificate, does not exceed 4,667 words.

Dated June 12, 2017.

HOY CHRISSINGER KIMMEL VALLAS, PC

Michael D. Hoy



Certificate of Service

Pursuant to NRAP 25(c), I hereby certify that I am an employee of Hoy Chrissinger Kimmel Vallas, PC, and that on June 12, 2017, I electronically filed through the Nevada Supreme Court's electronic filing system, the foregoing Petition for Rehearing , which will send an electronic notification to D. Albright and G. Albright, counsel for Appellants.

Shondel Seth