IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

vs.

MARK B. STEPPAN,

Respondent.

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

APPELLANTS' ANSWER TO PETITION FOR REHEARING

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COME NOW, the above captioned Appellants ("Appellants" or the "Iliescus"), and, pursuant to this Court's July 25, 2017 Order, hereby answer the June 12, 2017 Petition for Rehearing filed by Respondent Mark B. Steppan ("Petitioner" or "Steppan").

I. INTRODUCTION AND OVERVIEW

This Court has entered a decision, 133 Nev. Adv. Op. 25 (May 25, 2017)("Decision") reversing the district court's "Judgment" upholding a mechanic's lien against the Iliescus' Reno, Nevada real property. Appellant's Appendix ("AA") at AA2378-2380. The Decision directed the entry of a new judgment in favor of the Iliescus, negating that mechanic's lien, because Steppan violated NRS 108.245, by failing to ever serve the Iliescus with written notice that work had commenced and lien rights were accruing, as mandated by that statute. Decision at pp. 11-12. This Court further determined that Steppan could not rely upon the "actual notice" exception to the written notice requirements of NRS 108.245, as the cases formulating and maintaining that common law exception to the statutory mandate (the "*Fondren* actual notice cases"),[1] all involved the lien claimant's performance of observable on-site work, whereas Steppan's work was performed off-site. *Id.* at 7-9.

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[1] *Board of Trustees v. Durable Developers*, 102 Nev. 401, 724 P.2d 736 (1986); *Fondren v. KL Complex, Ltd.*, 106 Nev. 705, 800 P.2d 719 (1990); and *Hardy Companies Inc. vs. SNMARK, LLC*, 126 Nev. 528, 540 245 P.3d 1149, 1157 (2010).

Steppan's Petition does not challenge *either* of the two crucial factual premises of this Court's Decision: Steppan does not claim to have served any NRS 108.245 Notice and does not claim to have performed any on-site work.

Instead, Steppan contends, first, that the basis for this Court's Decision (distinguishing actual notice exception cases by virtue of an onsite/offsite work distinction) was not timely raised below, and was thus not a proper subject of this Court's *de novo* review, but should have been reviewed on an "abuse of discretion" standard, applicable to appeals from a Rule 60(b) Motion (the "Preservation for Appeal Argument"). Petition at pp. 1-6, and headings 1 and 2. Secondly, Steppan claims that the 2003 statutory revisions to Nevada's mechanic's lien statute require this Court to expand, not restrict, its recognition of an actual notice exception to the protections afforded to property owners via the mandates of NRS 108.245 (the "Statutory Revisions Argument"). Petition at pp. 6-11, heading 3. Finally, Steppan appeals to notions of substantial justice (the "Substantial Justice Argument"). Petition at pp. 11-12, heading 4. Each of these Arguments should be rejected.

II. RESPONSE

1. PETITIONER'S PRESERVATION FOR APPEAL ARGUMENT FAILS.

Petitioner's first argument, as described above, is based on a false premise, as the "onsite/offsite distinction" was in fact timely raised below, as part of the initial partial summary judgment arguments, and thereby preserved for this appeal.

By way of context: Steppan's failure to comply with NRS 108.245 was, of course, repeatedly referenced throughout the litigation below, and the issue of the consequences of that failure was clearly preserved for appeal, including in the Iliescus' initial petition to expunge the lien under NRS 108.2275 (AA0004); their (denied) Motion for Summary Judgment (AA00234-0235), and their Reply in support thereof (AA0442-0444). In response, Steppan has never claimed that he complied with the mandates of NRS 108.245, by ever providing the Iliescus with the written notice required thereby. Rather, Steppan has, from the outset, relied on the *Fondren* actual notice exception to the statutory requirements, to justify his claims, including in his initial response to the Iliescus' NRS 108.2275 attempt to reject his lien, and also, in his ultimately granted "Cross-Motion" for Partial Summary Judgment. AA0019-20; AA0348-350.

Contrary to Steppan's assertions, the Iliescus responded to these arguments by raising (among other contentions) the "onsite/offsite distinction." For example, in their initial Motion for Partial Summary Judgment, the Iliescus characterized the *Fondren* case as applicable where "the owner of property has actual notice of work being performed **on his or her property**" (AA0235 at ll. 15-18 – emphasis added) and noted that the *Fondren* property owner had actual notice "that construction was underway **on her property**" (*Id.* at ll. 27-28, emphasis added). The Iliescus then distinguished these facts, from the instant case, noting that *Fondren* involved "active construction" whereas the project at issue herein "was not being actively

constructed" such that Dr. Iliescu could not "observe work being performed." AA0238 at ll. 1 and 20-21; and AA0239 at l. 1.

The Iliescus even more clearly articulated this "onsite/offsite distinction" in their March 31, 2009 Reply filing, which included an Opposition to Steppan's Cross-Motion for Partial Summary Judgment. In that filing, the Iliescus argued that cases recognizing an actual notice exception to statutory written notice requirements, could be "distinguished from the instant case because they all involve some concrete evidence, . . . observed by the owner, of **work being done on the property**. . . . **In contrast,** no work had been performed **on the Iliescu property** to put Iliescu on **actual notice** that Steppan's lien could attach." AA0443, at ll. 12-23. [Emphasis added.] Steppan's responsive brief failed to directly respond to (and thus failed to refute) this argument, but indicated that the work merely needed to "benefit . . . the property" to fall within the exception (pointedly ignoring the facts of *Fondren* and *Durable Developers*, involving on-site work, and improperly conflating the question of what work is lienable, generally, with the question of what work is lienable when NRS 108.245 has been violated). AA0484 at l. 23; AA0487 at l. 16.

The Iliescus' onsite/offsite distinction arguments were ignored or rejected by the district court, when it granted partial summary judgment to Steppan on the actual notice issue (AA0508-0511). But these arguments *were* made. Thereafter, the district court repeatedly indicated that it would not reconsider the actual notice

issue or the partial summary judgment entered thereon, and that the litigants were restrained in their ability to seek reconsideration thereof until appeal. AA0643; 0770; 1468. It should thus not be of any surprise if little subsequent record of this, or of other *Fondren* arguments, exist.

Nevertheless, the issue had been timely raised and argued, prior to trial. Thus the Rule 60(b) Motion's similar onsite/offsite arguments, filed on October 27, 2014 (AA1964; AA2003-2004) *before* entry of the district court's February 26, 2015 Judgment (AA2378-80), were a reiteration of earlier arguments which had been made from the outset, including without limitation at AA0443.

Steppan's assertions that "Iliescu did not make [this] argument" at any time "before trial" but "first presented the onsite/offsite distinction in . . . a Rule 60(b) motion" filed ten months after trial (Petition at page 3, lines 1-7), is therefore simply false and inaccurate, as are the other variations thereon made in the first 6 pages of his Petition. (This is not the first time during this appeal that Steppan has placed the onus on the Iliescus to review the record for him, in order to refute an inaccurate and apparently unresearched Steppan claim that appellate arguments were supposedly not preserved below. Indeed, this seems to be a favorite ploy. *See, e.g.*, Appellants' Reply Brief ("ARB"), at pp. 11-13, 18.)

As Steppan's characterization of the record is inaccurate, his legal assertions, based thereon, that this Court may only review the lower court's determinations on a Rule 60(b) standard of review, are similarly false, and must

likewise be rejected. This Court's *de novo* review of the legal issues involved in the lower court's summary judgment ruling (AA0508-0511), applying this Court's case law to the mechanic's lien statute, was clearly appropriate. *L. Cox Constr. Co. v.CH2 Invs., LLC*, 129 Nev. 139, 142, 296 P.3d 1202, 1203 (2013) ("this court reviews questions of statutory construction and the district court's legal conclusions *de novo*."); *Cashman Equipment Co. v. West Edna Associates, Ltd.*, 132 Nev. Adv. Op. 69, 380 P.3d 844, 848 (2016)(district court's review of Nevada's mechanic's lien statute subject to *de novo* review); *MB America Inc. v. Alaska Pacific Leasing Co.*, 132 Nev. Adv. Op. 8, 367 P.3d 1286, 1287 (2016) ("this court reviews a district court's order granting summary judgment *de novo*.").

Steppan's reliance on *Schuck v. Signature Flight Support*, 126 Nev. 434, 245 P.3d 542 (2010) is misplaced. In that case, an appellant failed to raise arguments in response to a summary judgment motion, which it then raised for the first time on appeal. In this case, just the opposite occurred, as the Iliescus' opposition to Steppan's cross-motion for partial summary judgment did clearly include the "onsite/offsite distinction" arguments later reiterated in this appeal. (AA0443, at ll. 12-23).

Moreover, even if the specific "onsite/offsite distinction" argument had not been raised below (which it had), Steppan, via his own successful reliance upon the actual notice exception, himself established a basis for this Court's later *de novo* review of the legal parameters of that exception, as a matter of law. *See, e.g.,*

ARCO Products Co. v. May, 113 Nev. 1295, 1297, 948 P.2d 263, 265 (1997) (appellant's argument that the lower court had simply failed, as a matter of law, to properly resolve the economic loss defense to a negligence action, was appropriate for appellate review as a legal error, although no objection to jury instruction on this point was raised at trial). Thus, even if the Iliescus had first raised this argument in their Rule 60(b) motion (which contention is false), this Court could still have properly reversed the district court's legal reasoning in support of its summary judgment ruling, under a *de novo* review of the legal question of the meaning and extent of its actual notice exception.

Indeed, Steppan's lien foreclosure Complaint implicitly raised for the lower court's and then this Court's review, any applicable legal questions regarding his compliance with the lien statutes. *DTJ Design Inc. v. First Republic Bank*, 318 P.3d 709, 710-11, 130 Nev. Adv. Op. 5 (2014) (architectural mechanic's lien foreclosure claimant had duty to "plead and prove" the elements of his *prima facie* case, including compliance with applicable statutory prerequisites); *Schofield v. Copeland Lumber Yards, Inc.*, 101 Nev. 83, 84, 692 P.2d 519, 520 (1985) ("If one pursues his statutory remedy by filing a complaint to perfect a mechanic's lien, he necessarily implies full compliance with the statutory prerequisites giving rise to the cause of action." [citation omitted]).

2. PETITIONER'S STATUTORY REVISIONS ARGUMENT FAILS.

Petitioner's contention that this Court has overlooked certain 2003

amendments to the lien statutes, which, he avers, somehow require this Court to expand, rather than narrow, its "actual notice" exception to the mandates of NRS 108.245, is also inaccurate.

This argument is, for example, not supported by the 2003 amendments to NRS 108.245. That statute still mandates, as it did when *Fondren* was decided, that a written notice (that lien rights are being created), in the form prescribed by NRS 108.245(1), be delivered to a property owner, or, under NRS 108.245(3), the lien is not to be enforced. The information to be included within the Notice must now include information about the would-be lien claimant's identity. This Court's *Hardy* decision thus also requires that actual notice of "the identity of the third party seeking to record and enforce a lien" be established in order for the actual notice exception to apply. *Hardy*, 126 Nev. at 540, 245 P.3d at 1157. Steppan however failed to demonstrate at trial when, if ever, the Iliescus knew of his identity (AOB at pp. 37-38), and the district court failed to make the knowledge-of-identity finding required by *Hardy* to uphold Steppan's lien. AOB at pp. 38-39.

Another post-*Fondren* alteration to NRS 108.245, revised the language requiring a lien claimant to provide the mandated notice within at least 31 days after any services are commenced. Under the statute's current language, if a lien claimant remembers midway through a project to serve its NRS 108.245 Notice, the lienability of work performed after (31 days before) that point, is saved, but with earlier services still remaining unlienable. Steppan, however, never took

advantage of this provision, to send even a late NRS 108.245 Notice to the owner to save part of the lien. Steppan also failed to establish when, if ever, any alleged actual notice by the Iliescus occurred, and how much of the work liened for by Steppan was performed after (31 days prior to) that date, to be lienable under NRS 108.245(6), if the actual notice exception applied. This Court's reversal would also be appropriate on that basis, as well as on the other grounds this Court indicated it did not need to reach. Decision at p. 11 n.4.

The legislature's decision to revise the statute's timing requirement in favor of lien claimants, demonstrates that, had the legislature wished, instead, to further assist lien claimants, by simply deleting the written notice provisions of NRS 108.245 altogether, or by expressly allowing for actual, rather than written, notice of accruing lien rights, including for offsite work, it could have done so. But it did not. Thus, Steppan's claim that the 2003 amendments require this Court to expand its actual notice exception is unsupported.

Petitioner ignores these facts, and claims that, prior to 2003, lien claims could only be asserted for work performed *upon property*, and that this Court's *Fondren*, actual notice exception, only applied to on-site work *for that reason*. Petition at p. 9, ll. 9-14; p. 10, ll. 1-4. Thus, argues Steppan, as off-site work is now also lienable, this Court must expand its *Fondren* actual notice exception to NRS 108.245, to also apply against property owners who have allegedly received actual notice of offsite work, who must also now be deprived of the protections afforded

them under that statute.

But Steppan is just wrong: lien rights for offsite work *were* available prior to the 2003 amendments. As early as at least 1965, Nevada's mechanic's lien statutes allowed parties to lien for work which was "to be used" in the construction of a project, without requiring that work to be specifically performed on site. 1965 Nevada Statutes at Large, p. 1159. And as early as at least 1988, architects were pursuing mechanic's liens in Nevada, presumably on the basis that their work was "to be used" for construction of a project. *Depner Architects & Planners Inc. v. Nevada National Bank*, 104 Nev. 560, 763 P.2d 1141 (1988).

Nor is there any statement made, in any of the *Fondren* actual notice exception cases, which suggests that the reason the exception is being applied to on-site work, is because only on-site work is even lienable. Indeed, the *Hardy* decision was decided after the 2003 statutory amendments, but (i) nevertheless noted that the exception applies to work "upon" the owner's property, and (ii) still restricted, rather than expanding, that exception.

The question before the lower court, and before this Court on appeal, has never been about who is entitled to a lien, for what type of work (be it tangible onsite work or offsite design or fabrication services) but rather, who is entitled to a lien **without providing the mandated NRS 108.245 Notice**. Thus, even if Steppan's characterization of the statutory amendments were accurate, his argument improperly conflates two separate, distinct, and unrelated concepts:

what work is generally lienable vs. what work is lienable without providing the mandatory NRS 108.245 Notice. The *Fondren* case was based in part on the theory that the owner who knew that work was being performed on-site, thereby faced certain risks under NRS 108.234. *Fondren* at footnote 2. No assertion that offsite work would simply not be lienable, at all, is suggested therein. The post-2003 version of NRS 108.234(1) still states the risk to owners that work known to have been performed "upon property" can be deemed to have been performed at the instance of that property's owner.

If any work, regardless of where it was performed, were to put the owner at that same risk, then there would be no reason for NRS 108.245 to exist at all. But there is a very important reason for its existence: namely, to protect the constitutional due process rights of property owners. For example, the California Supreme Court has recognized that a state's mechanic's lien laws must meet the due process requirements of the 14th Amendment, because mechanic's liens effect a significant deprivation of a landowner's property interest, via State action. *Connolly Development, Inc. v. Superior Court*, 553 P.2d 637, 642-647 (Cal. 1976). However, that Court went on to rule that the procedural protections set forth in California's lien statute fulfill those due process requirements, including because

section 3097[2] of the statute requires that "the California claimant must notify the owner before he asserts the lien." *Id.* at 648. *See also, Connecticut v. Doehr*, 501 U.S. 1, 111 S.Ct. 2105, 2113, 115 L.Ed. 1, 12 (1991)("even . . . temporary or partial impairments to property rights that . . . liens . . . entail are sufficient to merit due process protection. Without doubt, state procedures for creating and enforcing . . . liens, are subject to the strictures of due process.")

NRS 108.245 was obviously modelled on similar provisions in other states, which exist in order to satisfy the due process protections to which property owners are constitutionally entitled. Based thereon, and given that mechanic's liens are purely a statutory creation in the first place, this Court has demonstrated keen wisdom in indicating that it will not expand its *Fondren* actual notice exception to the mandates of NRS 108.245, to the point where "the exception would swallow the rule." *Hardy*, 126 Nev. at 542, 245 P.3d at 1159. As this Court has also recently recognized, it is not appropriate for mechanic's lien litigants to ask this Court to rewrite the mechanic's lien statutes: "This court can neither supplement a . . . contractor's rights under NRS Chapter 108 nor limit [those rights]. [Where a] remedy that [a lien claimant] seeks . . . goes beyond mere interpretation of a statute [it] would require this court to legislate. However, that authority resides solely with the Legislature." *Cashman Equipment Co.*, 380 P.3d

[2] California Civil Code § 3097 (now found at § 8024) is California's equivalent to NRS 108.245, and requires the notice be provided within 20 days after commencing any work for which a lien can later be claimed.

at 851.

Steppan asks this Court to ignore that prior ruling, and the separation-of-powers principle on which it is based, in order to judicially expand his statutory rights beyond those which the legislature has afforded him, and which are, as a wholly statutory gift, subject to whatever limitations the legislature chose to impose. Steppan would also have this Court ignore the due process concerns raised by mechanic's lien statutes; ignore the legislature's response to that concern in the form of NRS 108.245; and ignore its own wise prior reticence, in its (post-2003) *Hardy* decision, to expand its judicial exception to the point where it swallows the statutory rule.

Steppan has, however, demonstrated no valid reason for this Court to pursue this rash course, which would judicially divest an increasingly large class of property owners from the due process protections afforded them by statutory mandate, and thereby strengthen potential constitutional challenges to the remainder of the lien statute.

3. PETITIONER'S SUBSTANTIAL JUSTICE ARGUMENT FAILS.

Finally, Petitioner claims that considerations of "substantial justice" require his lien against the Iliescus' wholly unimproved property to be reinstated, because the Iliescus were supposedly "enriched" by his work.

First, Steppan claims that the development entitlements greatly enhanced the value of the Iliescus' land. However, those entitlements were obtained by

attorneys, not by the architect (AA1106); were subject to various restrictions; and were ultimately insufficient to attract financing for the purchaser to close the deal. Any assertion that the value of the land has increased or decreased, in the many years after the never-closed 2005 purchase agreement, for any reason beyond the volatility in Nevada's real estate market, during those years, is simply speculation. Moreover, to the extent, if any, that the entitlements were based in whole or in part on any architectural instruments of service, that architectural work product does not belong to the Iliescus, but is owned by the architectural firm for whose work Steppan attempts to lien (AA1106-1107), and cannot be transferred by the Iliescus, in conjunction with a sale of their property, to increase the value of the property. *Id.*

Steppan also claims that the Iliescus received substantial compensation to delay the close of escrow during the entitlements process. Steppan fails to cite to the record to support the amount of compensation he claims was obtained for these extensions, let alone to demonstrate that such agreements all occurred during the entitlements process, or based thereon. But in any event:

(i) The potential purchaser, not the lien claimant, paid any escrow extension consideration. It would be pure speculation, hearsay, and conjecture to assume that that purchaser's willingness to do so was motivated, in whole or in part, by the existence of architectural services. No representatives of the purchaser testified at trial.

(ii) The value of any compensation received by the Iliescus to extend the escrow (even if it were as high as the Petition avers) would still be much lower than Steppan's $4,536,263.45 (and growing) lien (AA2379), and has clearly been more than offset by: the litigation fees and costs which the Iliescus incurred over the past 11 years; and even more so by the time value of the money which the Iliescus could have earned (and used to enjoy life, rather than litigation, in what may be one of the final decades of their elderly lives) had they been able to sell their property, which represents a substantial portion of their life savings, to a new buyer, many years ago, but for its encumbrance by the 2006 Steppan lien.

(iii) Most importantly: in lieu of, or in addition to, accepting monetary compensation for the first of such escrow extensions, which took place in September 2006 (Respondent's Supplemental Appendix at pp. RS 607-608), the Iliescus would have been far better off insisting on a release of any architectural liens, as a condition thereto. But the Iliescus did not know enough to demand or pursue such an alternative arrangement, because they had not been provided, by Steppan, with notice of his accruing lien rights, as mandated by NRS 108.245! Thus, Steppan's violation of the protections required to be afforded to the Iliescus, prejudiced them, and caused them real, practical, and substantial harm, given that they would otherwise have had an opportunity, in September of 2006, to protect themselves from Steppan's lien rights, had they learned thereof before granting an escrow extension, which they did before being served with the lien itself, as a *fait*

accompli, two months later, in November of 2006. AA1731.

This prejudice, suffered by the Iliescus, prevents Steppan from claiming substantial compliance with the lien statutes: "[T]his court has consistently held, a lien claimant has not substantially complied with the mechanic's lien statutes when the property owner is prejudiced by the absence of strict compliance." *Decision* at p. 9 [citations omitted.] (Subsequent opportunities to negotiate extensions of the escrow arose in very different circumstances, as the parties were all becoming increasingly aware of the diminishing likelihood of financing being received for the purchase of land now known to be liened.)

That Steppan would have the temerity to invoke "substantial justice" arguments is really quite startling in light of the facts of this case. Those facts include that the architect was paid **approximately $480,000.00** (AA1081 at ll. 3-5) comprising *every single dime, and more, of the hourly value of the architect's services, and of its reimbursable expenses* (AOB 20), but it somehow convinced its customer to sign a new backdated AIA Agreement, allowing for additional, windfall flat percentage fee invoices, tied to anticipated construction costs which never commenced, for its already accomplished work. After somehow procuring this signature from its customer, the architect mysteriously declined to sue that customer or any of its owners or affiliated entities on that flat fee contract, instead pursuing solely a mechanic's lien Complaint, naming solely the Iliescus, for these exorbitant flat fee amounts, which were incurring 18% contractual interest, under a

contract to which the Iliescus were not a party, and had never been advised. AOB 12-23. Furthermore, the real party in interest in this suit is not even Steppan, but his California employer, Fisher Friedman (AOB 24-27), who holds no license to perform, let alone lien for, architectural services in Nevada in the first place (AA1913; AA1481-82; AA2044), but who nevertheless caused the purported "Steppan" lien to be recorded (AA1074, AA1081-88) for its, not Steppan's, work product (AA1012 at l. 16, through AA1026), and for its, not Steppan's outstanding invoices (AOB at pp. 22-24). What "substantial justice" requires, is the rejection of this purported "Steppan" lien, which he was never required to prove up, on his own behalf, as *his* lien, in the same manner as any other lien claimant in the history of Nevada would have been required to do. ARB 22-25.

III. CONCLUSION

This Court's Decision should stand and the Petition should be rejected.

DATED this 8th day of August, 2017.

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NRAP 40 CERTIFICATE OF COMPLIANCE

1. I certify that this answer to 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 NRAP 32(a)(6) because: It has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

2. I further certify that this brief complies with the type-volume limitations of NRAP 40 because the brief, including footnotes and this Certificate, is proportionately spaced, has typeface of 14 points or more, and does not exceed 4,667 words, but rather, contains 4,538 words.

DATED this 8th day of August, 2017.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c), I certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT, and that on this 8th day of August, 2017, service was made by the following mode/method of a true and correct copy of the foregoing **APPELLANTS' ANSWER TO PETITION FOR REHEARING,** to the following person(s):

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