IN THE SUPREME COURT OF THE STATE OF NEVADA

APCO CONSTRUCTION, INC., A NEVADA CORPORATION, Appellant, vs. ZITTING BROTHERS CONSTRUCTION, INC., Respondent.	Case No.: 75197 Appeal from the Eighth Judicial District Court, the Honorable Mark Denton Presiding

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

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

1. Appellant, APCO Construction, Inc. (APCO), is not a publicly traded company, nor is it owned by a publicly traded company, and is not operating under a pseudonym.

2. Over the course of the litigation, APCO was represented in the district court by Gwen Rutar-Mullins, Esq. and Wade Gochnour, Esq. of Howard & Howard; Micah Echols, Esq., Cody Mounteer, Esq., and Jack Juan, Esq. of Marquis Aurbach Coffing; and John Mowbray, Esq., John Randall Jefferies, Esq., and Mary Bacon, Esq. of Spencer Fane LLP.

3. Micah Echols, Esq., Cody Mounteer, Esq., and Tom Stewart, Esq. of Marquis Aurbach Coffing; John Randall Jefferies, Esq., and Chris Byrd, Esq., represent APCO in this Court.

Dated this 18th day of April, 2019.

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By /s/ Tom W. Stewart
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I. JURISDICTIONAL STATEMENT

Appellant, APCO Construction, Inc. (APCO), timely appealed from an order granting partial summary judgment in favor of Respondent, Zitting Brothers Construction, Inc. (Zitting), which was certified as final under NRCP 54(b). 26 Appellant's Appendix (AA) 6052-6054. Thus, this Court has jurisdiction under NRAP 3A(b)(1).[1] As detailed below, the order granting partial summary judgment, certified as final under NRCP 54(b), is "an order finally resolving a constituent consolidated case" and is, thus, "immediately appealable as a final judgment" under NRAP 3A(b)(1). *In re Estate of Sarge*, 134 Nev., Adv. Op. 105, 432 P.3d 718, 722 (2018).

The underlying litigation involved seventeen consolidated cases and nearly ninety parties asserting claims, counterclaims, third-party claims, and claims in

[1] Additionally, APCO timely appealed from prior orders that were entered prior to this final appealable order, including the findings of fact, conclusions of law, and order granting Zitting's motion for partial summary judgment, entered on January 2, 2018, 14 AA 3239-3249; the order denying APCO's motion for reconsideration of the order granting Zitting's motion for partial summary judgment, entered on January 25, 2018, 19 AA 4474-4475; the order determining the amount of Zitting's attorney fees, costs, and prejudgment interest, entered on May 8, 2018, 23 AA 5291-5293; and the order granting the motion in limine to limit the defenses of APCO to the enforceability of pay-if-paid provisions, entered on December 15, 2017, 14 AA 3250-3255. Because the order granting partial summary judgment was certified as final under NRCP 54(b), the prior orders may properly be reviewed by this Court. *See Consol. Generator-Nevada, Inc. v. Cummins Engine Co., Inc.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998).

intervention that can generally be described as claims related to payment of either labor or materials provided to Manhattan West, a failed, large-scale condominium construction project. *See generally* 1 AA 1-8 AA 1738 (various underlying complaints and answers); *see also APCO Constr., Inc., v. Zitting Bros. Constr., Inc.*, Docket No. 75197 (Appellant's Response to Order to Show Cause, Dec. 20, 2018). The district court action was initiated in 2008 during the economic recession, endured three appeals, and lasted approximately ten years. *Id.* at 1-2. Eventually, the district court ordered the sale of Manhattan West and ordered that the sale would be "free and clear of all liens," including liens asserted by APCO and Zitting, and that "all liens on [Manhattan West] . . . be transferred to the net proceeds from the sale." 8 AA 1816; *see also* 8 AA 1742-1808 (ordering sale of property). However, the district court ordered the net proceeds from the sale be transferred into an interest-bearing account pending resolution of the ongoing dispute over priority that had emerged between Manhattan West's lender, Scott Financial Corporation, and the various mechanic's lienholders, including APCO and Zitting. *See* 8 AA 1816-1818; *see also In re Manhattan W. Mech.'s Lien Litig.*, 131 Nev., Adv. Op. 70, 359 P.3d 125 (2015). Eventually, this Court determined "the priority of the mechanic's lien remains junior to the amount secured by the original senior lien" held by Scott Financial Corporation. *In re Manhattan W. Mech.'s Lien Litig.*, 131 Nev., Adv. Op. 70, 359 P.3d at 128.

Following this Court's priority determination, the district court eventually ordered the proceeds of the sale disbursed to Manhattan West's lender, Scott Financial Corporation. 8 AA 1816-1818 (releasing net proceeds from the sale to Scott Financial Corporation).

Following the sale of the property and despite the massive number of parties and claims involved in the consolidated action, several events disposed of a vast number of the remaining parties and claims prior to trial—including the order granting partial summary judgment on appeal here. *See APCO Constr., Inc., v. Zitting Bros. Constr., Inc.*, Docket No. 75197, at 3-7 (Appellant's Response to Order to Show Cause, Dec. 20, 2018). The first such event was the October 7, 2016 order adopting the special master's recommendation that any party who had not completed the special master's questionnaire was dismissed from the litigation. 8 AA 1819-1822. Indeed, the special master ordered every party that wished to proceed in the litigation to complete a questionnaire by September 23, 2016 and warned that any party that did not would be deemed to have "abandoned any claim related to this litigation." 8 AA 1820. Following that order, only twenty parties remained in the litigation, including, among others, Zitting and APCO. *See* 8 AA 1820 (listing remaining parties).

The next such event took place on September 5, 2017 at a calendar call on the claims of the remaining parties in the case. 10 AA 2350-2351. During the

calendar call, APCO and other parties orally moved to dismiss those parties that had not filed their pre-trial disclosures. 10 AA 2350. The district court set the final pre-trial disclosure date for September 8, 2017. 10 AA 2350. The district court set a follow-up hearing on the matter for September 11, 2017. 10 AA 2351. At that hearing, and pursuant to the district court's order, only fifteen parties remained in the litigation, including, among others, Zitting and APCO. 10 AA 2351 (listing remaining parties). Then, several more parties were dismissed either by stipulation or summary judgment. *See* 8 AA 1823-1830.

Zitting had partial summary judgment entered against APCO on January 2, 2018, prior to trial, which is the underlying judgment on appeal here.[2] 14 AA 3239-3249. Although Zitting initially brought claims against APCO and other parties, at the time Zitting moved for partial summary judgment, Zitting had no other claims or defenses pending against any other party in the litigation. *See generally APCO Constr., Inc., v. Zitting Bros. Constr., Inc.*, Docket No. 75197

[2] APCO prevailed at trial against the remaining subcontractors, each of whom had nearly identical subcontracts, and at least one subcontractor has appealed the outcome of that trial. *See APCO Constr., Inc. v. Zitting Bros. Constr., Inc.*, Docket No. 75197 (Appellant's Response to Order to Show Cause, Dec. 20, 2018) at 8-9; *see also Helix Elec. of Nev., LLC v. APCO Constr., Inc.*, Docket No. 76276 (Notice of Appeal, July 5, 2018); *Helix Elec. of Nev., LLC v. APCO Constr., Inc.*, Docket No. 77320 (Notice of Appeal, Nov. 5, 2018). APCO has also lodged a cross-appeal from the trial. *See Helix Elec. of Nev., LLC v. APCO Constr., Inc.*, Docket No. 77320 (Notice of Cross-Appeal, Nov. 5, 2018).

(Appellant's Response to Order to Show Cause, Dec. 20, 2018) at 3 n.2, 7-8. Zitting moved for partial summary judgment on its claims of breach of contract and NRS 108 claims against APCO. 8 AA 1891-10 AA 2198. Zitting's motion for partial summary judgment was granted on its breach of contract and NRS 108 claims, and the district court ordered that, as a result, all of Zitting's remaining claims were moot. 14 AA 3239-3249. Accordingly, the partial summary judgment order disposed of all of Zitting's claims and defenses in the multi-party action.

APCO timely moved for reconsideration of the order granting partial summary judgment. 16 AA 3634-19 AA 4344. The district court denied APCO's motion for reconsideration, 19 AA 4474-4475, and APCO timely appealed the order denying APCO's motion for reconsideration and the order granting partial summary judgment, 21 AA 4752-23 AA 5288. The district court then entered an order awarding Zitting its attorney fees and costs. 23 AA 5291-5293. APCO timely appealed that order. 23 AA 5305-25 AA 5871.

Eventually, APCO moved for NRCP 54(b) certification of the partial summary judgment order, 25 AA 5872-26 AA 6038, because it was "a final judgment as to one or more but fewer than all of the parties" and "there [wa]s no just reason for delay." NRCP 54(b). The district court granted that motion, and certified as final the order granting Zitting's motion for partial summary judgment. 26 AA 6052-6054. As a result, the partial summary judgment order "finally

dispose[d] of all claims and defenses of one . . . part[y] in a multi-party action, leaving the action pending as to the claims and/or defenses of other parties." Nevada Appellate Practice Manual § 3:37 (2018 ed.) (citing *Loomis v. Whitehead*, 124 Nev. 65, 67 n.3, 183 P.3d 890, 891 n.3 (2008)).

Although other constituent cases remained pending at the time summary judgment was entered against APCO, "an order finally resolving a constituent consolidated case is immediately appealable as a final judgment even where the other constituent case or cases remain pending." *In re Estate of Sarge*, 134 Nev., Adv. Op. 105, 432 P.3d 718, 719-720 (2018). Consolidated cases "retain their separate identities so that an order resolving all of the claims in one of the consolidated cases is immediately appealable as a final judgment under NRAP 3A(b)(1)." *In re Estate of Sarge*, 134 Nev., Adv. Op. 105, 432 P.3d at 722. APCO timely appealed from that order. 26 AA 6064-29 AA 6854. Thus, the order granting partial summary judgment, certified as final under NRCP 54(b), grants this Court jurisdiction pursuant to NRAP 3A(b)(1).

II. ROUTING STATEMENT

The Supreme Court should retain this case pursuant to NRAP 17(a)(11) because it raises as principal issues several questions of statewide public importance, namely whether payment preconditions and agreed-upon payment schedules are valid conditions precedent to payments when not combined with a

waiver of a mechanic's lien, as announced by this Court in *Padilla Constr. Co. of Nevada v. Big-D Constr. Corp.*, Docket No. 67397, 2016 WL 6837851 (Order of Affirmance, Nov. 18 2016) (unpublished); whether NRCP 26(e)(2)'s requirement for a party to "seasonably" amend prior interrogatory responses is inapplicable when the opposing party has actual knowledge and evidence of the information that would otherwise be amended; and whether, under NRS 108.239(12), a prime contractor with no ownership interest in a subject property can be personally liable for a deficiency judgment after the statutory foreclosure of that property did not result in sufficient funds to satisfy all mechanic's liens. Additionally, issues raised in this appeal do not fall within those issues that are presumptively assigned to the Court of Appeals as identified in NRAP 17(b). Thus, the Supreme Court should retain this appeal.

III. ISSUES ON APPEAL

1. Whether payment preconditions and agreed-upon payment schedules are valid conditions precedent to payments when not combined with a waiver of a mechanic's lien as announced in *Padilla Constr. Co. of Nevada v. Big-D Constr. Corp.*, Docket No. 67397, 2016 WL 6837851 (Order of Affirmance, Nov. 18 2016) (unpublished);

2. Whether NRCP 26(e)(2)'s requirement for a party to "seasonably" amend prior interrogatory responses is inapplicable when the opposing party is in

possession of the information and has actual knowledge of the information that would otherwise be amended or, under NRCP 15(b), that issue should be tried by consent;

3. Whether, under NRS 108.239(12), a prime contractor with no ownership interest in a subject property can be personally liable for a deficiency judgment after the statutory foreclosure of that property did not result in sufficient funds to satisfy all mechanic's liens.

IV. STATEMENT OF THE CASE

The genesis of this case is a failed, large-scale condominium construction project, Manhattan West, whose owner and developer, Gemstone Development West, Inc. (Gemstone), lost financing and stopped work prior to the project's completion. As a result, the project's contractors—including the prime contractor, APCO, and a subcontractor, Zitting—went unpaid.[3]

In the immediate aftermath of the project's failure, contractors filed competing mechanics' liens on the property and began litigating lien priority against Gemstone's lender. Ultimately, this Court held in favor of the lender, and

[3] Between APCO's $8,000,000 of unpaid labor and supplies on Manhattan West, 17 AA 3869, and Zitting's eventual judgment in excess of $900,000 entered against APCO, 15 AA 5299-5300, APCO lost almost $9,000,000 as a result of Gemstone's failure to secure funding for Manhattan West.

determined "the priority of the mechanic's lien[s] remains junior to the amount secured by the original senior lien."[4]

Following the priority determination, a statutory foreclosure sale occurred, and the proceeds went to Gemstone's lender. Zitting then pursued APCO for certain payments that Gemstone failed to remit, eventually prevailing before the district court on partial summary judgment as a result of a materially false affidavit signed by Zitting's NRCP 30(b)(6) designee.

However, in precluding APCO's affirmative defenses by order in limine and in ordering partial summary judgment, the district court erred in several ways: first, Zitting ignored the agreed-upon payment schedules and failed to meet the agreed-upon conditions precedent to receiving payment and, thus, was not entitled to receive payment; second, even if Zitting had met the conditions precedent, APCO never received those monies from Gemstone, and, thus, APCO was not contractually obligated to provide them to Zitting; third, APCO's affirmative defenses involving these conditions precedent were disclosed to Zitting, or were in Zitting's possession, throughout the litigation, and, thus, the district court improperly excluded them; fourth, because Zitting had fair notice and would not be prejudiced by conditions precedent defenses, the district court should have allowed

[4] *See In re Manhattan W. Mech.'s Lien Litig.*, 131 Nev., Adv. Op. 70, 359 P.3d at 125.

them to be tried by consent; fifth, a prime contractor with no ownership interest in a subject property cannot be personally liable for a deficiency judgment after the statutory foreclosure of that property; and, finally, at a minimum, Zitting's own contradictory testimony, when viewed in a light most favorable to the non-moving party, created a genuine issue of material fact that precluded summary judgment. As a result, summary judgment was improper, and this Court should reverse.

V. STANDARDS OF REVIEW

Questions of law and statutory interpretation are reviewed de novo. *N. Nevada Homes, LLC v. GL Constr., Inc*., 134 Nev., Adv. Op. 60, 422 P.3d 1234, 1236 (2018). Likewise, a district court's order granting summary judgment is reviewed de novo. *Nevada Recycling & Salvage, Ltd. v. Reno Disposal Co., Inc.*, 134 Nev., Adv. Op. 55, 423 P.3d 605, 607 (2018) (citing *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005)). Additionally, "[w]hen the facts in a case are not in dispute, contract interpretation is a question of law, which this [C]ourt reviews de novo." *Klabacka v. Nelson*, 133 Nev., Adv. Op. 24, 394 P.3d 940, 946 (2017). A district court's decision to exclude evidence, however, is reviewed for an abuse of discretion. *Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev., Adv. Op. 37, 396 P.3d 783, 790 (2017).

VI. FACTUAL BACKGROUND

A. THE PRIME CONTRACT.

In late 2007, Gemstone hired APCO as the prime contractor for Manhattan West. 8 AA 1874-1916 (the prime contract). As the prime contractor, APCO was authorized to "engage . . . subcontractors . . . to complete" work on Manhattan West. 8 AA 1879. Additionally, the prime contract specificed that APCO would be paid incrementally, according to the work performed on the project—an arrangement known as "progress payments." 8 AA 1898-1902.

The prime contract outlined that "[o]n the first business day of each month, [APCO] and [Gemstone] shall meet and review the Work that was completed during the previous month and the corresponding payment required for such Work." 8 AA 1898. Two days later, APCO would submit to Gemstone an "application for payment" that would "show the [p]ercentage of [c]ompletion of each portion of the [w]ork as of the end of the period covered by" the application. 8 AA 1898. Within twelve days of receipt of that application for payment, Gemstone would provide to APCO the progress payment, subject to other contractual deductions, to compensate APCO for the work performed on Manhattan West. 8 AA 1899.

Additionally, the prime contract specified that, in the event of a termination of the prime contract, each subcontract "for a portion of the [w]ork is hereby

assigned by [APCO] to [Gemstone]" and that "[Gemstone] shall pay the corresponding [subcontractor] any undisputed amounts owed for any [w]ork completed by such [subcontractor], prior to the underlying termination for which [Gemstone] had not yet paid [APCO] prior to such underlying termination." 8 AA 1909.

B. THE SUBCONTRACT.

About two months later, APCO hired Zitting as a subcontractor to provide framing materials and labor at Manhattan West. To ratify this agreement, APCO and Zitting entered into a subcontract for Zitting's framing and drywall services (the subcontract). 9 AA 1918-1950.

The subcontract set forth, among other things, that Zitting would be paid per building, subject to an agreed-upon payment schedule, certain conditions precedent to payment, and to a "pay-if-paid" restriction—meaning that "[a]ny payments to [Zitting] [were] conditioned upon receipt of the actual payments by APCO from [Gemstone]." 9 AA 1920. In assenting to this pay condition, Zitting "agree[d] to assume the same risk that [Gemstone] may become insolvent that [APCO] assumed by entering into" the prime contract. 9 AA 1920-1921.

Further, like APCO, Zitting would also be paid progress payments. The subcontract defined Zitting's progress payment schedule and specified that

> As a condition precedent to receiving partial payments from [APCO] for Work performed, [Zitting] shall execute and deliver to [APCO], with its application for payment, a full and complete release . . . of all claims and causes of action [Zitting] may have against [APCO] and [Gemstone] through the date of the execution of said release, save and except those claims specifically listed on said release and described in a manner sufficient for [APCO] to identify such claim or claims with certainty . . . , [Zitting] herein agrees to assume the same risk that [Gemstone] may become insolvent that [APCO] has assumed by entering into the [prime contract] with [Gemstone].

9 AA 1920.

The subcontract further provided that "[p]rogress payments will be made by [APCO] to [Zitting] within 15 days after [APCO] actually receives payment for [Zitting]'s work for [Gemstone]." 9 AA 1920.

And, like APCO, Zitting would have 10% of the progress payment withheld until certain conditions precedent were met, an arrangement known as "retention payments." 9 AA 1921. The subcontract set forth the retention payment schedule that required five conditions precedent: (1) completion of drywall within the buildings;[5] (2) the approval and final acceptance of building work by Gemstone; (3) receipt of final payment by APCO from Gemstone; (4) Zitting's delivery of all as-built drawings for its scope of work and other close-out documents to APCO; and (5) Zitting's delivery of releases and waiver of claims from all of Zitting's

[5] The subcontract states "[c]ompletion of the entire building" as a condition precedent to the lease of retention payments, and later specifies that a "[b]uilding is considered complete as soon as drywall is completed." 9 AA 1921.

laborers, material and equipment suppliers, and subcontractors providing labor, materials or services to Manhattan West. 9 AA 1921.

The subcontract further required that Zitting needed to meet certain, specified conditions precedent to be entitled to change order payments. 9 AA 1921. Those conditions precedent were:

> [Zitting] agrees that [APCO] shall have no obligation to pay [Zitting] for any changed or extra work performed by [Zitting] until or unless [APCO] has actually been paid for such work by [Gemstone] unless [APCO] has executed and approved change order directing [Zitting] to perform certain changes in writing and certain changes have been completed by [Zitting].

9 AA 1921.

Finally, the subcontract specified that, if the prime contract was terminated, "[Zitting] shall be paid the amount due from [Gemstone] to [APCO] for [Zitting]'s completed work . . . after payment by [Gemstone] to [APCO]." 9 AA 1929.

C. GEMSTONE STOPS WORK BEFORE COMPLETION OF MANHATTAN WEST.

In late 2007, work began on Manhattan West. 8 AA 1834. In mid-2008, however, Gemstone purported to terminate the prime contract and stopped paying APCO for its work on Manhattan West. 8 AA 1867. As a result, on August 21, 2008, APCO stopped worked on the project and provided written notice of its intent to stop work to the subcontractors, including Zitting. 8 AA 1864-1867. The unpaid amounts owed by Gemstone to APCO included amounts earned based on

Zitting's work under the subcontract. 8 AA 1864. Following APCO's departure, APCO assigned to Gemstone all of the subcontracts, including Zitting's subcontract, and Gemstone hired a new prime contractor to replace APCO. 8 AA 1909. Zitting continued work on Manhattan West after APCO left, and did not leave the project until December 2008, when Manhattan West's lender stopped funding the project and all contractors ceased work. 8 AA 1850. However, APCO ensured that Zitting was paid for all work, less retention and certain unapproved change orders, performed while APCO was the prime contractor. 10 AA 2285. Zitting did not invoice APCO after June 30, 2008, for work performed on Manhattan West. 10 AA 2285. In total, APCO lost nearly $8,000,000 on the job. 17 AA 3868-3869. Following APCO's departure, Gemstone hired Camco as the prime contractor for Manhattan West. 12 AA 2678.

VII. PROCEDURAL HISTORY

Less than a year later, Zitting filed its complaint against APCO, alleging claims for, among other things, breach of contract and foreclosure of Zitting's mechanic's lien, seeking amounts allegedly owed for retention and change order payments.[6] 4 AA 793-810. Zitting's complaint sought damages for retention and change order payments allegedly owed by APCO. 4 AA 793-810.

[6] As noted in the jurisdictional statement, Zitting's complaint was one of seventeen consolidated cases, involving nearly ninety parties all asserting claims,

APCO timely answered Zitting's complaint. 5 AA 1106-1117. In doing so, APCO asserted affirmative defenses for, among other things, Zitting's failure to meet conditions precedent to payment, 5 AA 1113, and Gemstone's failure to pay APCO for Zitting's work,[7] 5 AA 1112.

A. INTERROGATORIES.

In March 2010, Zitting sent APCO interrogatories, *see* 9 AA 2118-2164, asking, among other things, about the basis of APCO's conditions precedent defense, 9 AA 2138. APCO's initial interrogatory responses indicated that APCO would rely on the enforceability of the pay-if-paid provision in the subcontract to excuse payment to Zitting. *See* 9 AA 2122-2139.

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counterclaims, third-party claims, and claims in intervention related to payment of either labor or materials provided to Manhattan West. Further description of the various claims and parties is provided in APCO's response to this Court's order to show cause. *See APCO Constr., Inc., v. Zitting Bros. Constr., Inc.*, Docket No. 75197 (Appellant's Response to Order to Show Cause, Dec. 20, 2018).

[7] As noted above, the subcontract required (1) completion of drywall within the buildings; (2) the approval and final acceptance of the work by Gemstone; (3) receipt of final payment by APCO from Gemstone; (4) Zitting's delivery of all as-built drawings and other close-out documents to APCO; and (5) Zitting's delivery of releases and waiver of claims. 9 AA 1921. The subcontract further states that "[c]ompletion of the entire building" is a condition precedent to the release of retention payments, and specifies that a "[b]uilding is considered complete as soon as drywall is completed." 9 AA 1921. APCO's assertion that Zitting failed to meet these conditions precedent became known as APCO's "conditions precedent" defenses, while APCO's assertion that Zitting ignored the agreed-upon payment schedule became known as APCO's "payment schedule" defenses.

In 2017, following a lengthy writ proceeding that effectively halted the underlying litigation,[8] Zitting served APCO with another set of interrogatories similar to those served in 2010. *See* 11 AA 2520-2570. The interrogatories requested, among other things, APCO's basis for its condition precedent defense. 11 AA 2538. APCO responded to Zitting's interrogatories indicating, among other things, the pay-if-paid provision in the subcontract, alleged problems with the quality of Zitting's work, and Zitting's continuation of work on the project following APCO's termination as the foundations of its defense. 11 AA 2538-2539.

B. DEPOSITIONS.

In mid-2017, Zitting deposed two of APCO's NRCP 30(b)(6) designees—one for construction topics and another for accounting topics. 8 AA 1853-1872 (construction designee); 17 AA 3900-4013 (accounting designee). In noticing those depositions, Zitting requested the designees be prepared to testify on topics including, among others, "[a]ll facts related to [APCO's] defenses against [Zitting]'s claims as alleged in [Zitting]'s complaint in this case." 17 AA 3857-3860.

[8] *See In re Manhattan W. Mech.'s Lien Litig.*, 131 Nev., Adv. Op. 70, 359 P.3d 125 (2015).

APCO's construction designee testified that Gemstone's failure to pay APCO was the reason for APCO's nonpayment of Zitting. 8 AA 1853-1872.

Additionally, APCO's accounting designee testified about the facts that gave rise to several of APCO's defenses, including that Zitting was not entitled to payment under the agreed-upon payment schedule and did not meet the conditions precedent of the subcontract's retention payment:

> [Zitting's counsel]: You testified that Zitting would not get . . . [retention payments] until certain conditions were met, correct?
>
> [APCO accounting designee]: Yes, sir.
>
> [Zitting's counsel]: Until those conditions were met, was there an actual retention check being issued to anyone and held by anyone?
>
> [APCO accounting designee]: No.

13 AA 2857.

Zitting's counsel asked APCO's accounting designee for clarification on this point, and APCO's accounting designee maintained that the conditions precedent to payment were not met:

> [Zitting's counsel]: Let me clarify. When you say completed by all subcontractors, that's only when the retention is being paid to Zitting, correct?
>
> [APCO accounting designee]: The project had to be completed in its entirety. Th[e] [subcontract] was bound to the [prime contract]. [Zitting] signed [the subcontract, which means] . . . [Zitting] [is] bound to the same terms of the [prime contract]. The [prime contract]

states that no retention will be released until the entire project is completed in its entirety.

13 AA 2858.

Asked a third time, APCO's accounting designee testified that retention payments were not issued to Zitting because they were not due under the payment schedule and the express conditions precedent to payment were not satisfied when APCO was terminated from Manhattan West and the subcontract assigned:

> [Zitting's counsel]: Right, so the only reason why the retention was not paid right away was that there were other conditions that may depend on other subcontractors, correct?
>
> [APCO accounting designee]: The job in its entirety.
>
> [Zitting's counsel]: Earlier you testified that the retention would be released once the entire project is complete; is that correct?
>
> [APCO accounting designee]: Yes.

13 AA 2858.

Given APCO's precondition defenses in the interrogatory answers, Zitting's counsel further questioned APCO's accounting designee about the precondition requirements in the subcontract:

> [Zitting's counsel]: Can I have you read [the definition of retention precondition language within the subcontract, 9 AA 1921], where it starts with "the ten percent withheld" into the record, please.
>
> [APCO accounting designee]: "The ten percent withheld retention shall be payable to subcontractor upon and only upon the occurrence of the following events, each of which is a condition precedent to the

> subcontractor's right to receive final payment hereunder and payment of such retainer."
>
> [Zitting's counsel]: Earlier you talked about how the release of retention is conditioned precedent to the completion. Can I have you read the handwritten part at the end of section 3.8 [of the subcontract, 9 AA 1921] into the record.
>
> . . .
>
> [APCO accounting designee]: "Building is considered complete as soon as the drywall is complete."

13 AA 2858.

Additionally, APCO's accounting designee testified that not all of Zitting's change order work was approved by Gemstone, a condition precedent to Zitting being paid under the change order payment schedule. 13 AA 2864-2866. In discussing accounting figures showing change order work completed, APCO's accounting designee testified that, "[n]ot all of it was approved." 13 AA 2865. Zitting's counsel asked for clarification, and was provided additional testimony regarding Zitting's failure to meet conditions precedent to payment:

> [Zitting's counsel]: Is there a reason for APCO to submit a bill containing change orders that was not approved by [Gemstone]?
>
> [APCO accounting designee]: [Gemstone] was the one that would determine what was approved. If Zitting gave [APCO] a change order billing, [APCO] would give it to [Gemstone]. [Gemstone] would say yes or no.
>
> [Zitting's counsel]: Understood. So during the application review process that's when, as far as you know, [Gemstone] would approve or disapprove of the change order work being billed, correct?

[APCO accounting designee]: Correct.

13 AA 2865.

C. APCO NOTICES ZITTING'S NRCP 30(b)(6) DEPOSITION

On March 29, 2017, APCO noticed Zitting's NRCP 30(b)(6) deposition. 18 AA 4018-4025. Upon Zitting's request, APCO and Zitting agreed to continue the deposition to permit the parties to spend less on attorney fees and more time engaging in settlement discussions. 16 AA 3731. Three months later, APCO re-noticed Zitting's NRCP 30(b)(6) deposition, this time for June 28, 2017. 19 AA 4290-4297. Once again, upon Zitting's request, APCO and Zitting agreed to postpone the deposition to engage in further settlement discussions. 16 AA 3731.

D. ZITTING'S MOTION FOR PARTIAL SUMMARY JUDGMENT.

1. Zitting moves for partial summary judgment and mischaracterizes APCO's defenses for non-payment.

On July 31, 2017, despite agreeing the postpone their own NRCP 30(b)(6) deposition to engage in further settlement discussions, Zitting filed a motion for partial summary judgment against APCO. 8 AA 1831-10 AA 2198. Zitting sought summary judgment on its breach of contract and NRS 108 claims.[9] 8 AA 1831-

[9] NRS 108 governs, generally, the process for perfecting and foreclosing on statutory liens, including mechanics' liens. *See generally* NRS 108.221–108.246.

1841. Zitting's motion asserted that, despite APCO's accounting designee testimony regarding Zitting's failure to meet conditions precedent to payment and APCO's eighteen other affirmative defenses, that APCO's sole basis for refusing to pay Zitting was a pay-if-paid defense. 8 AA 1838-1839. Implicitly recognizing the subcontract's retention payment schedule and preconditions and Zitting's burden to prove that it satisfied all conditions precedent as part of its claim, Zitting's owner and NRCP 30(b)(6) designee provided an affidavit that, contrary to the testimony of APCO's accounting designee, represented that Zitting had met the five preconditions for the retention payment schedule:

> 7. By the time [Manhattan West] shut down, Zitting had completed its scope of work for two buildings on the Project—Buildings 8 and 9. The drywall was complete for those two buildings.
>
> 8. Zitting had submitted close-out documents for its scope of work, including as-built drawings and releases of claims for Zitting's vendors.
>
> 9. I am not aware of any complaints with the timing or quality of Zitting's work on [Manhattan West]. As far as I am aware, [Gemstone] has approved the timing and quality of Zitting's work.

8 AA 1850.

2. APCO opposes summary judgment and demonstrates a litany of genuine issues of material fact precluding summary judgment.

In opposing partial summary judgment, APCO cited testimonial and documentary evidence that demonstrated genuine disputes over a litany of material

facts, 10 AA 2264-2329, including whether Zitting met the requisite conditions precedent to payment, 10 AA 2266-2267; whether Zitting's drywall was complete as required for a release of retention payments, 10 AA 2267; whether Zitting invoiced APCO after June 30, 2008, 10 AA 2267-2268; whether Zitting's purported pay applications were inconsistent or ever received by APCO, 10 AA 2267-2268; whether Zitting segregated the amount of work it allegedly completed under APCO or Camco in calculating its purported damages, 10 AA 2268; the value of Zitting's completed work (and whether it was ever submitted, approved, or rejected by APCO or Camco), 10 AA 2268; whether Zitting ever submitted the required close-out documents, 10 AA 2269; and whether Zitting received a notice of stop work, 10 AA 2269.

To authenticate and support the issues of material fact presented by the opposition, APCO provided the declaration of APCO's accounting designee, 10 AA 2285-2286; photos showing, unequivocally, the drywall on the relevant portions of Manhattan West was not complete and, thus, that acknowledged preconditions to payment had not occurred, 10 AA 2288-2302; the final, June 30, 2008, Zitting invoice and application for payment received by APCO, 10 AA 2304-2307; APCO's stop-work notice served on Zitting in August, 2008, 10 AA 2309-2310; and subsequent Zitting invoices and applications for payment directed to Camco following APCO's termination, 10 AA 2312-2329.

3. Zitting replies and fails to address crucial disputed facts.

On reply, Zitting failed to address four of APCO's disputed facts: (1) Camco's responsibility for the amount owed to Zitting, (2) Zitting's failure to submit the pay applications at issue, (3) the claimed change orders were never approved, and (4) the incomplete drywall. 10 AA 2358-2413.

4. The district court allows additional discovery before deciding partial summary judgment.

On October 5, 2017, at the initial hearing set for Zitting's motion for partial summary judgment, the district court reopened discovery to allow the parties forty-five days to complete depositions that had been intentionally delayed per the parties' mutual agreement, including the deposition of Zitting's NRCP 30(b)(6) designee. 11 AA 2414-2433; 17 AA 3880.

E. ZITTING'S NRCP 30(B)(6) DESIGNEE DIRECTLY CONTRADICTS HIS EARLIER SWORN TESTIMONY DURING HIS DEPOSITION.

Following the district court reopening discovery, Zitting's NRCP 30(b)(6) designee was deposed. Contrary to his earlier sworn affidavit to the district court, 8 AA 1850, Zitting's designee's testimony confirmed that Zitting did not meet the five conditions precedent to be entitled to any retention payment. 12 AA 2671-2701. First, contrary to his earlier declaration, Zitting's designee testified the drywall was not, in fact, complete:

> [APCO's counsel]: Okay. So as you sit here today, are you able to testify as to whether the drywall was complete prior to the time you stopped working for APCO on [Manhattan West]?
>
> [Zitting's designee]: I can testify that the first layer, if you will, of drywall was complete and the only thing that was, to my knowledge, not complete was some soffits in the kitchens . . . So they were not done . . . And so there was some open soffits that they were
>
> still waiting for clarification or design on. And to my knowledge, that's the only thing that was not complete, in terms of drywall.

12 AA 2678.

When presented with documentation showing the drywall throughout Manhattan West was either incomplete or not started, Zitting's designee could not provide "any facts, documents, or information to rebut" the documentary evidence demonstrating the condition precedent had not been fulfilled:

> [APCO's counsel]: Continuing on to the next page [of the deposition exhibit], Building 9, it says, Corridors, drywall has not started. First floor corridor lid framing is 70 percent complete and then the drywall itself is shown as being 55 to 70 percent complete depending upon the building. My question to you is: Sitting here as the corporate designee for Zitting, do you have any facts, documents, or information to rebut these purported percentages of completion for the drywall on Buildings 8 and 9?
>
> [Zitting's designee]: I don't.

12 AA 2695 (discussing 12 AA 2751-2766).

Then, again contrary to his earlier declaration, Zitting's designee testified he had no knowledge as to whether Zitting's work was approved by Gemstone, another explicit precondition to payment:

> [APCO's counsel]: [The subcontract requires] . . . the approval and final acceptance of the building work by [Gemstone]. While you were working for APCO, did that occur, to your knowledge?
>
> [Zitting's designee]: I have no knowledge of that.

12 AA 2693.

As for the third precondition, APCO's receipt of final payment from Gemstone, Zitting testified:

> [APCO's counsel]: Okay. Next item is, receipt of final payment by [APCO] from [Gemstone]. Do you have any personal knowledge or information to suggest whether that occurred?
>
> [Zitting's designee]: I do not.

12 AA 2679.

As for the fourth precondition requiring Zitting to submit close-out documents for its scope of work—and again directly contrary to his earlier declaration testimony that Zitting "had submitted close-out documents for its scope of work, including as-built drawings and releases of claims," 8 AA 1850—Zitting's designee testified:

> [APCO's counsel]: [The subcontract requires] delivery to [APCO] from [Zitting], all as-built drawings for its scope of work,

> and other closeout documents. Did Zitting ever satisfy that requirement?
>
> [Zitting's designee]: I don't recall.
>
> [APCO's counsel]: Do you know?
>
> [Zitting's designee]: I don't recall.
>
> [APCO's counsel]: Prior to today, have you seen any records in your file that would reflect the transmittal of that type of closeout documentation and as-builts?
>
> [Zitting's designee]: Not that I recall.

12 AA 2679.

At the deposition, Zitting's designee also admitted that Zitting agreed to a change order payment schedule. 12 AA 2680. In fact, Zitting added the language confirming that it was required to have an "executed and approved change order" to receive payment for change orders if Gemstone did not pay APCO for the change order. 12 AA 2680 (discussing 9 AA 1921). Zitting's designee admitted the same in his deposition:

> [APCO's counsel]: . . . [I]f I understand your testimony, your entitlement to a change order could be determined separate, apart from whether the owner paid APCO, if you had executed approved change orders?
>
> [Zitting's designee]: That was my intention here.

12 AA 2679.

Zitting's designee then confirmed Zitting could not prove that APCO was paid for the change orders that Zitting submitted, or that it had "executed and approved change orders" for some change orders for which it sought payment:

> [APCO's counsel]: Okay -- do you have executed and approved change order forms from APCO on those [unpaid change order claims]?
>
> [Zitting's designee]: Not on all of them.
>
> . . .
>
> [APCO's counsel]: . . . [A]s the corporate designee, do you have any information, documentation, evidence to suggest that APCO was paid your retention that you're seeking in this action?
>
> [Zitting's designee]: Not that I know of.
>
> [APCO's counsel]: As you sit here today as the corporate designee, do you have any documents, facts, information to suggest that APCO received payment for the change orders you're seeking payment for in this action?
>
> [Zitting's designee]: Not that I know of.

12 AA 2681.

F. APCO FILES SUPPLEMENTAL BRIEFING AND SUPPLEMENTS ITS PRIOR INTERROGATORY ANSWERS FOLLOWING THE CONTRADICTORY TESTIMONY.

The critical contradictions and admissions revealed in Zitting's designee's deposition testimony demonstrated that Zitting was not entitled to payment from APCO and that there were further disputes over the material facts at issue in the lawsuit. As a result, on November 6, 2017, APCO filed supplemental briefing to

"account for the recent deposition testimony" of Zitting's designee and provided the district court further evidence of the material facts still in dispute. 12 AA 2628-2789.

The same day—despite the APCO's accounting designee's deposition testimony, 17 AA 3900-4013, and the affirmative defenses in APCO's answer, 4 AA 112-113—Zitting filed a motion in limine to limit APCO's defenses to the enforceability of the pay-if-paid provision in the subcontract. 11 AA 2434-2627. Zitting argued that, despite the binding admissions of its NRCP 30(b)(6) designee that directly contradicted Zitting's prior partial summary judgment affidavit, there was purportedly "no explanation" for APCO's decision to assert defenses based on the testimony of Zitting's designee. 11 AA 2434-2445. Zitting argued that APCO was required to supplement its prior interrogatory responses pursuant to NRCP 26(e)(2).[10] 11 AA 2443-2445.

The next day, and within the forty-five days of additional discovery allowed by the district court, APCO supplemented its prior interrogatory responses to

[10] NRCP 26(e)(2) requires that "[a] party who has . . . responded to a request for discovery . . . is under a duty to supplement or correct the . . . response to include information thereafter acquired" and that the party "is under a duty seasonably to amend a prior response to an interrogatory . . . , if the party learns that the response is in some material respect incomplete or incorrect *and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing*." (Emphasis added).

Zitting to confirm and underscore the defenses that APCO was able to magnify through Zitting's designee's deposition. 17 AA 3765-3817. Specifically, APCO supplemented interrogatories requesting the basis for APCO's defenses to the claims alleged by Zitting, providing, in part, the following response:

> Zitting's own NRCP 30(b)(6) witness admitted during deposition that the subcontract provisions were not complied with, e.g., but not limited to, the conditions precedent detailed in various subsections . . . of the subcontract between APCO and Zitting. With specific regard to retention, which APCO never held or received, Zitting admittedly failed to satisfy the preconditions to release of retention specified in paragraph 3.8 of the subcontract. . . .

17 AA 3770-3771; 17 AA 3786-3787.

Additionally, in opposing Zitting's motion in limine, APCO noted that Zitting had actual notice of APCO's additional defenses throughout the life of the case. 12 AA 2790-14 AA 3108. Specifically, APCO highlighted APCO's affirmative defenses when APCO answered Zitting's complaint eight years earlier, 12 AA 2791-2792; that, before Zitting moved for partial summary judgment, APCO's accounting designee testified about "[a]ll facts related to [APCO's] defenses against [Zitting]'s claims as alleged in the complaint," including Zitting's failure to meet conditions precedent to payment, 12 AA 2792-2797; that Zitting's work was not complete, as acknowledged by Zitting's designee during his deposition only weeks before, 12 AA 2797-2802; and that, within two weeks of

Zitting's designee's deposition, APCO supplemented its prior interrogatory responses to Zitting, 12 AA 2802-2803.

G. THE DISTRICT COURT'S ORDERS.

A week later, the district court held an abbreviated hearing on the pending motions and granted Zitting's motion for partial summary judgment awarding Zitting over $900,000 despite the numerous, documented factual disputes and the contradictory testimony of Zitting's NRCP 30(b)(6) designee. 14 AA 3239-3249. The district court concluded that the subcontract's pay-if-paid agreements are illegal and unenforceable as against public policy. 14 AA 3244-3245. The district court's order granting partial summary judgment also precluded APCO from asserting any defense besides APCO's pay-if-paid defense, despite Zitting having actual notice of all aspects of APCO's condition precedent defenses, because the district court concluded APCO did not "seasonably amend its prior interrogatory answers" pursuant to NRCP 26(e)(2). 14 AA 3246-3247. Finally, the district court concluded Zitting was a prevailing party under the subcontract and as a prevailing lien claimant under NRS 108.237(1) and was thus entitled to its attorney fees and costs. 14 AA 3247-3248.

APCO timely moved for reconsideration of the order granting partial summary judgment. 16 AA 3634-19 AA 4344. The district court denied APCO's motion for reconsideration, 19 AA 4474-4475, and APCO timely appealed the

order denying APCO's motion for reconsideration and the order granting partial summary judgment, 21 AA 4752-23 AA 5288. The district court then entered an order awarding Zitting its attorney fees and costs. 23 AA 5291-5293. APCO timely appealed that order as well. 23 AA 5305-25 AA 5871.

APCO then moved for NRCP 54(b) certification of the order granting Zitting partial summary judgment; the order denying APCO's motion for reconsideration; the order determining the amount of Zitting's attorney fees, costs, and prejudgment interest; and the judgment in favor of Zitting. 25 AA 5872-26 AA 6038. The district court granted that motion, and certified as final the orders and judgment. 26 AA 6052-6054. APCO timely appealed from that order, 26 AA 6034-29 AA 6854, and this appeal follows.

VIII. LEGAL ARGUMENT

A. SUMMARY OF ARGUMENT.

The district court erred in precluding APCO's affirmative defenses in limine and in ordering partial summary judgment. First, the district court erred in granting summary judgment as to Zitting's breach of contract claim because Zitting ignored the subcontract's agreed-upon payment schedule and failed to meet the agreed-upon conditions precedent to receiving payment and, thus, was not entitled to receive payment. Even if Zitting had met the conditions precedent, APCO never received those monies from Gemstone, and, thus, APCO was not

contractually obligated to provide them to Zitting. APCO's affirmative defenses involving these conditions precedent were known to Zitting throughout the litigation and, thus, the district court improperly excluded them. Zitting had fair notice and would not be prejudiced by conditions precedent defenses, and, thus, the district court should have allowed them to be tried by consent. At a minimum, Zitting's own contradictory testimony, when viewed in a light most favorable to the non-moving party, created a genuine issue of material fact that precluded summary judgment. Additionally, the district court erred in granting partial summary on Zitting's NRS 108 claim because a prime contractor with no ownership interest in a subject property cannot be personally liable for a deficiency judgment after the statutory foreclosure of that property. Further, because the district court erred in granting summary judgment on Zitting's claims, the district court erred in awarding Zitting attorney fees and costs. As a result, summary judgment was improper, and reversal is warranted.

B. THE DISTRICT COURT ERRED IN GRANTING PARTIAL SUMMARY JUDGMENT ON ZITTING'S BREACH OF CONTRACT CLAIM.

1. The district court erred in concluding the subcontract's payment preconditions were unenforceable and against public policy.

To begin, the district court erred in concluding the subcontract's payment preconditions were "void and unenforceable" or "against public policy" because

the district court applied an improper legal standard and, in so doing, failed to recognize that the subcontract's express payment schedules and owner-payment preconditions satisfy statutory requirements, and the subcontract's lack of a waiver of Zitting's mechanic's lien rights satisfies this Court's case-by-case test. 14 AA 3244. Instead, the district court's order incorporated faulty analysis from a prior order that leaned heavily on NRS 624.628(3)[11] and *Lehrer McGovern Bovis*

[11] NRS 624.628(3) provides that

> [a] condition, stipulation or provision in an agreement [between a higher-tiered contractor and lower-tiered subcontractor] which:
>
> > (a) Requires a lower-tiered subcontractor to waive any rights [to payment as a lower-tiered subcontractor, as provided within the statute], inclusive, or which limits those rights;
> >
> > (b) Relieves a higher-tiered contractor of any obligation or liability imposed pursuant to [the relevant provisions of NRS 624]; or
> >
> > (c) Requires a lower-tiered subcontractor to waive, release or extinguish a claim or right for damages or an extension of time that the lower-tiered subcontractor may otherwise possess or acquire as a result of delay, acceleration, disruption or an impact event that is unreasonable under the circumstances, that was not within the contemplation of the parties at the time the agreement was entered into, or for which the lower-tiered subcontractor is not responsible,
>
> → is against public policy and is void and unenforceable.

v. Bullock Insulation, 124 Nev. 1102, 197 P.3d 1032 (2008), in concluding that the subcontract's pay-if-paid provisions were unenforceable. 14 AA 3244 (citing 14 AA 3250-3255). However, neither NRS 624.628(3) nor *Lehrer* provide support for the district court's conclusion. NRS 624.628(3) is inapplicable because the statute, when construed with the other controlling portions of NRS 624, allows for payment schedules containing owner-payment and other preconditions, while *Lehrer* is inapplicable because the subcontract contained no waiver or impairment of Zitting's mechanic's lien rights. Contrary to the district court's conclusions, the subcontract's payment schedule and preconditions were valid and enforceable but were not satisfied by Zitting, thus warranting reversal.

"Generally, the plaintiff has the burden to plead and prove that it fulfilled conditions precedent in order to recover on a breach of contract claim." *Clark County Sch. Dist. v. Richardson Constr., Inc.*, 123 Nev. 382, 395, 168 P.3d 87, 95 (2007). Certain conditions precedent—namely, pay-if-paid provisions—require closer judicial scrutiny. *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1118, 197 P.3d 1032, 1042 (2008). Indeed, pay-if-paid provisions are "enforceable only in limited circumstances and are subject to the restrictions laid out" in NRS 624.624 through NRS 624.628. *Id.*, 124 Nev. at 1118 n.50, 197 P.3d at 1042 n.50. The first of those restrictions allows for pay-if-paid provisions where the written agreement entered into between a higher-tiered

contractor and a lower-tiered subcontractor includes a schedule for payments as a precondition:

> [T]he higher-tiered contractor shall pay the lower-tiered subcontractor: (1) On or before the date payment is due; or (2) Within 10 days after the date the higher-tiered contractor receives payment for all or a portion of the work, materials or equipment described in a request for payment submitted by the lower-tiered subcontractor.

NRS 624.624(1)(a).

This provision allows payment schedules that are triggered after owner payment as a valid condition precedent to payment. *See Padilla Constr. Co. of Nevada v. Big-D Constr. Corp.*, Docket No. 67397, 2016 WL 6837851, at *2 (Order of Affirmance, Nov. 18 2016) (unpublished) ("Because the parties' subcontract contained a payment schedule that required that [subcontractor] be paid within ten days after [owner] accepted [subcontractor]'s work and paid [prime contractor] for that work and it is undisputed that [owner] never accepted [subcontractor]'s work and never paid [prime contractor] for [subcontractor]'s work, the district court correctly found that payment never became due to [subcontractor] under the subcontract or NRS 624.624(1)(a).")

On the other hand, a contractual provision between higher-tiered contractors and lower-tiered subcontractors may be "against public policy and[,] [thus] void and unenforceable" when the provision

> Requires a lower-tiered subcontractor to waive any rights [to payment, as provided within the statute], or which limits those rights; . . . [r]elieves a higher-tiered contractor of any obligation or liability [to pay, as provided within the statute]; or . . . [r]equires a lower-tiered subcontractor to waive, release or extinguish a claim or right for damages . . . that was not within the contemplation of the parties at the time the agreement was entered into, or for which the lower-tiered subcontractor is not responsible.

NRS 624.628(3).

Under this provision, a subcontract that contains both an explicit waiver of a subcontractor's right to place a mechanic's lien on the property *and* pay-if-paid provisions is unenforceable and against public policy. *Lehrer*, 124 Nev. at 1106, 197 P.3d at 1035.

Further, given the fact-intensive nature of reviewing contractual provisions and emphasizing that "not every lien waiver provision violates public policy," the Court requires trial courts review any purported mechanic's lien waiver and "engage in a public policy analysis particular to each lien waiver provision that the court is asked to enforce." *Lehrer*, 124 Nev. at 1117-1118, 197 P.3d at 1042. This "case-by-case" analysis should be undertaken with the understanding that pay-if-paid provisions are against public policy only when they effectively impair a subcontractor's right to place a mechanic's lien on the property. *Lehrer*, 124 Nev. at 1117-1118, 197 P.3d at 1042.

Here, the subcontract contained provisions requiring (1) payment from Gemstone to APCO, 9 AA 1921, and (2) a schedule of payments for both retention and change orders requiring APCO to be paid by Gemstone for Zitting's work before it had an obligation to pay Zitting, 9 AA 1921. It is undisputed that APCO did not receive payment from Gemstone for Zitting's work that Zitting now seeks to collect, 17 AA 3868-3869, and Zitting's designee admitted other preconditions were not met, 12 AA 2671-2701. Consistent with the plain text of NRS 624.624(1)(a)(2), and this Court's interpretation of that text, APCO's payment obligation to Zitting never became due. *See Padilla Constr. Co. of Nevada v. Big-D Constr. Corp.*, Docket No. 67397, 2016 WL 6837851, at *2 (Order of Affirmance, Nov. 18 2016) (unpublished).

The subcontract did not, however, contain any waiver or impairment of Zitting's mechanic's lien rights. 9 AA 1918-1950. Indeed, Zitting maintained such rights and liened the property, giving rise to this lawsuit. 4 AA 801-804. Thus, a proper "case-by-case analysis" of the contractual provisions at issue here reveals that the district court's reliance on *Lehrer* and NRS 624.628(3)—instead of NRS 624.624—to support its conclusion that the payment preconditions were void and unenforceable was fundamentally misplaced and, as a result, warrants

reversal.[12] *Holcomb Condo. Homeowners' Ass'n, Inc. v. Stewart Venture, LLC*, 129 Nev. 181, 184, 300 P.3d 124, 126 (2013) (reliance upon an inapplicable statute warrants reversal); *Auckenthaler v. Grundmeyer*, 110 Nev. 682, 690, 877 P.2d 1039, 1044 (1994) (reliance upon inapplicable case law warrants reversal).

2. The district court abused its discretion in granting the motion in limine pursuant to NRCP 26(e)(2) because Zitting had actual knowledge of APCO's condition precedent defenses throughout the life of the lawsuit.

The district court abused its discretion in granting the order in limine pursuant to NRCP 26(e)(2) because Zitting had actual knowledge of APCO's condition precedent defenses throughout the life of the lawsuit, as acknowledged by Zitting's pleadings, moving papers, deposition questions to APCO's designees, and the testimony of Zitting's designee.

Because "the rules of statutory interpretation apply to Nevada's Rules of Civil Procedure," this Court interprets rules of civil procedure by their plain meaning. *Logan v. Abe*, 131 Nev., Adv. Op. 31, 350 P.3d 1139, 1141–1142 (2015) (quoting *Webb v. Clark County School District*, 125 Nev. 611, 618, 218 P.3d 1239,

[12] Likewise, because the district court erred in concluding that the subcontract payment schedules were illegal under Nevada law, this Court should reverse the summary judgment, including the district court's award of attorney's fees and costs based upon that ruling. *See Mininni v. Wynn Las Vegas, LLC*, 126 Nev. 739, 367 P.3d 800 (2010) ("In light of our reversal of the summary judgment, the award of attorney fees must also be vacated.").

1244 (2009)). The plain meaning of NRCP 26(e)(2) mandates that a party must "seasonably" supplement prior interrogatory responses only "if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing."

Here, APCO had no duty to seasonably supplement because the information was made known to Zitting during the discovery process. Indeed, Zitting had actual knowledge of the conditions precedent defenses throughout the life of the case because the additional defenses were asserted as affirmative defenses when APCO answered Zitting's complaint eight years earlier, 5 AA 1106-1117; in response to questions from Zitting, APCO's accounting designee testified extensively about Zitting's payment schedule and APCO's conditions precedent defenses, 12 AA 2792-2797; because Zitting's scope of work—notably, the drywall—was not complete, as acknowledged by Zitting's designee during his deposition, 12 AA 2797-2802; and because Zitting's designee testified that Zitting did not submit its required close-out documents and releases required under the subcontract, 12 AA 2679. This "additional or corrective information" was "made known to [Zitting] during the discovery process," and, thus, NRCP 26(e)(2) was inapplicable.

Nonetheless, even if NRCP 26(e)(2) were to apply, APCO seasonably amended its interrogatory responses—APCO supplemented its prior interrogatory

responses within two weeks of taking Zitting's designee's deposition, which had been moved repeatedly on Zitting's request, *compare* 12 AA 2671, *with* 17 AA 3765—and, thus, APCO complied with NRCP 26(e)(2)'s duty to seasonably supplement.

In either respect, the district court abused its discretion by misapplying NRCP 26(e)(2) by granting the order in limine precluding APCO's condition precedent defenses and failing to consider those defenses in granting Zitting's motion for partial summary judgment. *See State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931–932, 267 P.3d 777, 780 (2011) (providing that a manifest abuse of discretion occurs when a district court clearly misinterprets or misapplies a law or rule); *BMW v. Roth*, 127 Nev. 122, 133, 252 P.3d 649, 657 (2011) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law."). As a result, reversal is warranted.

3. The district court abused its discretion in not allowing the payment schedule and condition precedent defenses to be tried by consent.

In the alternative, the district court abused its discretion in precluding APCO's conditions precedent defenses pursuant to NRCP 15(b) because Zitting had fair notice of those defenses and would not be prejudiced by their admission; thus, the condition precedent defenses should have been allowed by consent. *See University & Cmty. Coll. Sys. v. Sutton*, 120 Nev. 972, 988, 103 P.3d 8, 19 (2004)

(reviwing a district court's denial of an NRCP 15(b) motion for an abuse of discretion).

"[A]n affirmative defense may be tried by consent or when fairness warrants consideration of the affirmative defense and the plaintiff will not be prejudiced by the district court's consideration of it." *Douglas Disposal, Inc. v. Wee Haul, LLC*, 123 Nev. 552, 558, 170 P.3d 508, 517 (2007) (affirming the district court's decision to consider affirmative defenses that were not included in defendants' answers because plaintiff had notice of them); *see also Schettler v. RalRon Capital Corp*., 128 Nev. 209, 221 n.7, 275 P.3d 993, 941 n.7 (2012) (finding that fair notice of an affirmative defense was given on reconsideration and, thus, allowing the affirmative defense to be considered). Even if a party learns of an affirmative defense at a late stage of litigation, the affirmative defense may still be tried by consent if it does not prejudice the plaintiff. *Elliot v. Resnick*, 114 Nev. 25, 952 P.2d 961 (1998) (affirmative defense that was not raised in answer was tried by consent where plaintiff did not object when defendant raised issue in pretrial memorandum and presented evidence on issue at trial); *see also Mirage Casino-Hotel, LLC v. Eighth Judicial Dist. Court*, Docket No. 73770, 2018 WL 3625673, at *3 (Order Denying Petition for Writ of Mandamus, July 26, 2018) ("[W]e conclude that because [plaintiffs] had forty-eight days left for discovery when they learned of [defendants'] [affirmative] defense, the district court erred in finding

that [defendants] waived [that affirmative defense] . . . and that [plaintiffs] were prejudiced by [defendants'] assertion of [that defense]."). Notably, trial by consent under NRCP 15(b) does not require that the case actually progress to trial; the rule equally applies to pretrial motions. *Baughman & Turner, Inc. v. Jory*, 102 Nev. 582, 583, 729 P.2d 488, 489 (1986). When considering prejudice, a court should evaluate "the opposing party's ability to respond and its conduct of the case, not whether the amendment [could lead] to an unfavorable verdict." *W. Coast Paving, Inc. v. Engineered Structures, Inc.*, Docket No. 67877, 2016 WL 4082447, at *1 (Order of Affirmance, July 28, 2016) (citing *Jeong v. Minn. Mut. Life Ins. Co.*, 46 Fed. App'x. 448, 450 (9th Cir. 2002)).

Here, the district court abused its discretion in denying the payment schedule and condition precedent defenses' consideration because fairness warrants consideration of those defenses, which have been asserted throughout the life of the case. As noted above, Zitting has had notice and actual knowledge of these defenses for over a decade and, indeed, has submitted conflicting sworn testimony about these specific defenses at various points in the case. *Compare* 8 AA 1850 (affidavit stating conditions precedent were met), *with* 12 AA 2792-2797 (deposition testimony that conditions precedent were not met). Additionally, consideration of the conditions precedent defenses would not prejudice Zitting—indeed, because Zitting, as the plaintiff, "has the burden to plead and prove that it

fulfilled conditions precedent in order to recover on a breach of contract claim." *Clark County Sch. Dist.*, 123 Nev. at 395, 168 P.3d at 95. Zitting already has the burden of demonstrating the satisfaction of these conditions precedent before the district court and will, thus, have the ability to respond to the defenses. As a result, the district court abused its discretion in failing to allow APCO's condition precedent defenses to be considered by consent and, as a result, reversal is warranted.

4. The district court erred in its interpretation of the subcontract.

The district court also erred in its improper analysis of two important provisions of the subcontract upon which it relied in granting partial summary judgment: first, by determining that the conditions precedent only required "substantial performance" in order to be satisfied, 14 AA 3245 (citing *Laughlin Recreational Enterprises, Inc. v. Zab Dev. Co., Inc.*, 98 Nev. 285, 287, 646 P.2d 555, 557 (1982)); and, second, in concluding, contrary to the plain language of the subcontract, that Zitting was entitled to immediate payment of unbilled and undocumented retention and change order invoices upon APCO's termination of the prime contract, 14 AA 3245.

Contrary to the district court's conclusions, Nevada law requires "strict compliance"—not "substantial performance"—to satisfy contractual conditions

precedent. *MB Am., Inc. v. Alaska Pac. Leasing*, 132 Nev., Adv. Op. 8, 367 P.3d 1286, 1288 (2016). On this point, the district court's decision to apply the incorrect legal standard allowed for Zitting to meet a much lower burden than is imposed by Nevada law and, indeed, than Zitting agreed to be bound in the subcontract. *Compare Substantial-performance doctrine*, Black's Law Dictionary (10th ed. 2014) ("if a good-faith attempt to perform does not precisely meet the terms of an agreement or statutory requirements, the performance will still be considered complete if the essential purpose is accomplished"), *with MB Am., Inc.*, 132 Nev., Adv. Op. 8, 367 P.3d at 1288 (reasoning that because the contractual clause "was straightforward in stating that it was a condition precedent . . . [t]his required strict compliance with the provision"), *and* 9 AA 1919 ("[i]n consideration of the strict and complete and timely performance of all [s]ubcontract [w]ork," APCO and Zitting agree to the work and payment as described in the subcontract). Thus, the district court erred in applying the incorrect legal standard to Zitting's performance under the subcontract, and reversal is appropriate. *Staccato v. Valley Hosp.*, 123 Nev. 526, 528, 170 P.3d 503, 504 (2007) ("Because the district court's decision was based on an incorrect legal standard, we reverse its judgment and remand this matter.")

Additionally, the district court erred in its interpretation of the subcontract's provision regarding terminations for convenience because the district court's

interpretation contradicts the subcontract's plain terms and fails to recognize the integrated prime contract provisions. 14 AA 3245 (discussing 9 AA 1927). The starting point for the interpretation of any contract is the plain language of the contract. *See McDaniel v. Sierra Health and Life Ins. Co., Inc.*, 118 Nev. 596, 598-599, 53 P.3d 904, 906 (2002). When, as here, a contract's language is plain and unambiguous, the court "applies the contract as written." *Am. First Fed. Credit Union v. Soro*, 131 Nev., Adv. Op. 73, 359 P.3d 105, 106 (2015).

Here, by the subcontract's plain and unambiguous text, the section applies only to "terminations for convenience"—which the plain language of the prime contract defines as a "[t]ermination [b]y [Gemstone] [w]ithout [c]ause." 8 AA 1907. APCO's cessation of work on Manhattan West was neither a termination by Gemstone nor without cause—APCO stopped work because it was owed nearly $8,000,000, and, thus, the termination is not within the purview of the contractual provision cited by the district court. 17 AA 3869. Because the district court failed to interpret the subcontract according to its plain terms, reversal is warranted. *In re Amerco Derivative Litig.*, 127 Nev. 196, 212, 252 P.3d 681, 693 (2011).

Ultimately, however, that subcontractual provision is irrelevant because the subcontract was automatically assigned back to Gemstone upon APCO's termination pursuant to the prime contract. 8 AA 1909 (providing that in the event

of a termination of the prime contract, each subcontract "for a portion of the [w]ork is hereby assigned by [APCO] to [Gemstone]").[13] Because the subcontract was assigned back to Gemstone, the plain terms of the prime contract provide that Gemstone was obligated to "pay [Zitting] any undisputed amounts owed for any [w]ork completed by [Zitting], prior to the underlying termination for which [Gemstone] had not yet paid [APCO] prior to such underlying termination." 8 AA 1909. The district court failed to interpret these plain terms, and, again, reversal is warranted.

5. Zitting's contradictory testimony, when viewed in a light most favorable to APCO, created genuine issues of material fact precluding summary judgment.

At a minimum, the district court erred in granting summary judgment in favor of Zitting on its breach of contract claim because APCO submitted evidence establishing genuine factual disputes regarding whether Zitting satisfied the terms of the subcontract sufficient to warrant payment of the retention and progress payments.

[13] The district court also concluded that this provision was to be interpreted "exclusive of the void pay-if-paid provisions." AA 3245. Because the pay-if-paid provisions in the subcontract are enforceable conditions precedent to payment under Nevada law, *see* NRS 624.624(1)(a); *Padilla Constr. Co.*, Docket No. 67397, 2016 WL 6837851, at *2, the district court again erred in this determination.

Summary judgment is only proper if, when viewed in the light most favorable to the non-moving party, "the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." *Nevada Recycling & Salvage, Ltd. v. Reno Disposal Co., Inc.*, 134 Nev., Adv. Op. 55, 423 P.3d 605, 607 (2018). A fact is material "when it is relevant to an element of a claim or when its existence might affect the outcome." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). A factual dispute is genuine "when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Frederic & Barbara Rosenberg Living Tr. v. MacDonald Highlands Realty, LLC*, 134 Nev., Adv. Op. 69, 427 P.3d 104, 109 (2018) (citing *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005)).

Here, when viewing the evidence most favorable to APCO, a litany of material factual disputes regarding elements of Zitting's breach of contract claim preclude summary judgment. First, contrary to the district court's findings that Zitting provided written change orders to APCO to which APCO failed to respond and that the change orders were "approved by operation of law," 14 AA 3244-3245, Zitting's designee testified that some change orders were completed after APCO left Manhattan West, while others were outright rejected by APCO. *See* 12 AA 2684 (Q. "Isn't it true, sir, that as the corporate representative for

Zitting today, that APCO . . . did reject some change order requests. Correct?" A. "It appeared that they had."); *see also* 12 AA 2682 (Zitting's designee admitting a document regarding change orders from September of 2008 demonstrates "Zitting employees doing change order work that was signed off by somebody with [Camco]" after APCO left Manhattan West).

This is material because it involves an essential element of Zitting's breach of contract claim—the performance of either party under the subcontract.[14] If APCO had rejected the change order requests, or if Zitting had not submitted the change orders while APCO was still the prime contractor, then Zitting did not perform the conditions precedent to payment under the subcontract and, thus, was not entitled to payment. *See* 9 AA 1921 (change order preconditions). Further, the dispute is genuine, because a reasonable jury could find that Zitting's failure to

[14] Breach of contract is "a material failure of performance of a duty arising under or imposed by agreement." *Bernard v. Rockhill Dev. Co.*, 103 Nev. 132, 135, 734 P.2d 1238, 1240 (1987). A breach of contract claim requires the plaintiff to show "(1) formation of a valid contract; (2) performance or excuse of performance by plaintiff; (3) material breach by the defendant; and (4) damages." *See Laguerre v. Nev. Sys. of Higher Educ.*, 837 F. Supp. 2d 1176, 1180 (D. Nev. 2011). However, "when contracting, a promisor may incorporate into the agreement a 'condition precedent'—that is, an event that must occur before the promisor becomes obligated to perform." *Cain v. Price*, 134 Nev., Adv. Op. 26, 415 P.3d 25, 28–29 (2018); *see also* Restatement (Second) of Contracts § 224 (1981). Nevada law requires "strict compliance" with conditions precedent. *MB Am., Inc. v. Alaska Pac. Leasing*, 132 Nev., Adv. Op. 8, 367 P.3d at 1288. Thus, Zitting's failure to "strict[ly] compl[y]" with conditions precedent of the subcontract would excuse APCO's alleged non-payment of the change order amounts.

meet these conditions precedent entitled APCO to verdict in its favor. The genuine dispute over this material fact, thus, precluded summary judgment, and the district court erred in granting it.

Next, contrary to the district court's finding that Zitting completed its scope of work on Buildings 8 and 9 "without any complaints on the timing or quality of the work," 14 AA 3241, APCO submitted authenticated photographs of Buildings 8 and 9 demonstrating the drywall was not complete at the time APCO left Manhattan West, 10 AA 2288-2302.[15] Again, this is material because it is relevant to whether Zitting completed the conditions precedent to payment under the subcontract. *See* 9 AA 1921 (the subcontract provision defining "[c]ompletion of the entire building" as a condition precedent to the release of retention payments, and specifying that a "[b]uilding is considered complete as soon as drywall is

[15] On this point, Zitting's motion for partial summary judgment represented that Zitting completed the drywall before APCO left the project in August 2008, which is why Zitting's motion sought the full amount of retention and change order payments against APCO. *See* 8 AA 1837 ("Zitting had requested payments of $347,441.67 for satisfactory work on owner-requested change order[s] before APCO left [Manhattan West]."). However, after Zitting's designee testified the change-order work was completed under Camco, 12 AA 2684, Zitting changed the language in the district court's order granting partial summary judgment to reflect that Zitting's work was completed in December, 2008 under Camco's direction. 14 AA 3241. This is important because Zitting's motion for partial summary judgment represented that the liability it was asking the district court to find against APCO was incurred while APCO was the prime contractor on Manhattan West, which was contrary to the evidence. 8 AA 1837; *see also* 10 AA 2313-2329 (Zitting invoices and applications directed to Camco).

completed"). And, again, the dispute is genuine because authenticated, photographic evidence demonstrating the drywall work was not completed pursuant to the subcontract could result in a verdict in APCO's favor. Summary judgment was inappropriate and should be reversed.

APCO cited admissible evidence, including the binding admissions of Zitting's designee, directly disputing material facts at the heart of Zitting's breach of contract claims. "Given the numerous factual disputes in this case . . . summary judgment was improper," *Wallis v. Spencer*, 202 F.3d 1126, 1145 (9th Cir. 2000), and this Court should reverse.

C. THE DISTRICT COURT ERRED IN GRANTING PARTIAL SUMMARY JUDGMENT ON ZITTING'S NRS 108 CLAIM.

The district court erred in holding APCO liable under NRS 108.239(12) for the deficiency judgment of a property in which it has no ownership interest because such a result runs directly contrary to the policy rationale behind mechanic's liens and the other statutory provisions within NRS 108.

Indeed, because "[t]he purpose of a mechanics' lien is to prevent unjust enrichment of a property owner at the expense of laborers or material suppliers," *Basic Modular Facilities, Inc. v. Ehsanipour*, 83 Cal. Rptr. 2d 462 (Cal. Ct. App. 4th 1999), the object of Nevada's "mechanics' lien statutes is to secure payment to those who perform labor or furnish material to improve the

property of the owner." *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1115, 197 P.3d 1032, 1041 (2008); *see also In re Fontainebleau Las Vegas Holdings*, 128 Nev. 556, 573-575, 289 P.3d 1199, 1210-1211 (2012) (providing history of mechanics' lien statutes). To this end, NRS 108.239(12) affords a party whose claim is not completely satisfied at a foreclosure sale the right to a "personal judgment for the residue against the party legally liable for the residue amount"—the property's owner. *See Hardy Companies, Inc. v. SNMARK, LLC*, 126 Nev. 528, 535-563, 245 P.3d 1149, 1154-1155 (2010) (describing statutory obligation imposed upon owners of property under NRS 108). Indeed, only in "cases where a prime contractor has been paid for the work, materials or equipment which are the subject of a [mechanic's lien]" is a prime contractor obligated to indemnify the owner. NRS 108.235(2).

Here, APCO did not own Manhattan West—Gemstone did. *See* 4 AA 801 (Zitting's lien identifying Gemstone as the owner). Thus, the subject of Zitting's mechanic's lien was not APCO but, rather, Gemstone's property, upon which both Zitting and APCO performed labor and for which Gemstone received value. *See* 4 AA 801 (providing that Zitting "claim a lien upon the [Manhattan West] property"). Because of this, NRS 108.239(12) is inapplicable—Zitting has a right to a personal judgment against Gemstone, not APCO, for the outstanding residue following Manhattan West's foreclosure sale. As a result, the district court erred in

holding APCO liable under NRS 108.239(12) for the deficiency judgment of a property in which it has no ownership interest.

Further, APCO was not paid for the work that is the subject of Zitting's mechanic's lien—to the contrary, Zitting's mechanic's lien concerns work performed on Manhattan West after APCO terminated its contract with Gemstone and had already stopped work on the project.[16] 17 AA 3869. Thus, given the lack of payment, APCO is not obligated to indemnify Gemstone for work performed upon Gemstone's land that is the subject of Zitting's mechanic's lien. NRS 108.235(2). The district court's order does exactly that—contrary to NRS 108.235(2), it requires APCO to become a guarantor of Gemstone's debt for which APCO was provided no benefit—and, as a result, this Court should reverse the order granting Zitting partial summary judgment.

IX. CONCLUSION

The district court erred in precluding APCO's affirmative defenses in limine and in ordering partial summary judgment. The district court erred in granting summary judgment as to Zitting's breach of contract claim because Zitting ignored

[16] Additionally, in signing the subcontract, Zitting "agree[d] to assume the same risk that [Gemstone] may become insolvent that [APCO] assumed by entering into" the prime contract, 9 AA 1920-1921, but, nonetheless, Zitting received a $900,000 benefit from Manhattan West while APCO lost nearly $8,000,000 on the project. 17 AA 3869.

the subcontract's agreed-upon payment schedule and failed to meet the agreed-upon conditions precedent to receiving payment and, thus, was not entitled to receive payment. Even if Zitting had met the conditions precedent, APCO never received those monies from Gemstone, and, thus, APCO was not contractually obligated to provide them to Zitting. APCO's affirmative defenses involving these conditions precedent were known to Zitting throughout the litigation and, thus, the district court improperly excluded them. Zitting had fair notice and would not be prejudiced by conditions precedent defenses and, thus, the district court should have allowed them to be tried by consent. At a minimum, Zitting's own contradictory testimony, when viewed in a light most favorable to the non-moving party, created a genuine issue of material fact that precluded summary judgment.

Additionally, the district court erred in granting partial summary on Zitting's NRS 108 claim because a prime contractor with no ownership interest in a subject property cannot be personally liable for a deficiency judgment after the statutory foreclosure of that property. Further, because the district court erred in granting summary judgment on Zitting's claims, the district court erred in awarding Zitting attorney fees and costs. As a result, APCO respectfully requests this Court reverse the district court's findings of fact, conclusions of law, and order granting Zitting's motion for partial summary judgment, entered on January 2, 2018, 14 AA 3239-3249, and certified as final under NRCP 54(b) on July 30, 2018, 26 AA 6052-

6054; the district court's order denying APCO's motion for reconsideration of the order granting Zitting's motion for partial summary judgment, entered on January 25, 2018, 19 AA 4474-4475; the district court's order determining the amount of Zitting's attorney fees, costs and prejudgment interest, entered on May 8, 2018, 23 AA 5291-5293; and the district court's order granting the motion in limine to limit the defenses of APCO to the enforceability of pay-if-paid provisions, entered on December 15, 2017, 14 AA 3250-3255.

Dated this 18th day of April, 2018.

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CERTIFICATE OF COMPLIANCE

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

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 either:

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3. Finally, I hereby certify that I have read this 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 this 18th day of April, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANT'S OPENING BRIEF** was filed electronically with the Nevada Supreme Court on the 18th day of April, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Jorge Ramirez, Esq.
I-Che Lai, Esq.

/s/ Leah Dell
Leah Dell, an employee of
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