IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

vs.

HALE LANE PEEK DENNISON AND HOWARD PROFESSIONAL CORPORATION, a Nevada professional corporation,

Respondent.

Supreme Court No. 76146

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

JOINT APPENDIX TO APPELLANT'S OPENING BRIEF VOLUME XIII

Appeal from the Second Judicial District Court of the State of Nevada
in and for the County of Washoe County
Case No. CV07-00341

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Counsel for Appellants

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		15 Design Services Continuation Letter, dated 12/14/05		JA1276
		16 Design Services Continuation Letter, dated 2/7/06		JA1277
		17 Design Services Continuation Letter, dated 3/24/06		JA1278
		67 Proposal from Consolidated Pacific Development to Richard Johnson with handwriting, dated 7/14/05		JA1279-1280
		68 Land Purchase Agreement Signed by Seller, dated 7/25/05		JA1281-1302
		69 Addendum No. 1 to Land Purchase Agreement, dated 8/1/05		JA1303-1306
		70 Addendum No. 2 to Land Purchase Agreement, dated 8/2/05	VII	JA1307-01308
		71 Addendum No. 3 to Land Purchase Agreement, dated 10/9/05		JA1309-1324
		72 Addendum No. 4 to Land Purchase Agreement, dated 9/18/06		JA1325-1326

DOC.	FILE/HRG. DATE	DOCUMENT DESCRIPTION	VOL.	BATES NOS.
		76 Indemnity Agreement, dated 12/8/06 77 Waiver of Conflict Letter, dated 1/17/07	VII	JA1327-1328 JA1329-1333
35	09/04/12	Status Report [filed by Iliescu] (NV Sup. Ct. Case 60036)	V	JA1065-1066
34	08/31/12	Status Report [filed by Steppan] (NV Sup. Ct. Case 60036)	V	JA1063-1064
27	11/22/11	Stipulation	V	JA1005-1007
39	01/09/13	Stipulation and Order	VI	JA1082-1084
12	09/24/07	Stipulation to Consolidate Proceedings; Order Approving Stipulation	I	JA0216-0219
37	11/09/12	Stipulation to Dismiss Appeal (NV Sup. Ct. Case 60036)	V	JA1073-1079
14	03/07/08	Stipulation to Stay Proceedings Against Defendant Hale Lane and to Dismiss Claims Against Defendants Dennison, Howard and Snyder without Prejudice	II	JA0254-0256
10	08/03/07	Substitution of Counsel	I	JA209-0211
86	05/25/18	Supplemental Brief [filed by Third Party Defendant Hale Lane] re: Iliescu's Decision Not to Appeal Denial of Fees and Costs	XIII	JA2436-2438
9	07/30/07	Supplemental Response to Application for Release of Mechanic's Lien	I	JA0185-0208
4	05/03/07	Transcript of Proceedings – Application for Release of Mechanic's Lien held on May 3, 2007 [Transcript filed on June 29, 2007]	I	JA0107-0166
47	09/09/13	Transcript of Proceedings of Hearing regarding Motion for Continuance and to Extend Expert Disclosures	VI	JA1114-1149
88	06/06/18	Transcript of Proceedings of Third-Party Defendant Hale Lane's Motion For Summary Judgment of Third-Party Claims, filed June 21, 2018	XIII	JA2445-2496

DOC.	FILE/HRG. DATE	DOCUMENT DESCRIPTION	VOL.	BATES NOS.
93	12/11/13	Trial Transcript – Day 3, pages 811-815	XIII	JA2540-2545
73	10/24/17	Verified Memorandum of Costs [filed by Iliescus]	IX	JA1756-1761

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c), I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT, and that on this 21st day of November, 2018, the foregoing **JOINT APPENDIX TO APPELLANT'S OPENING BRIEF, VOLUME XIII**, was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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An employee of Albright, Stoddard, Warnick & Albright

MS. KERN: And I misspoke. Addendum number three wasn't the one that took us to April of 2007. That was addendum four. I apologize for that.

THE COURT: Three was another extension.

MS. KERN: Yes. Addendum four was apparently prepared in September of 2006 and this is where the extension went to April 25th of 2007. Once again, an additional consideration was provided with, it looks like, some funds and there was an increase in the purchase price from 7.5 up to 7.8, 7.6 million and that got us to April 25th.

THE COURT: And that's all that was, just additional consideration and additional time. Right?

MS. KERN: That's what I understand.

THE COURT: Incorporated all the terms of the addendum, okay. Could we take -- does that conclude all the materials we need to look at?

MS. KERN: The only other thing is I briefly referenced it in my argument, and that is with respect to the arguments as to the 15-day, I don't believe that that is even applicable here. I mean, I think that's really to protect owners of single-family residences, not a project of this magnitude. This had commercial and retail, which clearly the 15-day doesn't apply to at all.

But even if it did, that defect has been cured. A

15-day was, in fact, served on the sellers and another lien was recorded to correct those technical defects, if you so found.

THE COURT: Okay. I'd like to take a brief recess and I'll look at the Fondren case. There is another matter before the court at 3:00.

MR. SNYDER: Your Honor, I have a couple of points to make. I don't mind if it's after the recess.

THE COURT: I just want to take a recess and look. I wasn't going to rule. Let me ask: There must have been a human being or a group of human beings on behalf of the buyer in charge of this project. Do they have evidence to give as to whether or not the trust was aware of the architectural services?

MS. KERN: That's what we assume. We assumed that that occurred. That's the discovery that we are we're prevented and have been prevented since we found out escrow wasn't going to close from doing. We absolutely assumed. In fact --

THE COURT: Well, because of that entity's bankruptcy, you can't take that person's deposition on this subject?

MS. KERN: I couldn't between April 25th and today. I most certainly can. I need to do what's called an

application for 2004 exam.

THE COURT: Okay. So to permit that testimony?

MS. KERN: Yes. You don't have jurisdiction to let me do it. I can't bring him into this court but I can do it through the bankruptcy proceeding.

THE COURT: Okay. Let's take a brief recess.

(Recess taken.).

THE COURT: Ms. Kern, did you have anything else to add?

MS. KERN: Not at the present time.

THE COURT: Mr. Snyder?

MR. SNYDER: Thank you, your Honor. Just to follow-up on some of Ms. Kern's points in no particular order, this -- and I think you've hit on this -- this notion that the contract has an indemnity provision that provides in the case there's a lien filed the owner can look to the buyer, is really neither here nor there. It's not a substitute for the rights the owner has under the lien statute.

THE COURT: It's not. It has some slight significance because it does -- it does appear the parties anticipated a construction project, that there may be liens and it shifted the risk for those liens to the buyer. But, otherwise, I don't think it really has anything to do with

the lien process.

MR. SNYDER: I think I conceded that Dr. Iliescu knew that there would be a construction project here, that he knew the general nature of it, but that doesn't mean he had the information he needed to record a notice of non-responsibility.

THE COURT: Let me ask you this: It's not really in evidence today. But if Dr. Iliescu attended these planning process sessions and was present when this architectural firm presented renderings and design information to the planning authority, what else did he need to know? He knew who they were, he knew what the project was, he knew they had provided services.

MR. SNYDER: Right.

THE COURT: It seems to me it's irrational for him not to file a notice of non-responsibility as it was for the architect not to file a notice of lien right.

MR. SNYDER: Well, the timing here, I think, is crucial. Dr. Iliescu -- the original agreement was signed in July of 2005. Fisher, Friedman and Mr. Steppan began work in April of 2006.

The first planning commission meeting that the subject, you know, in which this was discussed was in October of 2004. At that time -- I'm sorry. October 4th, 2006. At

that time I submit to the Court -- and we haven't done thorough discovery of this -- but I suspect most of the architect's work was done at the time of the planning commission report. So the --

THE COURT: Well, that cuts both ways. By that meeting, if he attended the meeting he, not only knows who the architect is, but he knows they've done a lot of work and incurred substantial expenses.

MR. SNYDER: Right. And the architect didn't rely on any notice of non-responsibility or any -- they did that work knowing that they could not inform Dr. Iliescu that they were potential lien claimants. So they took that risk.

Also, I have the draft planning commission minutes here. These were printed off of the -- from the city council website. If I may approach. They were attached to the minutes of the city council meeting, and these are the minutes of the planning commission report.

Nowhere in these minutes is Mr. Steppan or Fisher, Friedman mentioned at all. I am informed by Mr. Johnson that someone from Fisher, Friedman appeared and spoke briefly at these but I'm not sure if he identified himself. It appears from these minutes, if you look at page 368, that the presentation was made primarily by Gary Duhan, who introduced Dave Snowgrove of Wood, Rogers.

We also have the planning commission report. So I'm clear, these minutes were attached to -- this is printed from the agenda. The planning commission report was printed from the agenda of an 11/15/2006 city council meeting.

THE COURT: This was an exhibit to that later city council meeting?

MR. SNYDER: Yes, that's correct. In this planning commission report.

THE COURT: By the time of the city council meeting the lien had already been filed?

MR. SNYDER: Filed, yes. At the planning commission report there's a single Power Point slide that has the name Fisher, Friedman, at least in my initial review. There could be more. But I only saw a single Power Point slide that has the name Fisher, Friedman in the entire report. They're not mentioned in the agenda or in the minutes.

And the point I'm trying to make is not that they weren't present, I think they were present, but the point is they were not a dominant presence. They were not up there advertising we're Fisher, Friedman, this is our product and address and any notice should be sent to here.

The manner in which Ms. Kern would have this court read Fondren is to have Fondren -- I believe what Ms. Kern

said was Fondren requires that the burden be shifted. If the owner has any notion that there might be a construction project, the burden is shifted to him to inquire. That's not what Fondren says.

What Fondren says is that where the owner has actual notice of construction, the constructive notice by the pre-lien statute or the notice of right to lien statute is not required. And so in order for Fondren to obviate the need for a pre-lien notice, the actual notice has to have at least the information that would be required under the pre-lien notice, under the constructive pre-lien notice.

What the pre-lien notice has to have is the identity of the lien claimant, a general description of the work, materials, equipment or services, the identity of the general contractor or subcontractor under whom the lien claimant is with contract.

None of that information was provided to Dr. Iliescu. He did not know the identity of the lien claimant until at the earliest October of 2006 after virtually all of the work had been done. So this notion that, because he had some idea that an architect somewhere would be creating some plans, some design work or a work improvement to this property, that he was under an obligation to go dig out that information is simply untrue. That's reading Fondren so

broadly as to vitiate the specific requirements of NRS 108.245, which explicitly says, if you don't file your pre-lien notice, you don't have a lien.

The -- the thing the Court needs to keep in mind here is the differing purposes of the notice of non-responsibility -- not the differing purposes but the manner in which the notice of non-responsibility and the pre-lien notice and the notice of intent to lien, notice of right to lien fit together. The purpose of the notice of right to lien is to let the owner, who might have to pay for work he never wanted done, is to let the owner know that some entity, some architect, some subcontractor is out here doing the work.

THE COURT: And that notice, by definition, doesn't include the amount of lien because presumably --

MR. SNYDER: It's at the outset.

THE COURT: -- the lienholder doesn't know that yet.

MR. SNYDER: Exactly.

THE COURT: And so the rationale of the Fondren case is that the actual knowledge of the owner substitutes for the knowledge that the owner would have acquired from the notice of lien.

MR. SNYDER: Exactly. Under Fondren, if the owner

has actual knowledge and he can go out and protect himself in the ways he would have if he had had constructive knowledge, in this case --

THE COURT: To put it simply, the person providing the service doesn't have to tell the owner what the owner already knows.

MR. SNYDER: Exactly. The notice of non-responsibility is really something that the owner does to protect himself but also to put the subcontractor, the lien claimant on notice that, you know, you can do this work if you want but I'm not going to be responsible.

And that, in turn, can allow the lien claimant the right to tell the person they're contracting with, okay, if we're going to do this work, we don't have lien rights, we need a bond to put up.

None of that can happen because Dr. Iliescu, the owner, was not informed of what was going to happen with his property of the identity of the lien claimant, of who he should tell, look, I'm not going to pay for this. He was not informed of any of that information, so he couldn't go to the lien claimant and say, look, you can do this work but, you know, don't look to me, don't look to this piece of property for payment. Look to your owner or if you -- look to your -- the buyer, the person you're contracting with. Look to them

and secure yourself however you need to do perhaps under the bond allowance of 108.240(3). And here there was -- as I understand, there was -- that issue wasn't even broached. There was no bond posted, nothing happened.

In -- the reason for that -- or the reason that's important is because when Dr. Iliescu found out at the earliest -- if we're saying that as of the planning commission meeting he knew of the identity of these architects, well, at that point from the architect's perspective the water was under the bridge.

They couldn't -- even at that point they could not -- if they had informed Dr. Iliescu of the work being done, I suppose they would have a lien from that point forward and not -- or 31 days back from that point. But, in any event, all their work had been done and any additional notices, anything done after that point would have been sort of superfluous because the damage had been done. They had not given him the ability to protect himself prior to that time.

THE COURT: I don't follow what you're saying. If he knew what he needed to know to file a notice of responsibility, he could have done that, because in this case they didn't give him a notice of lien right so he would have had zero responsibility. He wouldn't even be here today.

MR. SNYDER: I'm not sure -- let's say at this

meeting he had been introduced to Mr. Steppan and Mr. Steppan had given him a card and said we're doing lots of work on this project, just if you have any questions or need to let us know anything, here's our address, that didn't happen.

Assuming something like that happened where there's no issue of whether he had notice, at that point, if he had filed a notice of non-responsibility, it would have already been late. Because under 108.234 the notice of non-responsibility filed by an optionor needs to be recorded within three days of the date the option is exercised. So at that point it was already too late to file a notice of non-responsibility.

THE COURT: He's not an optionor.

MR. SNYDER: This is 108.234, sub one. I think that this statute draws a distinction between lessor and optionor. And it says that the lessor has to file the notice of responsibility within three days of when the lease is executed.

THE COURT: He's not an optionor or a lessor. He's an owner, so what time does he file his notice of non-responsibility?

MR. SNYDER: Correct. Well, I think in that case he has --

THE COURT: You've got a situation where the

purported lienholder doesn't serve the notice of lien right, then the owner records the notice of non-responsibility. The lienholder is done. He has no rights. He loses.

MR. SNYDER: I agree.

THE COURT: And I think one thing, maybe, the three lawyers in the room agree on is the reason actual notice is an issue is because, if you have actual notice, legally that substitutes for the notice of lien right.

MR. SNYDER: Right.

THE COURT: The contractor doesn't have to give the notice of lien right because, in effect, the owner already knows it. They know what's going on. And so I think -- I think really this is a one-issue case, isn't it, as to actual notice.

MR. SNYDER: As to whether he had actual notice, but not actual notice that work was being done. Actual notice that was sufficient to allow him to record a valid notice of non-responsibility and provide it to the relevant parties. And here he never --

THE COURT: Well, the case doesn't quite say that. And, as Ms. Kerns pointed out, at the time the pre-lien notice was different. It was generic in form, so the case really doesn't quite answer that question.

But I think the question is, Did the owner have

sufficient actual knowledge of information -- did the owner have actual knowledge of information sufficient to put him on a duty -- to impose on him reasonably a legal duty to do something, get more information or sufficient information for the notice of non-responsibility.

I don't think it's really that difficult, because in this case I think either it's going to turn out that the information presented in these public proceedings would be obviously enough or obviously not enough.

Now, I wanted to ask about something else because there hasn't been any discussion of this. If you recall in the Supreme Court case, one of the interesting little features was that the owner's lawyer was showing up periodically to see how the construction was going.

MR. SNYDER: Right.

THE COURT: So to use Ms. Kern's favorite word, it would be ludicrous for the owner to say I don't know what's going on. You're paying some lawyer to check it out now and then. There's really been no discussion of that phase of it today.

Was Dr. Iliescu or the trust actively involved in this project? Were they consulting with people or was it completely in the hands of the buyer or somewhere in between? I don't know.

MR. SNYDER: It was completely in the hands of the buyer and Dr. Iliescu was --

DR. ILIESCU: I'm ready to testify under oath today, if I may.

THE COURT: Well, we don't need to do it at the moment.

MR. SNYDER: The buyer was represented by Gary Duhan who shepherded it through.

THE COURT: Well, in the little time I've looked at it, it seems the gist of the sales agreement is intended to put all the development responsibility and risk on the buyer. That doesn't necessarily mean that the seller is uninvolved. The seller has a stake in the successful outcome of the project.

MR. SNYDER: The other point that I think needs to be made -- and this is sort of the logical conflation of the notice of right to lien in Fondren -- is that if Fondren says okay, from the date you file your pre-lien notice you get to go back 31 days and collect for that amount of time, under that same logic if you find -- if the Court finds that Dr. Iliescu at some point had any knowledge of the lien sufficient to allow him to record a notice of non-responsibility, from the date he had actual notice we only get to go back 31 days for work performed during that

time and, you know, lien the property for that amount.

THE COURT: How do you get that from the Fondren case?

MR. SNYDER: Well, Fondren says that actual notice is a substitute for the record notice provided by the pre-lien notice. The pre-lien notice says you get to go back 31 days so if -- even assuming -- and this is a point we are -- I hope it's clear -- vigorously contesting -- even assuming that Dr. Iliescu at some point had actual notice, the property could only be liened for work going back 31 days.

Otherwise, the subcontractor in every case would -- if they filed a pre-lien notice late it would just wait to the last -- you know, the completion of the job until the owner, oh, yeah, I never filed my pre-lien notice but, you know, here's a picture of my truck on the property so you had actual notice that I was working at it. It can't be in the actual notice requirements of Fondren give you broader rights than the requirements of 102.245. Do you follow?

THE COURT: No, I don't. I don't follow that. Tell me that again.

MR. SNYDER: 108.234 says that, once you file your pre-lien notice, you have to file it -- well, what it used to say is you have to file it within 31 days.

THE COURT: You're saying, if the actual notice substitutes for the record pre-lien notice, the actual notice on the part of the seller or the owner cannot give the lienholder any greater rights. So if the lienholder's rights start 31 days prior to the pre-lien notice, the owner's financial responsibility could only begin 31 days prior to his actual notice.

MR. SNYDER: Exactly.

THE COURT: It's logical, but I don't know if that's the case or not. There's probably no law on it.

MR. SNYDER: No, there's no law on it. But it has to be the case because, otherwise, you know -- take this instance: Let's suppose it's a standard construction job, owner, contractor --

THE COURT: It is interesting, though, because if -- let's say Dr. Iliescu had knowledge in April of 2006 and let's say his first knowledge was not in April but was in October, a million dollars worth of work might have been done in the meantime and so knowledge at one point rationally would have different consequences than knowledge at a different point.

MR. SNYDER: Right.

THE COURT: Of course, if he timely filed his notice of non-responsibility, it wouldn't make any

difference. The lienholder couldn't get anything out of him, wouldn't have a lien to hold.

MR. SNYDER: That's true. If -- and that's going back to the other point. Assuming he had the information he needed to have to file a notice of non-responsibility. And I don't think there's any evidence here that he did. There is evidence that he did not.

THE COURT: Well, he doesn't need much. He needs to know that architectural work is being done on the property by this firm. That's about it. Doesn't need to know much about the scope or value of it or anything.

MR. SNYDER: That's true. He needs to also know who this firm is contracted with.

THE COURT: Right, okay. Counsel, I have reviewed the Fondren case in the recess and I think that the issue presented by this motion is simply whether or not the applicants had actual knowledge that the respondent and the respondent's firm were performing architectural services for the benefit of the real property which is the subject of the land purchase agreement.

And I believe the request for discovery on this subject is reasonable and the Court will permit discovery on this issue for a period of 90 days commencing from today. I'll request counsel to reset this hearing to resume at that

time. Now, of course, I have no authority in the United States Bankruptcy Court and no knowledge of the course of proceedings in that jurisdiction but I will permit discovery for a period of 90 days on the subject of actual notice.

It is important for the Court to discern what Dr. Iliescu's knowledge was. His declaration sets forth that he was not aware of whether or not B.S.C. had retained a design team to perform work on this development. He was never notified of the identity of the B.S.C. team, but he did attend two public meetings at which the design team made a presentation. He said he was not introduced to any of the architects or engineers involved.

I think the respondent in this case is entitled to an opportunity to conduct discovery on that subject from the parties as well as third parties and, therefore, that is the order of the court. Thank you.

Court is in recess.

(Whereupon, proceedings were concluded at 3:02 p.m.)

-oOo-

STATE OF NEVADA)
)SS.
COUNTY OF WASHOE)

I, CHRISTINA MARIE HERBERT, official reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify:

That as such reporter, I was present in Department No. 6 of the above court on Thursday, May 3rd, 2007 at the hour of 1:30 p.m. of said day, and I then and there took verbatim stenotype notes of the proceedings had and testimony given therein.

That the foregoing transcript, consisting of pages numbered 1 to 59, both inclusive, is a true and correct transcript of my said stenotype notes so taken as aforesaid, and is a true and correct statement of the proceedings had and testimony given in the above-entitled action to the best of my knowledge, skill and ability.

DATED: At Reno, Nevada, this 29th day of June 2007.

Christina Herbert

CHRISTINA HERBERT, CCR#641

EXHIBIT "3"

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;	Appeal No. 68316

Appellants,

vs.

MARK B. STEPPAN,

Respondent.

Respondent's Answering Brief

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Attorneys for Respondent

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

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

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

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

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

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

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

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

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

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

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

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81 AA 0221, ¶ 21

EXHIBIT "4"

FILED
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Howard W. Conyers
Clerk of the Court
Transaction # 850528

Code 3370

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

JOHN ILIESCU JR., et al.,

Case No. CV07-00341

Plaintiffs,

Dept. No. 6

vs.

MARK B. STEPPAN,

Respondent.
_____/

AND ALL RELATED MATTERS.
_____/

ORDER

The action stems from a question of if the Applicants had knowledge the Respondent and his firm were performing architectural services for the benefit of the project in question. The Applicants ("Applicants" or "Iliescu") filed a motion for partial summary judgment on Mark Steppan's ("Respondent") claim for foreclosure of mechanic's lien. The Respondent opposed the motion and filed a cross motion for partial summary judgment to foreclose on the mechanic's lien.

The Applicants argue that they were never served with notice of right to lien as required under NRS 108.245(1). They further argue the Applicants did not have actual notice of construction on the project or of the identify of the Respondent. *Fondren v. K/L Complex Ltd.*, 106 Nev. 75, 800 P.2d 719 (1990).

//

The Respondent argues that Iliescu did have actual notice from the land sale agreement that the buyer would be hiring several design professionals, including architects. Iliescu was also made aware at the public meetings that the Respondent was the architect for this project. Since the Applicants knew that the construction project was underway, they should have filed a notice of non-responsibility as required under NRS 108.234. See *Fondren supra* at 721. The Respondent also alleges that the Applicants' counsel reviewed the contract on the project and therefore had knowledge of the architect's identity and this knowledge is imputed to the Applicants. *Lange v. Hickman*, 92 Nev. 41, 544 P.2d 1208 (1976).

The Applicants respond that the Respondent did not even attempt to comply with the statutory requirements which results in a lack of substantial compliance. *Las Vegas Convention & Visitors Auth. v. Miller*, 124 Nev. Adv. Rep.62, 191 P.3d 1138 (2008). The Applicants further argue that there has been no evidence to prove that Iliescu has actual knowledge of the Respondent's architectural services. Iliescu also argues that there is a question whether Iliescu's prior counsel had Respondent's information in mind when it was acting on Iliescu's behalf.

"Summary judgment is appropriate under NRCP 56 when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law." *Wood v. Safeway, Inc.*, 121 P.3d 1026, 1031 (Nev. 2005).

"A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Id.*

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

Accordingly, the motion for partial summary judgment is denied. The cross motion for summary judgment is granted.

DATED: This 22 day of June, 2009.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 11 day of June, 2009, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

SALLIE ARMSTRONG, ESQ.

GAYLE KERN, ESQ.

Further, I certify that I deposited in the county mailing system for postage and mailing with the U.S. Postal Service in Reno, Nevada, a true copy of the foregoing addressed to:

Stephen C. Mollath, Esq.
Prezant & Mollath
6560 SW McCarran Blvd., Ste. A
Reno NV 89509

Heidi Boe
Judicial Assistant

FILED
Electronically
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2018-04-10 08:41:59 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 6620171

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * *

MARK B. STEPPAN,

Plaintiff,

vs.

JOHN ILIESCU, JR., et al.,

Defendants.

_____/

Case No.: CV07-00341

Dept. No.: 10

ORDER

Presently before the Court is the DEFENDANTS' MOTION FOR AN AWARD OF COSTS AND ATTORNEY'S FEES AND INTEREST THEREON ("the Motion") filed by JOHN ILIESCU, JR.; SONNIA SANTEE ILIESCU; and JOHN ILIESCU, JR. AND SONNIA ILIESCU, as Trustees of the JOHN ILIESCU, JR. AND SONNIA ILIESCU 1992 FAMILY TRUST AGREEMENT ("the Defendants") on November 3, 2017.[1] MARK B. STEPPAN ("the Plaintiff") filed the OPPOSITION TO DEFENDANTS' MOTION FOR AN AWARD OF COSTS AND ATTORNEY FEES AND INTEREST THEREON ("the Opposition") on December 4, 2017. The Defendants filed the DEFENDANTS' REPLY POINTS AND AUTHORITIES IN SUPPORT OF

[1] The Defendants filed the ERRATA TO ILIESCUS' MOTION FOR AN AWARD OF COSTS AND ATTORNEY'S FEES AND INTEREST THEREON ("the First Errata") on November 14, 2017. The Defendants filed the ERRATA TO THE ILIESCUS' VERIFIED MEMORANDUM OF COSTS; AND ERRATA TO DEFENDANTS' MOTION FOR AN AWARD OF COSTS AND ATTORNEY'S FEES AND INTEREST THEREON ("the Second Errata") on December 15, 2017. The First Errata corrects typographical errors. The Second Errata makes changes to the computation of attorney's fees and costs.

ITS MOTION FOR AN AWARD OF COSTS AND ATTORNEY'S FEES AND INTEREST THEREON ("the Reply") on December 18, 2017. The Court heard oral argument on the Motion on January 30, 2018, at which time the Court took the matter under advisement.[2]

The underlying facts of the Complaint arise from a mechanic's lien that was placed on the Defendants' property in November 2006. JUDGMENT UPON REMAND IN FAVOR OF THE ILIESCUS RELEASING STEPPAN'S MECHANIC'S LIEN AND VACATING PRIOR JUDGMENT THEREON ("Judgment Upon Remand"), entered January 3, 2018, 1:25. Both parties filed separate lawsuits to resolve the lien, and the cases were consolidated. Judgment Upon Remand, 2:7-12. Through partial summary judgment and trial, the Court granted the Plaintiff's lien foreclosure claims, entering a JUDGMENT, DECREE, AND ORDER FOR FORECLOSURE OF MECHANIC'S LIEN on February 26, 2015. Judgment Upon Remand, 2:19-23. The Defendants appealed to the Nevada Supreme Court, which issued a decision agreeing with and accepting the Defendants' argument the mechanic's lien is invalid by virtue of the Plaintiff's failure to provide notice as required by NRS 108.245. The matter was remanded for the entry of Judgment in favor of the Defendants. Judgment Upon Remand, 2:19-23. Judgment was entered accordingly on January 3, 2018.

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[2] The Court also heard oral argument on the MOTION TO DENY OR RETAX COSTS filed by the Plaintiff on October 30, 2017.

"The general rule in Nevada is that attorney fees are not recoverable 'unless authorized by agreement or by statute or rule.'" *Wheeler Springs Plaza, LLC v. Beemon,* 119 Nev. 260, 268, 71 P.3d 1258, 1263 (2003) (quoting *Young v. Nevada Title Co.,* 103 Nev. 436, 442, 744 P.2d 902, 905 (1987)). The Motion moves for an award of attorney's fees and costs pursuant to NRS 18.010(2)(a); NRS 108.237(3); NRS 108.2275; NRCP 68 and NRS 17.115.[3] The Motion, 2:1-2.

NRS 108.237(3) provides:

> If the lien claim is not upheld, the court may award costs and reasonable attorney's fees to the owner or other person defending against the lien claim if the court finds that the notice of lien was pursued by the lien claimant without a reasonable basis in law or fact.

NRS 108.2275(6)(a) mandates an award of attorney's fees and costs if the court determines, following a hearing requested by motion, that the notice of lien is frivolous and made without reasonable cause. The Motion argues the lien was pursued without a reasonable basis in law or fact because the Plaintiff did not comply with NRS 108.245's written notice requirement. The Motion, 7:24-28. Additionally, the Motion argues the Defendants should be awarded costs and fees pursuant to NRS 17.115[4] and NRCP 68, as the Plaintiff rejected their offer of judgment and did not obtain a more favorable judgment.

The Opposition argues an award of fees would be inequitable. The Opposition, 10:6. It further argues the Plaintiff's claim was brought with reasonable grounds and not with the intention to harass. According to the Opposition, the claim involved a novel issue of law, and was therefore not frivolous. The Opposition, 10:9-20. The Opposition finally argues the $25,000 offer of judgment was not reasonable in timing or amount, as would be required for an award of costs and fees under NRCP 68 and NRS 17.115. The Opposition, 23:4-9.

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[3] The Court entered an ORDER contemporaneously herewith finding NRS 108.273 applies and NRS 18.020 does not based on the rule of statutory construction that the specific statute is given precedence over the general one.

[4] Now repealed, but in effect at the time the offer was made.

The Reply avers the Nevada Supreme Court clarified and declined to extend case law, not change existing Nevada law when it granted the Defendant's appeal and overturned the Court's decision. The Reply, 8:5-9. It next argues the Plaintiff's decision to refuse the offer of judgment was not reasonable at the time because Judge Adams advised him in settlement discussion that his claims were "implausible." The Reply, 12:8-15.

The Court finds the claim was not frivolous and was not pursued without a reasonable basis in law and fact. The Plaintiff was the prevailing party both in partial summary judgment and at trial. The case was appealed to the Nevada Supreme Court, and as a matter of first impression the Court held *Fondren v. K.L. Complex Limited Co.*, 106 Nev 705, 800 P.2d 719 (1990), did not apply for lien claimants who did not physically improve the property at issue. The fact the Plaintiff did not prevail upon appeal does not, *ipso facto*, make his claim frivolous. At least one party in every appeal does not succeed, and their claims are not automatically "frivolous." The Plaintiff relied on case law he and the Court both believed to be applicable to the instant case, so his position cannot be described as "baseless," or "not warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." *Simonian v. Univ. & Cmty. Coll. Sys. of Nevada,* 122 Nev. 187, 196, 128 P.3d 1057, 1063 (2006).

Further, the Court finds the Defendants are not entitled to costs and fees under to NRCP 68. An award of attorney's fees and costs pursuant to NRCP 68 requires an evaluation of the following factors:

> (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendants' offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount.

Beattie v. Thomas, 99 Nev. 579, 588–89, 668 P.2d 268, 274 (1983). At oral argument the Court observed the offer of $25,000 was approximately one percent of what the Plaintiff believed he was entitled to based on the claim. TRANSCRIPT OF PROCEEDINGS ("Transcript"), 45:1-14. Further, the $25,000 offer of judgment was a quarter of the settlement offer reached by the parties earlier in the case, but later repudiated. Transcript, 59-61. As for timing, the offer was made after the motion for partial summary judgment was granted in favor of the Plaintiff. Transcript, 44:8-9. The offer of judgment was not reasonable in timing and amount, and the Plaintiff's rejection of the offer was not grossly unreasonable or in bad faith. The Plaintiff won the trial, so his decision to proceed to trial was clearly not unreasonable. The Court clearly found the Plaintiff's witnesses and evidence to be persuasive because it ruled in favor of the Plaintiff at trial. Additionally, the appeal was granted based on an issue of new statutory construction, not on the overall merits of the Plaintiff's case. At every stage until the Nevada Supreme Court's ruling, the Plaintiff acted in accordance with the belief his claims were viable and brought in good faith.

The Plaintiff's claims were not frivolous and were not pursued without a reasonable basis in law or fact. Nor does the Plaintiff's rejection of the settlement offer entitle the Defendants to costs and attorney's fee because an analysis of the *Beattie* factors leads to the conclusion costs and fees are not warranted. The court cannot award costs or attorney's fees under NRS 108.237(3) or NRCP 68. The Court therefore need not reach the issue of whether the Defendants' claimed costs or fees are reasonable.

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IT IS ORDERED the DEFENDANTS' MOTION FOR AN AWARD OF COSTS AND ATTORNEY'S FEES AND INTEREST THEREON is hereby **DENIED**.

DATED this 10 day of April, 2018.

ELLIOTT A. SATTLER
District Judge

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this ____ day of April, 2018, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

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G. MARK ALBRIGHT, ESQ.
D. CHRIS ALBRIGHT, ESQ.

TODD ALEXANDER, ESQ.

Sheila Mansfield

SHEILA MANSFIELD
Judicial Assistant

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * *

MARK B. STEPPAN,

Plaintiff,

vs.

JOHN ILIESCU, JR., et al.,

Defendants.

_____/

Case No.: CV07-00341

Dept. No.: 10

ORDER

Presently before the Court is THE ILIESCUS' VERIFIED MEMORANDUM OF COSTS[1] ("The Memorandum of Costs") filed by JOHN ILIESCU, JR.; SONNIA SANTEE ILIESCU; and JOHN ILIESCU, JR. AND SONNIA ILIESCU, as Trustees of the JOHN ILIESCU, JR. AND SONNIA ILIESCU 1992 FAMILY TRUST AGREEMENT ("the Defendants") on October 24, 2017. MARK B. STEPPAN ("the Plaintiff") filed the MOTION TO DENY OR RETAX COSTS ("the Motion") on October 30, 2017. The Defendants filed the RESPONSE TO PLAINTIFF'S MOTION TO DENY OR RETAX COSTS ("the Opposition") on November 1, 2017. The Plaintiff

[1] The Defendants filed the ERRATA TO THE ILIESCUS' VERIFIED MEMORANDUM OF COSTS; AND ERRATA TO DEFENDANTS' MOTION FOR AN AWARD OF COSTS AND ATTORNEY'S FEES AND INTEREST THEREON ("the Errata") on December 15, 2017. The Errata makes changes to the computation of attorney's fees and costs.

filed the REPLY IN SUPPORT OF MOTION TO DENY OR RETAX COSTS ("the Reply") on November 9, 2017. The Court heard oral argument on the Motion on January 30, 2018, at which time the Court took the matter under advisement.[2]

The underlying facts of the Complaint arise from a mechanic's lien that was placed on the Defendants' property in November 2006. JUDGMENT UPON REMAND IN FAVOR OF THE ILIESCUS RELEASING STEPPAN'S MECHANIC'S LIEN AND VACATING PRIOR JUDGMENT THEREON ("Judgment Upon Remand"), entered January 3, 2018, 1:25. Both parties filed separate lawsuits to resolve the lien, and the cases were consolidated. Judgment Upon Remand, 2:7-12. Through partial summary judgment and trial, the Court granted the Plaintiff's lien foreclosure claims, entering a JUDGMENT, DECREE, AND ORDER FOR FORECLOSURE OF MECHANIC'S LIEN on February 26, 2015. Judgment Upon Remand, 2:19-23. The Defendants appealed to the Nevada Supreme Court, which issued a decision agreeing with and accepting the Defendants' argument the mechanic's lien is invalid by virtue of the Plaintiff's failure to provide notice as required by NRS 108.245. The matter was remanded for the entry of Judgment in favor of the Defendants. Judgment Upon Remand, 2:19-23. Judgment was entered accordingly on January 3, 2018.

"The general rule in Nevada is that attorney fees are not recoverable 'unless authorized by agreement or by statute or rule.'" *Wheeler Springs Plaza, LLC v. Beemon,* 119 Nev. 260, 268, 71 P.3d 1258, 1263 (2003) (quoting *Young v. Nevada Title Co.,* 103 Nev. 436, 442, 744 P.2d 902, 905 (1987)). The Defendants apply for costs under NRS 18.020. The Memorandum of Costs, 2:5.

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[2] The Court also heard oral argument on the DEFENDANT'S MOTION FOR AN AWARD OF COSTS AND ATTORNEY'S FEES AND INTEREST THEREON.

Nevada Revised Statute ("NRS") 18.020 explains a prevailing party may, as a matter of course, recover costs from an adverse party against whom judgment is rendered in certain actions. These actions include those for recovery of money or damages exceeding $2,500.00, and those that involve the title or boundaries of real estate. NRS 18.020(3); NRS 18.020(5).

The Motion argues NRS 108.237 controls the award of attorney's fees and costs in a mechanic's lien action, as shown by previous order of the Court. The Motion, 2:25-27.

The Opposition argues NRS 108.237 is only one of the statutes pursuant to which fees may be requested. The Opposition, 2:16-18. It argues the Plaintiff must demonstrate NRS 18.020 does not apply, as the Memorandum was filed pursuant to that statute. The Opposition, 2:23-28. Further, the Opposition argues the Defendants are also entitled to fees under NRS 108.237, as the Plaintiff had no reasonable basis in law or fact for his lien. The Opposition, 3:23-28.[3]

The Reply posits none of the proceedings referenced in NRS 18.020 took place in this case. The Reply, 2:26. It argues it is an accepted rule of statutory construction that specific statutes take precedence over more general ones, and NRS 108.237 specifically addresses fees in mechanic's lien cases. The Reply, 3:9-12. Finally, the Reply argues the claim was not frivolous or unreasonable because the issue was one of first impression before the Nevada Supreme Court. The Reply, 4:8-9.

It is an accepted principle "that a more specific statute will be given precedence over a more general one." *Corley v. United States,* 556 U.S. 303, 316, 129 S.Ct. 1558, 1568 (2009) (citing *Busic v. U. S.,* 446 U.S. 398, 406, 100 S.Ct. 1747, 1753 (1980)); *State Dep't of Taxation v. Masco*

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[3]The Opposition also argues the provisions of NRS 108.237 treating property owners differently than materialmen are unconstitutional for violating the Equal Protection Clause. The Opposition argues the part of the statute setting a higher bar for property owners should be invalidated, and therefore the Defendants should get fees and costs on the same terms as materialmen. This argument invites the judiciary to draft legislation in a fashion similar to the line-item veto, and is therefore a clear violation of the separation of powers doctrine.

Builder, 129 Nev. 775, 778, 312 P.3d 475, 478 (2013). NRS 108.273 applies specifically to mechanic's liens, whereas NRS 18.020 does not. The Court finds NRS 108.273 applies here, as it is the more specific statute. The Memorandum of Costs requests attorney's fees and costs pursuant to NRS 18.020, which is inapplicable to the instant action.

IT IS ORDERED the MOTION TO DENY OR RETAX COSTS is hereby **GRANTED**. THE ILIESCUS' VERIFIED MEMORANDUM OF COSTS is hereby **VACATED.**

DATED this 10 day of April, 2018.

ELLIOTT A. SATTLER
District Judge

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this ____ day of April, 2018, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

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TODD ALEXANDER, ESQ.

Sheila Mansfield
SHEILA MANSFIELD
Judicial Assistant

Document Code: 2540

HOY CHRISSINGER KIMMEL VALLAS, PC
Michael D. Hoy (NV Bar 2723)
50 W. Liberty Street, Suite 840
Reno, Nevada 89501
(775) 786-8000 (main)
Attorneys for: Mark B. Steppan

In the Second Judicial District Court of the State of Nevada

In and for the County of Washoe

MARK B. STEPPAN, Plaintiff, v. JOHN ILIESCU, JR.; SONNIA SANTEE ILIESCU; JOHN ILIESCU, JR. and SONNIA SANTEE ILIESCU, as trustees of the John Iliescu, Jr. and Sonnia Iliescu 1992 Family Trust, Defendants.	Case No. CV07-00341 Dept. No. 10
And Related cross-claims and third-party claims.	

Notice Of Entry Of Order

PLEASE TAKE NOTICE that on April 10, 2018, the Court entered the attached Order Denying Defendants' MOTION FOR AN AWARD OF COSTS AND ATTORNEY FEES AND INTEREST THEREON.

Privacy Certification

The undersigned affirms that this document does not contain any social security numbers or other private information.

Dated April 10, 2018

HOY CHRISSINGER KIMMEL VALLAS, PC

Michael D. Hoy
Attorneys for Mark B. Steppan

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2018, I electronically filed the foregoing with the Clerk of the Court by using the electronic filing system which will send a notice of electronic filing to the following:

G. MARK ALBRIGHT, ESQ. for SONNIA ILIESCU, JOHN ILIESCU, JR., JOHN & SONNIA, TRUSTEES JOHN ILIESCU,JR & SONNIA ILLIESCU TRUST

D. CHRIS ALBRIGHT, ESQ. for SONNIA ILIESCU, JOHN ILIESCU, JR.

TODD ALEXANDER, ESQ. for KAREN D. DENNISON, R. CRAIG HOWARD, HALE LANE PEEK

DATED April 10, 2018.

/s/Shondel Seth
Shondel Seth

Index of Exhibits

1 April 10, 2018 Order Denying Defendants' Motion for an Award of Costs and Attorney's Fees and Interest Thereon

Exhibit 1

Exhibit 1

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NRS 108.237(3) provides:

> If the lien claim is not upheld, the court may award costs and reasonable attorney's fees to the owner or other person defending against the lien claim if the court finds that the notice of lien was pursued by the lien claimant without a reasonable basis in law or fact.

NRS 108.2275(6)(a) mandates an award of attorney's fees and costs if the court determines, following a hearing requested by motion, that the notice of lien is frivolous and made without reasonable cause. The Motion argues the lien was pursued without a reasonable basis in law or fact because the Plaintiff did not comply with NRS 108.245's written notice requirement. The Motion, 7:24-28. Additionally, the Motion argues the Defendants should be awarded costs and fees pursuant to NRS 17.115[4] and NRCP 68, as the Plaintiff rejected their offer of judgment and did not obtain a more favorable judgment.

The Opposition argues an award of fees would be inequitable. The Opposition, 10:6. It further argues the Plaintiff's claim was brought with reasonable grounds and not with the intention to harass. According to the Opposition, the claim involved a novel issue of law, and was therefore not frivolous. The Opposition, 10:9-20. The Opposition finally argues the $25,000 offer of judgment was not reasonable in timing or amount, as would be required for an award of costs and fees under NRCP 68 and NRS 17.115. The Opposition, 23:4-9.

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[3] The Court entered an ORDER contemporaneously herewith finding NRS 108.273 applies and NRS 18.020 does not based on the rule of statutory construction that the specific statute is given precedence over the general one.

[4] Now repealed, but in effect at the time the offer was made.

The Reply avers the Nevada Supreme Court clarified and declined to extend case law, not change existing Nevada law when it granted the Defendant's appeal and overturned the Court's decision. The Reply, 8:5-9. It next argues the Plaintiff's decision to refuse the offer of judgment was not reasonable at the time because Judge Adams advised him in settlement discussion that his claims were "implausible." The Reply, 12:8-15.

The Court finds the claim was not frivolous and was not pursued without a reasonable basis in law and fact. The Plaintiff was the prevailing party both in partial summary judgment and at trial. The case was appealed to the Nevada Supreme Court, and as a matter of first impression the Court held *Fondren v. K.L. Complex Limited Co.*, 106 Nev 705, 800 P.2d 719 (1990), did not apply for lien claimants who did not physically improve the property at issue. The fact the Plaintiff did not prevail upon appeal does not, *ipso facto*, make his claim frivolous. At least one party in every appeal does not succeed, and their claims are not automatically "frivolous." The Plaintiff relied on case law he and the Court both believed to be applicable to the instant case, so his position cannot be described as "baseless," or "not warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." *Simonian v. Univ. & Cmty. Coll. Sys. of Nevada,* 122 Nev. 187, 196, 128 P.3d 1057, 1063 (2006).

Further, the Court finds the Defendants are not entitled to costs and fees under to NRCP 68. An award of attorney's fees and costs pursuant to NRCP 68 requires an evaluation of the following factors:

> (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendants' offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount.

Beattie v. Thomas, 99 Nev. 579, 588–89, 668 P.2d 268, 274 (1983). At oral argument the Court observed the offer of $25,000 was approximately one percent of what the Plaintiff believed he was entitled to based on the claim. TRANSCRIPT OF PROCEEDINGS ("Transcript"), 45:1-14. Further, the $25,000 offer of judgment was a quarter of the settlement offer reached by the parties earlier in the case, but later repudiated. Transcript, 59-61. As for timing, the offer was made after the motion for partial summary judgment was granted in favor of the Plaintiff. Transcript, 44:8-9. The offer of judgment was not reasonable in timing and amount, and the Plaintiff's rejection of the offer was not grossly unreasonable or in bad faith. The Plaintiff won the trial, so his decision to proceed to trial was clearly not unreasonable. The Court clearly found the Plaintiff's witnesses and evidence to be persuasive because it ruled in favor of the Plaintiff at trial. Additionally, the appeal was granted based on an issue of new statutory construction, not on the overall merits of the Plaintiff's case. At every stage until the Nevada Supreme Court's ruling, the Plaintiff acted in accordance with the belief his claims were viable and brought in good faith.

The Plaintiff's claims were not frivolous and were not pursued without a reasonable basis in law or fact. Nor does the Plaintiff's rejection of the settlement offer entitle the Defendants to costs and attorney's fee because an analysis of the *Beattie* factors leads to the conclusion costs and fees are not warranted. The court cannot award costs or attorney's fees under NRS 108.237(3) or NRCP 68. The Court therefore need not reach the issue of whether the Defendants' claimed costs or fees are reasonable.

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//

IT IS ORDERED the DEFENDANTS' MOTION FOR AN AWARD OF COSTS AND ATTORNEY'S FEES AND INTEREST THEREON is hereby **DENIED**.

DATED this 10 day of April, 2018.

ELLIOTT A. SATTLER
District Judge

CERTIFICATE OF MAILING

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Document Code: 2540

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Reno, Nevada 89501
(775) 786-8000 (main)
Attorneys for: Mark B. Steppan

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In and for the County of Washoe

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And Related cross-claims and third-party claims.	

Notice Of Entry Of Order

PLEASE TAKE NOTICE that on April 10, 2018, the Court entered the attached Order Granting Plaintiff's MOTION TO DENY OR RETAX COST.

Privacy Certification

The undersigned affirms that this document does not contain any social security numbers or other private information.

Dated April 10, 2018

HOY CHRISSINGER KIMMEL VALLAS, PC

Michael D. Hoy
Attorneys for Mark B. Steppan

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DATED April 10, 2018.

/s/Shondel Seth
Shondel Seth

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Exhibit 1

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Clerk of the Court
Transaction # 6620159

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * *

MARK B. STEPPAN,

Plaintiff,

vs.

JOHN ILIESCU, JR., et al.,

Defendants.

_____/

Case No.: CV07-00341

Dept. No.: 10

ORDER

Presently before the Court is THE ILIESCUS' VERIFIED MEMORANDUM OF COSTS[1] ("The Memorandum of Costs") filed by JOHN ILIESCU, JR.; SONNIA SANTEE ILIESCU; and JOHN ILIESCU, JR. AND SONNIA ILIESCU, as Trustees of the JOHN ILIESCU, JR. AND SONNIA ILIESCU 1992 FAMILY TRUST AGREEMENT ("the Defendants") on October 24, 2017. MARK B. STEPPAN ("the Plaintiff") filed the MOTION TO DENY OR RETAX COSTS ("the Motion") on October 30, 2017. The Defendants filed the RESPONSE TO PLAINTIFF'S MOTION TO DENY OR RETAX COSTS ("the Opposition") on November 1, 2017. The Plaintiff

[1] The Defendants filed the ERRATA TO THE ILIESCUS' VERIFIED MEMORANDUM OF COSTS; AND ERRATA TO DEFENDANTS' MOTION FOR AN AWARD OF COSTS AND ATTORNEY'S FEES AND INTEREST THEREON ("the Errata") on December 15, 2017. The Errata makes changes to the computation of attorney's fees and costs.

filed the REPLY IN SUPPORT OF MOTION TO DENY OR RETAX COSTS ("the Reply") on November 9, 2017. The Court heard oral argument on the Motion on January 30, 2018, at which time the Court took the matter under advisement.[2]

The underlying facts of the Complaint arise from a mechanic's lien that was placed on the Defendants' property in November 2006. JUDGMENT UPON REMAND IN FAVOR OF THE ILIESCUS RELEASING STEPPAN'S MECHANIC'S LIEN AND VACATING PRIOR JUDGMENT THEREON ("Judgment Upon Remand"), entered January 3, 2018, 1:25. Both parties filed separate lawsuits to resolve the lien, and the cases were consolidated. Judgment Upon Remand, 2:7-12. Through partial summary judgment and trial, the Court granted the Plaintiff's lien foreclosure claims, entering a JUDGMENT, DECREE, AND ORDER FOR FORECLOSURE OF MECHANIC'S LIEN on February 26, 2015. Judgment Upon Remand, 2:19-23. The Defendants appealed to the Nevada Supreme Court, which issued a decision agreeing with and accepting the Defendants' argument the mechanic's lien is invalid by virtue of the Plaintiff's failure to provide notice as required by NRS 108.245. The matter was remanded for the entry of Judgment in favor of the Defendants. Judgment Upon Remand, 2:19-23. Judgment was entered accordingly on January 3, 2018.

"The general rule in Nevada is that attorney fees are not recoverable 'unless authorized by agreement or by statute or rule.'" *Wheeler Springs Plaza, LLC v. Beemon,* 119 Nev. 260, 268, 71 P.3d 1258, 1263 (2003) (quoting *Young v. Nevada Title Co.,* 103 Nev. 436, 442, 744 P.2d 902, 905 (1987)). The Defendants apply for costs under NRS 18.020. The Memorandum of Costs, 2:5.

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[2] The Court also heard oral argument on the DEFENDANT'S MOTION FOR AN AWARD OF COSTS AND ATTORNEY'S FEES AND INTEREST THEREON.

Nevada Revised Statute ("NRS") 18.020 explains a prevailing party may, as a matter of course, recover costs from an adverse party against whom judgment is rendered in certain actions. These actions include those for recovery of money or damages exceeding $2,500.00, and those that involve the title or boundaries of real estate. NRS 18.020(3); NRS 18.020(5).

The Motion argues NRS 108.237 controls the award of attorney's fees and costs in a mechanic's lien action, as shown by previous order of the Court. The Motion, 2:25-27.

The Opposition argues NRS 108.237 is only one of the statutes pursuant to which fees may be requested. The Opposition, 2:16-18. It argues the Plaintiff must demonstrate NRS 18.020 does not apply, as the Memorandum was filed pursuant to that statute. The Opposition, 2:23-28. Further, the Opposition argues the Defendants are also entitled to fees under NRS 108.237, as the Plaintiff had no reasonable basis in law or fact for his lien. The Opposition, 3:23-28.[3]

The Reply posits none of the proceedings referenced in NRS 18.020 took place in this case. The Reply, 2:26. It argues it is an accepted rule of statutory construction that specific statutes take precedence over more general ones, and NRS 108.237 specifically addresses fees in mechanic's lien cases. The Reply, 3:9-12. Finally, the Reply argues the claim was not frivolous or unreasonable because the issue was one of first impression before the Nevada Supreme Court. The Reply, 4:8-9.

It is an accepted principle "that a more specific statute will be given precedence over a more general one." *Corley v. United States,* 556 U.S. 303, 316, 129 S.Ct. 1558, 1568 (2009) (citing *Busic v. U. S.,* 446 U.S. 398, 406, 100 S.Ct. 1747, 1753 (1980)); *State Dep't of Taxation v. Masco*

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[3]The Opposition also argues the provisions of NRS 108.237 treating property owners differently than materialmen are unconstitutional for violating the Equal Protection Clause. The Opposition argues the part of the statute setting a higher bar for property owners should be invalidated, and therefore the Defendants should get fees and costs on the same terms as materialmen. This argument invites the judiciary to draft legislation in a fashion similar to the line-item veto, and is therefore a clear violation of the separation of powers doctrine.

Builder, 129 Nev. 775, 778, 312 P.3d 475, 478 (2013). NRS 108.273 applies specifically to mechanic's liens, whereas NRS 18.020 does not. The Court finds NRS 108.273 applies here, as it is the more specific statute. The Memorandum of Costs requests attorney's fees and costs pursuant to NRS 18.020, which is inapplicable to the instant action.

IT IS ORDERED the MOTION TO DENY OR RETAX COSTS is hereby **GRANTED**. THE ILIESCUS' VERIFIED MEMORANDUM OF COSTS is hereby **VACATED.**

DATED this 10 day of April, 2018.

ELLIOTT A. SATTLER
District Judge

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this ____ day of April, 2018, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe; that on the 10 day of April, 2018, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

MICHAEL HOY, ESQ.

G. MARK ALBRIGHT, ESQ.
D. CHRIS ALBRIGHT, ESQ.

TODD ALEXANDER, ESQ.

Sheila Mansfield
SHEILA MANSFIELD
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

MARK B. STEPPAN,

Plaintiff,

vs.

JOHN ILIESCU JR. and SONNIA ILIESCU, as Trustees of the JOHN ILIESCU, JR. AND SONNIA ILIESCU 1992 FAMILY TRUST AGREEMENT; JOHN ILIESCU, individually; DOES I-V, inclusive; and ROE CORPORATIONS VI-X, inclusive,

Defendants.

AND RELATED CLAIMS

CONSOLIDATED

Case No. CV07-00341

Dept. No. 10

THIRD PARTY DEFENDANT HALE LANE'S SUPPLEMENTAL BRIEF RE: ILIESCU'S DECISION NOT TO APPEAL DENIAL OF FEES AND COSTS

Third Party Defendant, HALE LANE PEEK DENNISON AND HOWARD PROFESSIONAL CORPORATION ("Hale Lane"), by and through its undersigned attorneys, Lemons, Grundy & Eisenberg, hereby provides this Supplemental Brief regarding the implications, if any, of the decision by third-party plaintiffs JOHN ILIESCU, JR. and SONNIA ILIESCU, individually and as trustees of the ILIESCU 1992 FAMILY TRUST (collectively, "Iliescu") not to appeal this Court's April 10, 2018 Orders (denying Iliescu's motions for fees and costs against plaintiff Steppan). This Supplemental Brief is submitted pursuant to this Court's April 13, 2018 Order, as reflected in the minutes entered on that date. This Supplemental Brief is based on the following Memorandum of Points and Authorities and upon such other matters as the Court may deem it appropriate to consider.

///

LEMONS, GRUNDY & EISENBERG
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(775) 786-6868

MEMORANDUM OF POINTS AND AUTHORITIES

It is Hale Lane's position, and Iliescu will undoubtedly agree, that Iliescu's decision not to appeal this Court's April 10, 2018 Orders (denying fees and costs to Iliescu from Steppan) has no lingering implications on the third-party claims remaining in this action against Hale Lane.

Iliescu's decision not to pursue an appeal of the April 10, 2018 Orders could, under certain circumstances, form the basis of additional affirmative defenses to Iliescu's legal malpractice claim against Hale Lane. But, if Hale Lane asserted those affirmative defenses, it would have the burden of proof to establish that an appeal would have been successful. *Hewitt v. Allen*, 118 Nev. 216, 222, 43 P.3d 345, 348-49 (2002). Hale Lane concedes that an appeal of the April 10, 2018 Orders was not likely to succeed. Thus, Hale Lane does not intend to assert the affirmative defenses referenced in *Hewitt*, based on Iliescu's decision not to appeal the April 10, 2018 Orders.

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED: May 25, 2018.

Lemons, Grundy & Eisenberg

By: _____
Todd R. Alexander, Esq.
Attorneys for Third Party Defendant
Hale Lane Peek Dennison and Howard

LEMONS, GRUNDY & EISENBERG
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the law office of Lemons, Grundy & Eisenberg and that on May 25, 2018, I e-filed a true and correct copy of the foregoing **THIRD PARTY DEFENDANT HALE LANE'S SUPPLEMENTAL BRIEF RE: ILIESCU'S DECISION NOT TO APPEAL DENIAL OF FEES AND COSTS**, with the Clerk of the Court through the Court's eFlex electronic filing system and notice will be sent electronically by the Court to the following:

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

JOHN ILIESCU, JR. and SONNIA ILIESCU, et al.,

Third-Party Plaintiffs,

vs.

HALE LANE PEEK DENNISON AND HOWARD PROFESSIONAL CORPORATION, a Nevada professional corporation, dba HALE LANE; et al.,

Third-Party Defendants.

CASE NO. CV07-00341
(Consolidated w/CV07-01021)

DEPT NO. 10

COURT DIRECTED SUPPLEMENTAL BRIEF IN OPPOSITION TO HALE LANE MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF COUNTERMOTION TO AMEND AND FOR MORE DISCOVERY

Date of Hearing: June 6, 2018
Time of Hearing: 2:00 p.m.

INTRODUCTION

This matter was heard on April 13, 2018, this Court indicating that it had reviewed Hale Lane's Motion for Summary Judgment (Trans. 6399784), the Iliescus' Opposition and Countermotion for Leave to Amend and For Further Time to Complete Discovery (Trans. 6442526), and Hale Lane's Reply. This Court noted the countermotions should have been filed as a separate document, under applicable local rules, but would not require the Iliescus to re-file separately at this time, but would consider the same on the merits. The Court had not yet reviewed the Iliescus' Reply in Support of its Countermotions (Trans. 6479742) but indicated it would do so before the newly scheduled hearing. This Court further determined to postpone said hearing until after the time expired for the Iliescus to file any appeal of this Court's recent rulings in favor of Mark Steppan and against the Iliescus on certain Motions regarding the Iliescus' Costs and Attorneys' Fees against Steppan. If the Iliescus

declined to appeal that ruling, the Court wanted to know the parties' positions as to any effect of that decision on these pending Hale Lane/Iliescu Motion and Countermotions, and thus ordered the filing of this five page supplement to address that question. The Iliescus have declined to file any such appeal.

ANALYSIS

A. The Iliescus' Position.

The Iliescus' decision to forego an appeal has no effect upon the merits of the Iliescus' Opposition to the Hale Lane Motion for Summary Judgment, which Motion should be denied, and has no effect on the Iliescus' Countermotions for Leave to Amend, and for more time to complete discovery, which should both be granted. The Iliescus' arguments that Hale Lane's Motion was premature (*see*, Trans. 442526 at page 17, lines 2-15), because this Court had not yet ruled on the Iliescus' costs and fees claims against Steppan, is now moot, but all of the other, more substantive arguments raised by the Iliescus in their prior briefs remain valid, based on the below analysis:

B. The Iliescus Only Had a Duty to *Reasonably* Attempt to Mitigate Their Losses.

A party suing for legal malpractice, just like a party suing for any other breach of contractual or tort duties of care, is required to engage in reasonable efforts to mitigate its damages and losses, arising out of the defendant's breach. *See, e.g.*, *Hewitt v. Allen*, 118 Nev. 216, 222, 43 P.3d 345, 348 (2002) ("defendants in [a] legal malpractice action [where no appeal is filed] are able to assert, as an affirmative defense, that the proximate cause of the damages was . . . judicial error that could have been corrected on appeal. This issue is commonly raised under theories of . . . failure to mitigate damages."); *Albers v. County of Los Angeles*, 398 P.2d 129 (Cal. 1965) ("The rule is of general and widespread application that one who has been injured either in his person or his property by the wrongful act or default of another is under an obligatory duty to make a reasonable effort to minimize the damages liable to result from such injury").[1]

However, a party's duty to mitigate its damages does not extend to an unreasonable extent.

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[1] Indeed, one major reason why the Iliescus can sue Hale Lane for the costs and attorneys' fees they incurred in fighting against the Steppan lien, is that these mitigation efforts are chargeable to Hale Lane. As the *Albers* court went on to note: "and that it is held as a natural corollary to this rule of duty [to mitigate] . . . that the injured party . . . will be allowed to recover the expenses necessarily incurred in so doing." *Id.*

Stannard v. Reynolds, 295 P.2d 610, 613 (Kan. 1956) ("One injured by another's act must do that which an ordinary prudent person would do under similar circumstances to mitigate or lessen damages, although he is not required to unreasonably exert himself or incur an unreasonable expense."). In the context of legal malpractice claims, this means that a party does not have a duty to appeal a lower court ruling if such an appeal would not be likely to succeed: "We conclude that a party does not abandon his right to pursue a claim of legal malpractice by voluntarily dismissing his appeal from an adverse judgment where the judgment is not likely to be reversed." *Hewitt*, 118 Nev. at 224, 43 P.3d at 350.

C. Application to the Present Facts.

In the present case, the Iliescus have met their duty to mitigate their losses: Before pursuing, through a still future trial, their legal malpractice claims against Hale Lane, stemming from the Steppan lien, the Iliescus stipulated to stay those claims, and then zealously defended against the Steppan lien, including by appealing ultimate rulings of this Court which were adverse to their position, and obtaining a reversal thereof. This was a victory not only for the Iliescus, but also for Hale Lane: The Iliescus' damages claims against Hale Lane are no longer based on the value of the Steppan lien and $4.5 million+ Judgment thereon, but are now based on: (1) the economic losses suffered by the Iliescus for having their real property clouded by the Steppan mechanic's lien for over ten years; and (2) the costs and attorneys' fees the Iliescus expended in their effort to mitigate their losses, which are recoverable under Nevada law, as a corollary right, arising from their now fulfilled duty to mitigate.[2] Although substantial, these losses are still much lower than the amount which would be sought had Steppan's $4.5 million Judgment been upheld.

After successfully mitigating these damages, the Iliescus then continued in their mitigation efforts by making a zealous and good faith attempt to obtain the costs and attorneys' fees portion of their damages (*i.e.*, the second aforestated component of their damages) from Steppan, before instead resuming their pursuit of that portion of their damages claim against Hale Lane. That zealous and good faith effort failed, when this Court ruled against the Iliescus thereon.

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[2] *See, e.g., Davis v. Beling*, 128 Nev. 301, 278 P.3d 501, 514 (2012)("preeminently reasonable" costs incurred by vendors to avoid failure to mitigate defense were a "recoverable component of their compensatory damages."); *Sadler v. Pacificare of Nevada, Inc.*, 130 Nev. Adv. Op. 98, 340 P.3d 1264, 1271 (2014)("there are significant policy reasons for allowing a recovery for medical monitoring costs, not the least of which is that early detection can permit a plaintiff to mitigate the effects of a disease, such that the ultimate costs for treating the disease may be reduced").

The Iliescus then had to make a determination as to whether to appeal that failure. They were guided in that determination by the above-quoted statement from the Nevada *Hewitt* decision, that no need exists to pursue an appeal which "is not likely to" lead to a reversal of the lower court's decision. Having considered the grounds for this Court's rulings on the fees and costs motions, the Iliescus have determined that the likelihood of obtaining a reversal of that ruling is so low that pursuing such an appeal (and putting their claims against Hale Lane on hold for yet another two to three years while such an appeal is pending), would be futile, under *Hewitt*, as such an appeal "is not likely to" succeed.

In order to prevail on such an appeal, the Iliescus would have to demonstrate that Steppan's claims were not pursued on a reasonable basis, under NRS 108.237(3), such that fees and costs are awardable against Steppan under that statute. However, given that Steppan's lien claim was upheld by this district court throughout the litigation proceedings, until the successful appeal, it is extremely unlikely that the Nevada Supreme Court would rule that Steppan's claims, though ultimately without merit, were pursued without any reasonable basis, prior to that ultimate outcome. *See, e.g., Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 971 P.2d 383 (1998)(litigant's original success in district court proceeding, established that his original claims could not be treated as brought on an unreasonable basis, for purposes of awarding attorneys fees). A similar analysis would apply to the Iliescus' arguments asserted under the Offer of Judgment rules.

The Iliescus needed to make a good faith and zealous effort to pursue their attorneys' fees and costs from Steppan, before they could pursue Hale Lane for the same, in order to avoid a failure to mitigate defense. If such a defense is raised, the Iliescus can now demonstrate that they attempted to mitigate, and zealously pursued the position they were required by the statute to argue, as best as they reasonably could, to fulfill their duty to attempt mitigation. But, having lost, *Hewitt* demonstrates that the Iliescus are not now required to go even further, and appeal to avoid a failure-to-mitigate defense, unless they are likely to succeed.

The other grounds on which the Iliescus could appeal would be to contend that NRS 108.237 is unconstitutional in its disparate treatment of mechanic's lien claimants who prevail vs. owner defendants who prevail, in NRS 108 mechanic's lien litigation. The Iliescus do in fact believe this to be the case. However, if NRS 108.237 were stricken on that basis, this would, as this Court pointed

out during oral hearings on the fees motion, likely simply mean that neither lien claimants nor owners are entitled to costs and attorneys' fees, rather than meaning that the Iliescus would then be awarded their costs and attorneys' fees. While the Iliescus made a good faith argument for the position they took in their briefs before this Court, which they believe met the standard of Rule 11, asserting legal contentions which were warranted by existing law or by nonfrivolous arguments for the modification of existing law, the question of whether Rule 11 can be satisfied, and the *Hewitt* question of whether a party is likely to prevail on appeal, rendering such an appeal a prerequisite to legal malpractice claims, are two very different issues.

Dr. Iliescu is already 91 years old. His claims against Hale Lane are already over ten years old. He has already bent over backwards undertaking extraordinary litigation efforts to mitigate his losses against Hale Lane, before proceeding to trial on those claims. It is time for the malpractice claims against Hale Lane to move forward and to be tried.

CONCLUSION AND AFFIRMATION

The Iliescus' decision to forego an appeal of the adverse decision on their attempt to obtain fees and costs from Steppan should have no negative effect upon their claims against Hale Lane. For the reasons set forth in their prior briefs, Hale Lane's Motion for Summary Judgment should be denied and the Iliescus' Countermotions should be granted. The undersigned does hereby affirm that the preceding document filed in the Second Judicial District Court does not contain the social security number of any person.

DATED this 25th day of May, 2018.

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

By _____
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT, and that on this 25 day of May, 2018, service was made by the ECF system to the electronic service list, a true and correct copy of the foregoing **COURT DIRECTED SUPPLEMENTAL BRIEF IN OPPOSITION TO HALE LANE MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF COUNTERMOTION TO AMEND AND FOR MORE DISCOVERY**, to the following person:

Michael D. Hoy, Esq. HOY CHRISSINGER KIMMEL VALLAS, P.C. 50 West Liberty Street, Suite 840 Reno, Nevada 89501 Tel: (775) 786-8000 mhoy@nevadalaw.com *Attorney for Plaintiff Mark Steppan*	____ Certified Mail __X__ Electronic Filing/Service ____ Email ____ Facsimile ____ Hand Delivery ____ Regular Mail
David R. Grundy, Esq. Todd R. Alexander, Esq., LEMONS, GRUNDY & EISENBERG 6005 Plumas Street, Third Floor Reno, Nevada 89519 Tel: (775) 786-6868 drg@lge.net / tra@lge.net *Attorneys for Third-Party Defendant Hale Lane*	____ Certified Mail __X__ Electronic Filing/Service ____ Email ____ Facsimile ____ Hand Delivery ____ Regular Mail

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SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE ELLIOTT A. SATTLER, DISTRICT JUDGE

--oOo--

MARK STEPPAN,

Plaintiff,

vs.

JOHN ILIESCU, et al.,

Defendants.

Case No. CV07-00341

Dept. No. 10

TRANSCRIPT OF PROCEEDINGS

ORAL ARGUMENTS

Wednesday, June 6, 2018

Reno, Nevada

APPEARANCES:

For the Plaintiff	D. CHRIS ALBRIGHT, ESQ. ALBRIGHT STODDARD WARNICK & ALBRIGHT 801 South Rancho Drive Las Vegas, Nevada 89106
For the Defendant	TODD R. ALEXANDER, ESQ. LEMONS, GRUNDY & EISENBERG 6005 Plumas Street, Suite 300 Reno, Nevada 89519

-oOo-

RENO, NEVADA, WEDNESDAY, JUNE 6, 2018, 2:02 P.M.

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THE COURT: This is CV07-00341, Dr. and Mrs. Iliescu versus Hale Lane. The plaintiffs are here represented by Mr. Albright. 14:04

Good afternoon again, Mr. Albright. I saw you when I came in and said good afternoon.

MR. ALBRIGHT: Good afternoon, Your Honor.

THE COURT: Dr. Iliescu and Mrs. Iliescu, good morning to you, as well. 14:04

I said "good morning." It's been a long day, folks.

Good afternoon to both Dr. Iliescu and Mrs. Iliescu.

Here on behalf of Hale Lane is Mr. Alexander.

Good afternoon, Mr. Alexander. 14:05

MR. ALEXANDER: Good afternoon, Your Honor.

THE COURT: We are here to conduct oral argument on a motion. I should say for a continued oral argument. The parties were here last on April 18th of 2018, and we had a brief discussion about some motion practice that had been filed, and then the Court granted a continuance so the plaintiffs could decide what steps, if any, they wanted to take regarding an order issued in an ancillary case. And so now that we know exactly what's going on in that case, I think we 14:05

can proceed in this case.

The Court has received and again reviewed the November 17, 2017, file-stamped Third-Party Defendant Hale Lane's Motion For Summary Judgment of Third-Party Claims, and the associated exhibits. 14:05

Additionally, the Court has received and reviewed again the December 18, 2017, file-stamped Third-Party Plaintiff's Opposition to Third-Party Defendant Hale Lane's Motion For Summary Judgment, Dismissal of Third-Party Claims, and Counter-Motion to Amend Third-Party Complaint and For 14:06 Further Time to Complete Discovery, and the associated exhibits.

The Court has received and again reviewed the January 8, 2018, file-stamped Third-Party Defendant Hale Lane's Reply in Support of Motion For Summary Judgment and Opposition 14:06 to Counter-Motion to Amend, and the associated exhibits.

The motion for summary judgment was submitted to the Court for consideration on January 8th of 2018.

The Court has also received and now reviewed the January 2, 2018, file-stamped Third-Party Plaintiffs Reply in 14:06 Support -- let me start again -- Third-Party Plaintiff's Reply, Points and Authorities in Support of Counter-Motion to Amend Third-Party Complaint in Support of Counter-Motion For Further Time to Complete Discovery.

I wonder, Mr. Albright, if you actually tried to say that out loud as you typed it. But that was the title of the document.

And the associated exhibits. I had not reviewed that at the time that we had the hearing last April. I have now. 14:07
The Court would note that it's 22 pages long in violation of the Pretrial Order that was in place regarding replies.

That motion practice was also submitted to the Court for consideration.

When we were here in April I discussed the fact that 14:07
motions should be separate documents, not pled in the way that they were pled in this case. But the Court has taken all of those motions under consideration.

The Court also gave the parties the opportunity to file a brief supplement to the initial motion stream regarding 14:07
any impact that may take place as a result of the Iliescus deciding not to appeal the Court's decision regarding attorney's fees and costs in the Steppan versus Iliescu matter.

The Court has received and reviewed the May 25, 2018, file-stamped Court Directed Supplement -- Supplemental Brief in 14:07
Opposition to Hale Lane Motion For Summary Judgment and in Support of Counter-Motion to Amend and For More Discovery.

Further, the Court has received and reviewed the May 25, 2018, file-stamped Third-Party Defendant Hale Lane's

Supplemental Brief Regarding Iliescus' Decision Not to Appeal Denial of Fees and Costs.

So with all of that information in mind, I am now ready, and I think we're all ready, to go forward with oral argument regarding the motion for summary judgment. 14:08

Mr. Alexander and Mr. Albright, what I anticipate doing is allowing Mr. Alexander to make the initial argument. Mr. Albright, you can make your opposition argument and address any issues regarding the request for leave to file an amended third-party complaint or to continue with discovery. And then 14:08 Mr. Albright -- or, excuse me, Mr. Alexander will have the last word.

I also did print out a copy of the September 27, 2007, file-stamped Answer and Third-Party Complaint. So I have it here on the bench with me. If at any time a party wishes to 14:09 refer to the document that we're discussing today, the Third-Party Complaint, I have it here.

If you have a desire to refer to any exhibits that are attached to any of the motion practice that I've referenced, please let me know and I have them on my computer here on the 14:09 bench.

Mr. Alexander, go ahead.

MR. ALEXANDER: Thank you, Your Honor.

To begin, I'm always troubled by the notion of judging

an attorney's conduct in hindsight. I think we all are.

THE COURT: When you're talking about an attorney who -- Gary Hatlestad was the head of the Appellate Division in the DA's office for probably 25 years. He was one of the smartest people that I know, one of the smartest attorneys that I have ever met. He had an interesting way of looking at appellate practice that kind touches on what you're saying. 14:10

Gary looked at me once and said, "Post-Conviction attorneys judge in the cool of the evening what men do in the heat of the day." 14:10

I was like, "Wow. That's kind of profound." It's a lot smarter than anything I would ever come up with, but --

MR. ALEXANDER: That is a good way to put it.

THE COURT: But that's -- I think that's kind of along the same lines. But that is the nature of legal malpractice. 14:10

MR. ALEXANDER: True. In certain circumstances it is.

Luckily, Your Honor, I don't think we have to engage in such exercises. And what I mean by that is, from my perspective we're not so much focused on the breach element. I am willing to acknowledge that there may be disputed issues of fact as to whether Hale Lane could have created ironclad litigation-proof transactional documents in the underlying matter. 14:10

Those disputes, however, are not material here.

They're simply not what we're talking about. The reason is, after all that occurred, in 2007 Hale Lane Attorney Jerry Snyder, while Hale Lane still represented the Iliescus, filed the application to release Steppan's lien. According to the Nevada Supreme Court now in 2017 that application actually -- 14:11
excuse me -- should have been granted.

To lay the -- the legal framework of where that leaves us here today, the Nevada Supreme Court has recognized that judicial error can and does constitute a superseding cause of a client's damages in the malpractice claims. 14:12

That was really set forth in the Hewitt case, where the Court stated:

"In cases where no appeal from an adverse ruling is filed, the defendants in a legal malpractice action are able to assert as an affirmative defense that the proximate cause of 14:12
the damages was not the attorney's negligence, but judicial error that could have been corrected on appeal."

Further down in that same paragraph the court went on to say that: "Finally, whether an appeal is likely to succeed is a question of law to be decided by the trial court." 14:12

Fortunately, the Supreme Court has already given us the answer to that question of law.

Now, having recognized the doctrine, the Nevada Supreme Court hasn't really fleshed it out, the doctrine of

judicial error as superseding cause. Other courts, however, have fleshed out the doctrine, and as I pointed out in the briefing -- this is the Kiribati Seafood case, which held that "judicial error resulting in an adverse ruling is a superseding cause that relieves a negligent attorney from liability for 14:13
legal malpractice without regard to whether the judicial error was foreseeable." And this approach applies, quote, "where the attorney has presented the necessary legal arguments and the judge, albeit in error, rejects them."

The other case that I pointed out in the briefing, 14:13
Your Honor, is the Crestwood Cove case. This is a Utah case from 2007. It found that: "Judicial error, rather than an attorney's alleged malpractice, caused the plaintiff's loss."

It noted: "Were it otherwise, an attorney would be subject to liability every time a judge erroneously ruled 14:13
against the attorney's client. In effect, an attorney would become an guarantor of correct judicial decision making, a result we cannot accept."

And finally: "When an attorney has raised the appropriate legal arguments and the court nevertheless commits 14:14
judicial error, a plaintiff's suit can be appropriately dismissed on summary judgment."

And as I've also pointed out in the briefing there -- there are two approaches to this doctrine. Under the first

one, as set forth in Kiribati Seafood -- and for the purpose of the court reporter, Kiribati is spelled K-i-r-i-b-a-t-i. In Kiribati Seafood and Crestwood Cove, Your Honor, the judicial error is a superseding cause regardless of whether it is foreseeable. 14:14

We believe that the Nevada Supreme Court would adopt that view of the judicial error doctrine for two reasons. Number one, it sets forth an easily applicable bright line rule, and number two, it -- holding otherwise, holding attorneys to a standard where they must attempt to foresee 14:15 judicial error, just conceptually is exceedingly daunting. I don't know of another way to put it.

THE COURT: Well, it's challenging, also, Mr. Alexander, because judges are not widgets, they are different. They have different skill sets. They have 14:15 different abilities. They are different on different days.

We each try and do our best every day. I'm not just saying judges, but professionals in general. Some days you have good days and some days you have bad days. Arguably, maybe Judge Adams had a bad day when he made the decision in 14:15 this case that has gone on to this point.

And I don't shirk my responsibility, because it's part of the order that I entered because it was kind of baked in the cake when I got it, so to speak. That was part of the case

when I received it. It was transferred here from Department 6.

But it just makes it difficult for me to conceptualize how -- you might just get a bad judge, or you just have a judge make a bad decision. You make the right argument, and the judge blows it. 14:16

MR. ALEXANDER: Sure. And I'll talk more about the specific arguments made. But first I wanted to also address the second approach, where judicial error is a superseding cause if it is not foreseeable.

Now, even though we don't believe the Nevada Supreme Court would adopt that standard, I wanted to point out that even under that standard, Hale Lane's conduct in this case, its argument that is set forth before Judge Adams, would have passed that test, as well. 14:16

That's the Stanfield decision, the Texas case from 2016 that we cite in our reply brief. And there the court held that: 14:16

"To break" -- excuse me. "To break the causal connection between an attorney's negligence and the plaintiff's harm, the judicial error must not be foreseeable." 14:17

And it then went on to further explain:

"A judicial error is reasonably foreseeable if an unbroken connection exists between the attorney's negligence and the judicial error, such as when the attorney's negligence

directly contributed to and corroborated that judicial error, rendering the error a part of a continuous succession of events that foreseeably resulted in harm."

And I think the most important part of that decision, Your Honor, is where the Stanfield court stated, and I'll quote: 14:17

"Merely furnishing a condition that allows judicial error to occur does not establish that the ensuing harm was a reasonably foreseeable result of the defendant's negligence."

That's important here, Your Honor, because Iliescu attempts to make much of the fact that Hale Lane could have taken other steps to preclude Steppan from asserting -- having asserted the lien in the first place. What we're really saying is that, while that may be the case, all of that is immaterial at this point because Hale Lane stood up at the very beginning of its case, argued that the lien was improper, ineffective, and should have been set aside. 14:18 14:18

THE COURT: Mr. Alexander, I just want to make sure that I understand your approach conceptually this afternoon.

Initially in your motion for summary judgment you attacked two of the four prongs of any negligence action. And as you point out, the two causes of action in the third-party Complaint filed by the Iliescus, both sounded negligence, one of them is legal malpractice, the other one is simply 14:18

negligence. But as we all know it's duty, breach, causation, damages.

MR. ALEXANDER: Correct.

THE COURT: You concede in the motion that there's a duty. Everyone concedes that there is a duty Hale Lane had. 14:19
You argue about whether or not there is a breach. You argue about whether or not there was causation. And as we know, there's the issue of damages. But the primary focus that you were looking at in the motion itself was both the breach of the duty and the causation issue. 14:19

I don't mean to put words in your mouth, but it sounds to me like you're abandoning at this point the breach analysis, and simply relying on Cuzze, C-u-z-z-e, if I remember correctly, to point out that when a defendant is moving for summary judgment, all you need to do is demonstrate that one of 14:19
the elements cannot be proven, and then the whole thing gets dismissed.

So is that -- am I looking at that correctly? We're not even talking about the breach anymore. You just want me to focus primarily on the causation issue that is briefed in the 14:20
motion, and then more thoroughly analyzed in the reply.

MR. ALEXANDER: Your Honor has stated it correctly, yes.

THE COURT: Okay. I just -- okay. Go ahead.

MR. ALEXANDER: While I'm not willing to completely concede the breach element, what I am doing here is as a result of the fact that I believe the causation analysis is simply cleaner.

So getting back to this, Your Honor. Here Hale Lane raised the appropriate arguments, but obviously Judge Adams rejected them. Hale Lane, by and through Jerry Snyder, filed the application arguing that Steppan had not filed the required pre-lien notice. But he went even further than that, Your Honor. 14:20

What I wanted to point out is that the hearing on the application -- that was the May 3rd of 2007 hearing, and the transcript for that is attached as Exhibit 2 to Iliescu's reply points and authorities.

THE COURT: One moment. Let me just pull that up. 14:21

MR. ALEXANDER: Sure. And in doing so, Your Honor, if you would turn to page -- starting on 47, I would just like to read a brief segment of Mr. Snyder's argument, showing that he indeed did make the appropriate arguments.

THE COURT: Hold on. Their reply. Okay. 14:21

MR. ALEXANDER: Yes.

THE COURT: One moment. I'm not putting my clicker right on it. Are you talking about the January 12, 2018, reply?

MR. ALEXANDER: Yes, Your Honor.

THE COURT: And then Exhibit No. 1. Oh, I might have just clicked on the wrong thing. Hold on a second.

MR. ALEXANDER: Yes. Exhibit 2.

THE COURT: There you go. There. I had forgotten there's one exhibit, but it has multiple subparts in my binder -- 14:22

MR. ALEXANDER: Oh. I understand.

THE COURT: -- which is what it's called here on the computer. It just looks like one big thing. But I've looked at it. That's why I kept flipping back and forth, because I know I've seen it. 14:22

So go ahead, Mr. Alexander.

MR. ALEXANDER: Yeah. If you would scroll to page 47, Your Honor. And as a brief backdrop, at this time Steppan was represented by Gayle Kern. 14:22

THE COURT: Okay. Go ahead.

MR. ALEXANDER: And Mr. Snyder argues, looking at the bottom of that page, Your Honor, and on to the succeeding pages, at Line 23 of 47, he states: 14:23

"The manner in which Ms. Kern would have this Court read Fondren is to have Fondren -- I believe what Ms. Kern said was, Fondren requires that the burden be shifted. If the owner has any notion that there might be a construction project, the

burden is shifted to him to inquire.

"That's not what Fondren says. What Fondren says is that where the owner has actual notice of construction, the constructive notice by the pre-lien statute or the notice of right to lien statute is not required. And so in order for Fondren to obviate the need for a pre-lien notice, the actual notice has to have at least the information that would be required under the pre-lien notice under the construction" -- "constructive pre-lien notice." 14:23

"What the pre-lien notice has to have is the identity of the lien claimant, a general description of the work, materials, equipment, or services, the identity of the general contractor or subcontractor under whom the lien claimant is with contract. 14:23

"None of that information was provided to Dr. Iliescu. He did not know the identity of the lien claimant until, at the earliest, October of 2006, after virtually all of the work had been done. So this notion that, because he had some idea that an architect somewhere would be creating some plans, some design work, or a work of improvement to this property, that he was under an obligation to go dig out that information is simply untrue. That's reading Fondren so broadly as to vitiate the specific requirements of NRS 108.245, which explicitly says, if you don't file your pre-lien notice you don't have a 14:24 14:24

lien."

So Mr. Snyder's -- he's saying here that -- he's making the same point that the Supreme Court eventually held, that actual notice of on-site construction is different, because in the course of -- in the course of on-site construction an owner sees what's going on. He sees what is being done and who is doing it. He sees the trucks on his property with contractor's names on them. 14:25

With off-site work you don't -- you don't know what's being done or -- or what has been done to that date, and you don't know by whom. 14:25

Although the issue was not -- back in 2007 it was not necessarily framed in terms of on-site versus off-site work, Mr. Snyder was really making that same distinction. He was making the appropriate distinction between this case, Your Honor, and the Fondren case, which the Supreme Court later made itself. 14:25

Now, all this stuff in Iliescu's opposition to the current motion about, "Well, Hale Lane could have done X or Y or Z to have prevented Steppan from recording a lien in the first place" -- you know, back to what I said in the beginning. This dispute as to whether Hale Lane could have put together an ironclad transaction, you know, litigation-proof transactional documents, it simply doesn't matter because that judicial 14:26

error, the legal effect of that judicial error, cuts off the chain of causation here.

THE COURT: Well, and as I thought about it, Mr. Alexander, even if one were to draft what any person would think of as an ironclad contract or an ironclad legal document of some point -- of some part, even if it's perfect, it doesn't mean you are not going to get sued. That's just the nature of the business that we're in. 14:27

Even if -- even if it is, it does all of the things that Mr. Albright suggests could have been done in this case, even if all of those things had taken place -- theoretically, Hale Lane or any attorney would have gone through and taken all of the suggestions Mr. Albright makes about what should have happened, and did all of them -- it still doesn't mean that in this case -- to use this example -- Mr. Steppan wouldn't or couldn't have sued. The strength or weakness of his case would have been entirely different. But you're still -- we all know, every lawyer in this room knows, you can still get sued by just about anybody. 14:27 14:27

MR. ALEXANDER: Of course. 14:27

THE COURT: Especially if the person who is suing is judgment proof, has no worry about their financial responsibilities for their actions. You know, represent yourself, you're not even a lawyer, just sue away. I mean,

it's an unfortunate part of business that you just have to deal with.

MR. ALEXANDER: I appreciate, and completely agree. I wanted to go one step further here and sort of put the -- put the suspenders on over the belt. And what I mean by that is, 14:28
even if this Court determines that Jerry Snyder should have stood up and said the words "on-site" versus "off-site" construction, such language did not matter. And what I mean by that is, if you look at page 13 of Iliescu's opposition, he
fully concedes that all -- virtually all of the attorneys after 14:29
Hale Lane continued to assert that same argument. And he writes, starting on page -- or page 13, line 2, starting on a portion of that sentence, he states:

"Iliescu's arguments under NRS 108.245 were reasserted
by attorneys Downey Brand, who did raise a distinction between 14:29
Steppan's off-site work and the on-site work which had been performed in the actual notice cases relied upon by Steppan to preserve that issue for appeal."

This Court -- it goes on to state:

"This Court initially rejected Iliescu's arguments 14:29
under NRS 108.245 raised in the Hale Lane application and also in the summary judgment briefs."

So not only -- I guess that takes me to two points. Number one, even if Mr. Snyder had gotten up and said those

precise words, it wouldn't have mattered.

But if the notion from Mr. Albright is that, until that precise legal argument was made the judicial error doctrine actually cannot apply, then we're dealing with a very much more limited scope of liability. It would be from the date Hale Lane first asserted its application to release Steppan's lien until the attorneys from Downey Brand got up and actually raised the on-site versus off-site work distinction, which was -- which was less than a year, Your Honor. That was -- that was something Downey Brand filed in April 17th of '08, which was again rejected by Judge Adams. 14:30 14:31

THE COURT: Help me remember something, Mr. Alexander. And it deals with the interplay of 108.245 and Fondren, and then what happened in this case.

The order that was issued by the Supreme Court in 2017 in the Iliescu versus Steppan decision, would it be fair to say that Justice Hardesty, in writing the opinion, found as a matter of first impression that off-site work is different under the Fondren analysis? So the Supreme Court didn't overturn Fondren, it just clarified one of the issues in Fondren. 14:31 14:32

So it's an issue that was raised, certainly, by Downey Brand, as you suggest, and raised in some way in -- in the Hale Lane filings. But it was really for the first time when

Justice Hardesty comes out in the decision and says, "No. Off-site work is different for the following reasons."

So theoretically, if somebody -- if this were to all happen tomorrow, things would be entirely different. But at the time that the arguments were made, it was at least a new or novel or unique argument that was being made, and there was no real on-point guidelines on what to do with off-site work -- architectural work in this case -- versus on-site work. 14:32

And I keep saying Justice Hardesty. I didn't go back and read the opinion again, but it kind of sticks in my mind that Justice Hardesty wrote the opinion. 14:33

Justice Hardesty just said, well, you know, off-site is different for the following reasons, therefore, the Fondren analysis doesn't really apply.

MR. ALEXANDER: Yes. 14:33

THE COURT: Is that accurate or inaccurate?

MR. ALEXANDER: That is accurate, Your Honor. It was not -- it was not an opinion that overturned Fondren, it merely clarified it on the basis of --

THE COURT: Of the immediate facts and circumstances of this case. 14:33

MR. ALEXANDER: Well, yes, Your Honor. But what I was going to say is, on the basis of the arguments that every attorney since Hale Lane had been making throughout the case.

With that, Your Honor, I will take a seat.

THE COURT: Okay. Mr. Albright. It sounds like at least you don't have to push the rock uphill about breach. We're just talking about causation today, and then your request to file the amended complaint and possibly continue discovery, assuming that takes place. 14:33

MR. ALBRIGHT: Okay.

THE COURT: So you've already prevailed on one of your arguments.

MR. ALBRIGHT: That's great, Your Honor. I was prepared to argue two arguments. If I'm understanding the record correctly, that I don't have to make the first argument, then that's fine. I had some things I wanted to say about that, but I don't want to argue something that I've prevailed on. 14:34 14:34

THE COURT: And it always throws your opponent off when you just concede right away. I mean, you're crossing off things --

MR. ALBRIGHT: As long as -- it's a little --

MR. ALEXANDER: That's my strategy here. 14:34

MR. ALBRIGHT: -- a little -- I heard the concessions, but I did hear some things brought about what they've conceded.

THE COURT: Well, that's why --

MR. ALBRIGHT: But if it's conceded --

THE COURT: That's why I wanted to get clarification from Mr. Alexander.

MR. ALBRIGHT: Yeah. If it's conceded for today -- obviously they can raise it at trial, but for purposes of today's motion, if I don't have to argue breach, then that's great. 14:34

So let's go to the second big argument that was in their briefs, which is lack of proximate causation as the result of judicial error. And I think what you see if you read the Kiribati case, if you read the Stanfield case, what all of these cases seem to indicate is that in order to invoke that doctrine of -- or that defense of no proximate cause due to judicial error, you have to do two things. You have to argue -- under Kiribati you have to argue the argument and then have it rejected. And under Stanfield you have to not argue the opposite. You have to not invite the judicial error, as it were. 14:34 14:35

THE COURT: But when you say you have to make the argument, argue the argument, again, attorneys are not fungible. We're not widgets, just like judges aren't widgets. So the argument -- are you saying it has to be argued exactly as the Supreme Court said it, or in essence what the Supreme Court says? Do you have to present the judge with the theory -- 14:35

MR. ALBRIGHT: I think the general gist.

THE COURT: -- not so many words?

MR. ALBRIGHT: I certainly think you have to avoid inviting the error. Okay? So let's remember the argument that ultimately prevails in front of the Nevada Supreme Court has two components to it. Number one, Mr. Steppan did not serve a written notice under NRS 108.245. Number two, Mr. Steppan is not excused from that failure by the Fondren actual-notice doctrine, because the Fondren actual-notice doctrine should not apply to off-site work. Okay? 14:36

THE COURT: I agree.

MR. ALBRIGHT: The first of those arguments gets made by Mr. Snyder in court on the hearing on the motion to expunge or motion to release the mechanic's lien.

But with respect to the second argument, that argument is not raised. It's not raised on pages 47 and 48 that were read to you. It's not raised by Mr. Snyder. In fact, Mr. Snyder argues exactly the opposite. He argues, if you look at pages 4 and 5 of the transcript from that hearing -- 14:36

THE COURT: Hold on. It's taking me a second to get back there. One moment. 14:37

Okay. Go ahead. I'm there.

MR. ALBRIGHT: He says: Look, now the whole question here -- I'm looking at the bottom of page 4, line 24, and then

continuing on to page 5. Mr. Snyder tells the court:

"Now, the whole question here is whether Dr. Iliescu had knowledge of construction, knowledge of the lien claimant's work that was sufficient to enable him to file a notice of non-responsibility." 14:37

And so -- and then at the bottom of page 5:

"Here there is no way on earth Dr. Iliescu could have reported a valid notice of non-responsibility because he did not know the identity of the architects."

Going to pages 47 and 48. We'll look at page 48, line 5: 14:38

"What Fondren says is that where the owner has actual notice of construction, the constructive notice by the pre-lien statute or the notice of right to lien statute is not required. And so in order for Fondren to obviate the need for pre-lien notice the actual notice has to have at least the information that would be required in the pre-lien notice under the constructive pre-lien notice." 14:38

Going down to line 17: "None of that Information was provided to Dr. Iliescu." 14:38

So the question of fact -- you know, you talked about maybe Judge Adams had a bad day.

THE COURT: I didn't say that.

MR. ALBRIGHT: Judge Adams didn't have a bad day.

Judge Adams ruled the way that Hale Lane argued that he should rule. Judge Adams was told: There's a question of fact that's relevant in this case, and that question of fact is, what did the Iliescus know? And did they have enough knowledge to allow Fondren to overcome NRS 108.245? 14:39

And Judge Adams agreed: Okay. This is what the Iliescus' attorney is telling me, is that that's a relevant question of fact. And so, therefore, I am going to determine, I am going to rule that it's a relevant question of fact, and I am going to issue an order that says: Go do discovery on that 14:39 relevant question of fact, and then come back and let's talk about it some more.

And when they come back and talk about it some more, Judge Adams rules against them on that question of fact, which Hale Lane had told them was a relevant question of fact. 14:39

And so this idea that Kiribati and Stanfield and cases like it cut off the claims, you have to remember that in those cases the argument was made by the attorney, and then it was rejected.

In this case the argument doesn't get made until later 14:40 on by Downey Brand. But by that time Judge Adams already has it in his mind. And you mentioned that by the time the case gets --

THE COURT: But how --

MR. ALEXANDER: -- transferred to you, it's sort of set in stone. So this is the track the case has been put on.

THE COURT: Hold on a second. Hold on.

MR. ALEXANDER: Okay.

THE COURT: How do we know that? How do I know what's in Judge Adams's mind? I guess I could pick up the phone and call him, but that would be inappropriate. 14:40

When you say it's already in his mind, it's like now you're saying it's baked into the cake with him.

MR. ALBRIGHT: Well, sure. I mean -- 14:40

THE COURT: I mean, he enters the order but you're basically just suggesting -- and I want to paraphrase this correctly, Mr. Albright.

You're saying, in essence, that Hale Lane put a kernel of something in Judge Adams' mind during the initial argument 14:41 that stayed there and germinated and flowered in the order that he wrote subsequently when Downey Brand got involved in the case.

MR. ALBRIGHT: Well, I mean --

THE COURT: Generally speaking. 14:41

MR. ALBRIGHT: Generally speaking. And I think that's the argument that even is made in the Hale Lane brief, is they say: Here's the order that goes to judicial error. And the order that they attach is the order calling for discovery on

this question of fact, which ultimately was not a relevant question of fact.

And I think it's interesting that Hale Lane's arguments on that day were all about this idea of a notice of owner responsibility. Because remember what happens here. 14:41

Hale Lane gets hired by my clients to write Addendum No. 3. At the same time Hale Lane gets hired by the purchaser entity, and a lawyer at Hale Lane, Sarah Class, starts reviewing the architectural contracts.

And at some point in time the lawyers have a meeting 14:42

and they realize, "Oh, we're representing the buyer and the seller here." And so they send us -- they send us a conflict waiver letter. They don't send us a letter that says, "Oh, by the way, we've been reviewing the architectural contracts and there's some dangers you should know about." 14:42

We're not talking here about drafting ironclad documents. We're talking about communicating with your client, a duty to warn, a duty to inform, a duty to sit down and suggest strategies to deal with a risk, a red flag that's come up. 14:42

Sarah Class, the very attorney who has been reviewing the architectural agreements, is the one who faxes the conflict waiver letter. It doesn't say anything about this information that's in Hale Lane's possession.

THE COURT: But how does that relate to the causation issue? I mean, that's basically on the conceded --

MR. ALBRIGHT: No. I understand.

THE COURT: -- breach issue.

MR. ALBRIGHT: Well, I think -- because remember what happens is that initially one of the questions -- when this all -- when this dispute flowers, I guess, one of the big questions that comes up is: Hale Lane, why didn't you tell us to record a notice of non-responsibility? That's one of the disputes that sort of develops between the Iliescus and Hale Lane. Why didn't you tell us to do that? 14:43 14:43

Now, we happen to know that ultimately that doesn't matter because there's dicta in the Nevada Supreme Court decision that says that doesn't matter. But that was what was sort of on everybody's mind as regards to a possible dispute now between the Iliescus and Hale Lane. 14:43

And so when Hale Lane goes to court and they're arguing about this notice of non-responsibility, gee, they didn't have enough knowledge to file a notice of non-responsibility. It almost seems to me that an argument could be made that Hale Lane is really trying to protect Hale Lane, and that what -- if they had been really focused on trying to protect the Iliescus, they would have said, "Your Honor, let's look at this Fondren case." 14:44

Because there's a footnote, too, in this Fondren case, and it talks about the reason for this -- for this exception to NRS 108.245. And the footnote seems to suggest that it really -- the reason for this is because of the effects of construction on the property. And, you know, that's the argument that ultimately prevails and ultimately carries the day. 14:44

But Judge Adams isn't given that argument. He's given an invitation to make the determination that what the Iliescus knew, when they knew it, is a relevant question of fact. It's not ultimately a relevant question of fact. But Judge Adams is told that it is. And so for Hale Lane, who made that argument to Judge Adams, to now come in and say: "Oh, Judge Adams got it wrong. That's judicial error. That cuts off proximate causation." Well, not according to Stanfield that says you can't raise that defense if you invited the judicial error. Not according to Kiribati that says you can't raise that defense if you didn't make the argument and have it rejected. And so that's really why we don't think that this proximate cause should carry the day. 14:44 14:45 14:45

And remember, also -- and we've cited in our brief the Yamaha decision that says, you know, proximate cause is not generally an issue that a summary judgment should be granted. Because generally there's a question of fact for the trier of

fact.

And in Nevada the question of proximate cause is -- is determined on the basis of, not that you're the sole and absolute cause, and there's no other contributing factors, but the primary factor or a contributing factor plus foreseeability test. 14:46

And so when you look at how proximate cause works in Nevada, which is, did you contribute to the risk, even if there were other things also contributing to the risk? Was it a foreseeable risk? And when you look at the standard for issuing a summary judgment on a proximate cause theory, I just don't think that summary judgment is appropriate in this case, Your Honor, period. 14:46

THE COURT: Would you like to discuss your motion to amend the third-party complaint or the arguments -- any argument regarding the continuation of discovery with -- as I noted here, your reply was -- 14:46

MR. ALBRIGHT: And I appreciate, Your Honor -- you told us last time we were here that we -- that we had submitted some briefs that were too long, and I should have stood up at that point and said: You know that reply you haven't read yet? That's also going to break that rule. Can I resubmit that? 14:46

THE COURT: It was kind of --

MR. ALBRIGHT: And I --

THE COURT: I almost said "amusing." It wasn't. It's not a big deal, Mr. Albright. We had the discussion last time. I tell people all the time: You've just got to be familiar with the pretrial order. Mine is slightly different from Judge Adams'. We have a universal or a district-wide pretrial order that we use now. But when I began reviewing that third-party Complaint, the first thing I did was I kind of felt the -- 14:47

MR. ALBRIGHT: Looked at the page count. And me, too. When I was getting ready for the hearing, I thought, "Oh, no."

THE COURT: I felt it, and I was like, are these all exhibits? And then I thought, "No. It's just 23 pages long." 14:47

MR. ALBRIGHT: Sure. Be that as it may, Your Honor, I think that the remitter in this case was just issued in October. I believe this motion for summary judgment got filed -- was it in November? -- shortly -- shortly after that. 14:47

THE COURT: It was December, if I remember correctly. November 17th.

MR. ALBRIGHT: And so, you know, within like a month. It's a little quick, you know. We would like some time to --

THE COURT: Well, but doesn't -- 14:47

MR. ALBRIGHT: -- get an expert witness on a couple things.

THE COURT: But I don't know that the alacrity that Hale Lane employed is in any way negative.

MR. ALBRIGHT: I would have --

THE COURT: If I were to get sued, I would have done the exact same thing.

MR. ALBRIGHT: Sure.

THE COURT: I mean, let's get this over with. 14:48

MR. ALBRIGHT: Sure. And I understand, Your Honor. But at the same time, remember that there was a stipulation and order to stay discovery in this case. And so we're not talking about a case that we've just been sitting on, not doing anything for years and years. 14:48

In fact, I tried to get some things rolling and Your Honor said: "Nope. There's a stipulation in place. We're not going to do anything on Hale Lane for now."

And so now that the stipulation I think is gone, because we've gotten a remitter, now is the time for us to go 14:48 and get an economic damages expert who can say, "Look, having your property tied up for this amount of time caused you X amount of damages," and to get a legal malpractice expert who says, "In my opinion the duty has been breached."

And as you know, there's case law in Nevada that says 14:49 you have to have such an expert to bring your case to trial. We don't want to go pay for such an expert while there's a motion for summary judgment pending, but we certainly want the time to go hire one and get them in.

THE COURT: I know I'm just thinking out loud, and I always tell myself to stop talking when I do that. But when you suggest that there are damages to the Iliescus regarding the inability to sell their property while the lis pendens has been attached -- I think that it was right at the height of the -- the recession. The property wasn't selling for anything. I have no idea what the property is worth now. I know that -- because I drive past it every morning on my way to work, it's still on -- 14:49

MR. ALBRIGHT: Sure. I think, Your Honor -- 14:49

THE COURT: It might be worth more now than it was in 2010. I don't know.

MR. ALBRIGHT: I don't know. I know that some things have happened in the interim while the lien was on there. I know that the ordinances changed with respect to how many doors you can build. That, I think, probably negatively affects its value. 14:50

I know that there's a time-value money, and if there's money sitting in a bank account, or in this case valuable property that you can't sell, you can't use as collateral, I think that there's probably an economic loss there, in addition to -- 14:50

THE COURT: I think you're right, Mr. Albright. It's certainly not outcome determinative of anything we're talking

about today, but it just kind of popped in my head. You said, we'd like to get an expert --

MR. ALBRIGHT: Sure.

THE COURT: -- a financial expert to see what the consequence of all this has been to Dr. and Mrs. Iliescu. 14:50

MR. ALBRIGHT: And obviously they can move to exclude that expert, and we can have that argument another day.

THE COURT: The next thing that popped into my head is, I know my house is worth more now --

MR. ALBRIGHT: Yeah. 14:50

THE COURT: -- than it was in 2010, and I've done nothing to it other than live in it, so --

MR. ALBRIGHT: Yeah. Well, I don't know if this property is worth more than it was in 2006 when the lien was first recorded against it. But certainly the inability to 14:50 access that property for any purpose has some financial component to it, in addition to the damages that relate to -- you know, we went out and we mitigated, and having a duty to mitigate there's a correlated right to get the cost of that mitigation. 14:51

But my point is, the remitter was only recently issued before this motion for summary judgment came in. It's our view that now that we know what we didn't know when we filed the initial third-party complaint that's in front of you, as to how

the Court was going to rule and the dicta that they were going to insert into their ruling on the notice of non-responsibility question -- now that we know those things, justice requires for the freedom to -- to freely amend and to assert a third-party complaint that is now in line with the facts as we know and understand them. 14:51

And we would like the opportunity to do that, and we would also like the opportunity to do some discovery. You know, I mentioned some things about Sarah Class. I know we can't sue her. You've ruled on that elsewhere. But I think as an employee of Hale Lane, who knew certain things at the time that she faxed a conflict waiver to us, that's a deposition I would like to take. And I think we would like to do that before summary judgment issues. And I think that there are genuine issues of material fact relating to proximate cause on which some discovery should be allowed before summary judgment issues. 14:52 14:52

THE COURT: And regarding the argument that an amendment to the third-party action would be futile because there's always going to be, in essence, this hole, as Mr. Alexander suggests, regarding proximate cause, any comments or thoughts about that? It's the standard response to a request to amend is that amendments would be futile. 14:52

MR. ALBRIGHT: Sure. And I guess that goes back to my

underlying argument that we disagree with the idea that there is no proximate cause that can be shown here. I think there's a genuine issue of material fact as to proximate causation.

THE COURT: Thank you, Mr. Albright.

Mr. Alexander, the final word. 14:53

MR. ALEXANDER: Yes, Your Honor. Very -- I can be very brief here.

Mr. Albright first pointed out that the standard is that Hale Lane had to in void -- had to avoid inviting the error. This is exactly what Hale Lane did. And by -- by sort 14:53 of selectively reading portions of that transcript, I believe Mr. Albright tried to twist around what Mr. Snyder was arguing back then.

Mr. Snyder was not saying that whether Mr. Iliescu had actual notice is a relevant fact, Your Honor, therefore, we 14:53 should go do discovery on that relevant fact. What he was saying was that Iliescu did not have actual notice, and because -- and further, not only did he not have actual notice, he was saying, because this case is not like Fondren, i.e., it did not involve on-site construction. Because of that 14:54 distinction between this case and Fondren, Mr. Snyder was arguing that Iliescu could not have had the knowledge that would have been included in a pre-lien notice.

He's saying because there was -- this is not like

Fondren which involved on-site construction. Mr. Iliescu did not know the identity of the contractor, did not know the address of the contractor, did not know a description of the work -- all of those things that would have been included in the statutory pre-lien notice, because this case is not like Fondren in that it did not involve on-site construction. 14:54

So he was drawing the proper conclusion back then, Your Honor. He was not -- he was not saying whether Mr. Iliescu had actual notice is a relevant fact. He was saying, "No. He did not have actual notice, and" -- "and in addition to that, this case is distinguishable from Fondren in material ways," thereby making the very argument that should have carried the day back then. 14:55

I have nothing further, Your Honor.

THE COURT: Thank you, Counsel. I am going to take a couple of minutes. I do want to go look at one thing in my office, and then I'll come back. I think I will be able to rule from the bench. 14:55

Court is in recess.

(Recess taken.) 14:55

THE COURT: Okay. Counsel, we'll go back on the record in Iliescu versus Hale Lane.

What I wanted to do on the recess is go back and look at a couple of cases just to make sure that my recollection of

them was accurate as they inform the decisions that I am going to make. Specifically I wanted to go back and look at the Kiribati case, which is, as Mr. Alexander stated, K-a -- or excuse me, K-i-r-i-b-a-t-i, Seafood Company versus Decheter D-e-c-h-e-t-e-r, LLP. So I went back and reviewed that case again. The citation is 2016 Westlaw 1426297. It is a 2016 case from the Massachusetts Supreme Court. 15:17

Interestingly, that case cites to a number of other cases. I believe it actually even cites to Hewitt. If not, one of the cases it cites to then cites to Hewitt. So it's a body of case law that is developing. 15:18

But that case also cites back to a case from the Utah Supreme Court, which is Crestwood, C-r-e-s-t-w-o-o-d, Cove Apartments Business Trust v. Turner, 164 P.3d 1247, a case from the Utah Supreme Court in 2007. 15:18

And the reason I want to go back and look at those two cases is to determine what level of specificity is -- is required, if there is any clear definition of what has to be done to raise an issue for review.

Obviously the argument being made by both Mr. Albright and Mr. Alexander revolves around exactly what Mr. Snyder did, and whether or not he raised the issue that ultimately the Supreme Court found was prevailing when he argued initially that the notice of lien was ineffective. 15:18

From the questions that I asked both parties -- hopefully you got the idea. I'm trying to think of whether or not, you know, there's some sort of talismanic way that he had to raise the issue, some specific thing that he had to say. Did he need to make the exact analysis that the Supreme Court makes in its decision that was announced in 2017 regarding the Steppan versus Iliescu litigation? 15:19

And, frankly, I don't think that he does. I think that what is required is that the attorney raises the issue, and certainly that is what occurred in this case. There is no material question of fact whether or not the issue was raised by Mr. Snyder. 15:19

And then it was subsequently raised again by Downey Brand approximately a year later, and it's the issue that the Supreme Court ruled was controlling in the case. 15:20

In looking at the Crestwood case, one of the things that struck me was the language that the Utah Supreme Court uses regarding the duty of the attorney to raise the issue. At page 255 to 256 the Utah Supreme Court says, quote:

"Where an attorney has raised and preserved all relevant legal considerations in an appropriate procedural manner, and a court nevertheless commits judicial error, the attorney's actions cannot be considered the proximate cause of the client's loss. Although a client may believe that an 15:20

attorney has not litigated the case in the most effective manner possible, such beliefs are irrelevant where the attorney has presented the necessary arguments, and the Judge, albeit in error, rejects them. Were it otherwise an attorney would be subject to liability every time a judge erroneously ruled against the attorney's client. In effect, an attorney would become the guarantor of correct judicial decision making a result that we cannot accept." 15:21

Mr. Alexander in his reply brief cites a portion of that. But I thought that the bigger issue is, was it raised and preserved? And certainly Mr. Snyder raised and preserved the issue. 15:21

And then in the Kiribati case, the citation is basically back to back, the same language. It's on page 12 of the Westlaw opinion. And in the Kiribati decision it talks about how the client may believe an attorney has not litigated the case in the most effective manner possible. 15:21

That's really what I determined the argument here is about. Mr. Albright is, in essence, arguing that it wasn't raised in the most effective way possible. In effect, Mr. Snyder didn't use all of the buzz words that the Supreme Court used. 15:22

When I say "buzz words" it sounds pejorative. And that's not exactly what I intended. Maybe he wasn't as

articulate as Justice Hardesty was in writing the opinion in the Steppan versus Iliescu case. But that's not the standard that -- that is applied. The Court doesn't believe that is the standard that the Nevada Supreme Court will adopt and apply. The issue has to be raised and preserved, and certainly Mr. Snyder did that in this instance. It was raised and preserved. 15:22

It is in the area of first impression, I believe, in Nevada, and so my responsibility would be to look at it and think about what the Nevada Supreme Court would do if confronted with this same issue. 15:22

The Court has reviewed the Kiribati case, the Crestwood case, and a number of the other cases that are cited in the Kiribati decision. If memory serves me correctly some of them are from Illinois, some of them are from other jurisdictions. They're not all Massachusetts cases. But it's a cross-section of jurisdictional analysis regarding this issue. 15:23

The Court will grant the motion for summary judgment. The Court finds that there are no material issues of fact regarding the causation issue alone. The Court notes that its decision is based solely on the causation issue and the fact that Judge Adams' ruling was a superseding cause. 15:23

The Court finds that there is not a material issue of

fact that Mr. Snyder did in fact raise the issue of the propriety of the lien, and it was certainly raised in a way that would have given Judge Adams the opportunity to rule favorably on behalf of the Iliescus.

The Court doesn't find that there is anything in the record that indicates that somehow Mr. Snyder planted a seed -- that was the term that I used -- in Judge Adams' mind, that that subsequently germinated in a subsequent order that inures to the detriment of the Iliescus. 15:24

The Court finds that pursuant to Mr. Alexander's argument he has abandoned the breach issue. The only issue that the Court is analyzing is the causation issue. Pursuant to Cuzze versus University Community College System and Wood versus Safeway and both of their progeny, the Court finds that a summary judgment is appropriate on that issue. The Court has reviewed all of the cases that have been cited by both of the parties and finds that that is the appropriate conclusion to come to. 15:24

Additionally, the Court would find that if the Nevada Supreme Court does not adopt the Kiribati analysis that it would then adopt, arguably, the analysis articulated in Stanfield v. Neubaum, which is 494 S.W. 3rd 90, a 2016 case from the Supreme Court of Texas. 15:25

But under either analysis, the conclusion would be the

same. That is, that the ruling made by Judge Adams is the superseding cause. And so there is no causation. And because there is no causation, either under a negligence theory as articulated in the Sixth Claim For Relief in the third-party action or under the malpractice theory articulated in the Fifth Claim for Relief of that same pleading, the plaintiffs cannot prevail on their two causes of action against Hale Lane; and, therefore, it is appropriate that the motion for summary judgment be granted. 15:25

Generally speaking, I write my own orders. However, under the facts and circumstances of this case the Court does believe that it's appropriate, pursuant to both the District Court Rules and the Local Rules regarding the prevailing party preparing the order, that I will direct Mr. Alexander to prepare the order for the Court. 15:26 15:26

The Court is very familiar with the facts and circumstances not only of this case, but of the Steppan case, based on my involvement with both over the last five years. Since I basically took the bench I've been dealing with both the Steppan versus Iliescu and then Iliescu versus Hale Lane cases. And so I don't feel that it's appropriate or necessary for me at this point to provide a detailed analysis of all the factual background. I am intimately familiar with it. 15:26

Given the fact that the only issue the Court is

addressing in this ruling is the breach issue, I do think it's appropriate to direct Mr. Alexander to prepare the written order.

Mr. Alexander, I know that you are a very thorough and thoughtful attorney, but I have taken it upon myself recently, 15:27
whenever I am telling attorneys to prepare orders, I'm reminding them these days that it's a good idea to think that while you are going to circulate it to Mr. Albright and I'll review it generally and sign it, it's an order that you are going to want to defend before a court of appeals. And, again, 15:27
I say that now to everybody, because I don't want to start singling people out and suggesting, you know, Attorney A is not good and Attorney B is good. But you would be surprised at the number of orders that have been submitted to me when I've prepared or directed a party to prepare the order, where I kind 15:27
of scratch my head and think, "You want me to sign this?" So I just am suggesting to people always now to be mindful of the fact that it will be your responsibility to defend the order. I believe that it is appropriate.

I was talking to a colleague at lunch who directed 15:27
someone to prepare the order, and literally got an order that suggested that, "Having considered the motion, the opposition, the reply, and oral argument, the order is granted." And I'm not quite sure how you -- the judge, by the way, did not sign

that order.

But I'm just suggesting, you know, make it thorough and thoughtful. I would be happy to answer any questions that you may have. With my familiarity of the facts and of the pleadings, having reviewed them all a number of times, and the exhibits, I can answer any questions for you that you need. But I think that the issues are completely fleshed out. 15:28

Further, the Court would note that it is denying the request to file the supplement or to file an amended third-party action because the Court does find that the amendment would be futile. It's unnecessary under the facts and circumstances of this case. The Court finds that there is nothing that could be pled in that amendment that has been articulated to me that would cure the issue regarding the causation problem in the case; and, therefore, an amendment or a request to amend is denied. 15:28 15:28

And once the motion for summary judgment is granted, there really is no need, obviously, to do any supplemental discovery, nor does the Court believe that supplemental discovery would in any way change the decision regarding the motion for summary judgment on the Fifth and Sixth Causes of Action in the third-party complaint. 15:29

Mr. Alexander, is there anything that you need of me, that I can provide to you? I don't want to just sit up here

and just say, "You win. Go figure it out." I mean, I think the parties have thoroughly briefed the issues. I think both Mr. Albright and Mr. Alexander have done an exceptional job on behalf of their clients framing the issues.

And I would also say, Mr. Alexander, I appreciate the fact that you've abandoned one issue, I think because you simply argued the stronger issue. It makes a lot more sense just to do it that way. So anything else on your behalf that I could do to assist you? 15:29

MR. ALEXANDER: I do not believe so, Your Honor. I will make it as thorough and thoughtful as possible. 15:29

THE COURT: I would point out that -- I think it's pursuant to Local Rule 9 -- the prevailing party has the obligation to circulate the order. One moment.

Rule 9 regarding findings of fact, conclusions of law and judgments says that the Court directs it, and then it has to be circulated to opposing counsel, and then five days after service it gets submitted to the Court for consideration. 15:30

I think there was another -- there's a District Court Rule that deals with directing the prevailing party to prepare the order. One moment. 15:30

It's Rule 21. Rule 21 simply says:

"The counsel obtaining any order, judgment, or decree shall furnish the form of the same to the clerk or judge in

charge of the court."

That's District Court Rule 21, as opposed to Local Rule 12 -- or Local Rule 9, I should say.

So pursuant to both of those the Court directs Mr. Alexander to prepare the order for the Court. 15:31

Let's see. Today is June 6th. So I would request that that be prepared and circulated to Mr. Albright by the close of business on Friday, June 22nd of 2018. That should give you enough time to draft it. And then it needs to be submitted to me by Wednesday, June 27th to make sure that I 15:31 have the time to decide it. Because I'm not going to be available the following week. So let's just make sure it gets done in a timely fashion.

And, Mr. Albright, if you have any objections to the form, obviously you can make those known to Mr. Alexander. And 15:32 then if I need to get involved -- which has happened in the past -- regarding the content of the order, the parties are free to contact me through my judicial assistant, and we can try and resolve the issues that way.

And we can do it certainly telephonically, 15:32 Mr. Albright, so you wouldn't need to come up from Las Vegas in order to participate in that process. So we can just do it -- just call Sheila and set something up if there becomes an issue regarding the form. Obviously, you're not agreeing to the end

result, but at least to the form of the written order.

Anything else on behalf of your clients, Mr. Alexander?

MR. ALEXANDER: None, Your Honor.

THE COURT: On behalf of the Iliescus, Mr. Albright? 15:32

MR. ALBRIGHT: Your Honor, I guess I would like to know, will the order include a Rule 54 -- 54B certification of finality? There are a couple of other third-party defendants out there that I'm not exactly sure what to do with. I think a couple of them, many years ago their attorneys withdrew, they were supposed to get a new attorney, and never did. But they're sort of sitting there for me to default or release or dismiss or something. 15:33

I guess, obviously, this is one we would like to appeal, but I don't know. If you want us to clean up those things first before we appeal this or -- 15:33

THE COURT: Well, I'm trying to think, Mr. Albright. Are they defendants, third-party defendants that Mr. Alexander represents?

MR. ALBRIGHT: No. 15:33

THE COURT: He's shaking his head in the negative.

MR. ALBRIGHT: No, they are not.

THE COURT: So we're only dealing with these defendants -- or, excuse me, with Hale Lane under these

circumstances.

MR. ALBRIGHT: Right.

THE COURT: Mr. Alexander can't say anything about any other defendants that he does not represent. It might be, if you would like, Mr. Albright, that after the Court enters the order on this case -- 15:34

MR. ALBRIGHT: Um-hum.

THE COURT: -- if you want to begin taking action on those others parties who haven't appeared or who are not participating in litigation, you might want to do so. But then you also have to be mindful of the fact that it doesn't toll the running of your time to file the appeal regarding this order. 15:34

MR. ALBRIGHT: I guess that's my question. Is this a final order and -- 15:34

THE COURT: It would be for Hale Lane.

MR. ALBRIGHT: Okay.

THE COURT: I guess that's all I can say is, it would be for Hale Lane.

MR. ALBRIGHT: In that case, I think I just want to make sure that that's clear in the order so that I know when my time to appeal is going to run. 15:34

THE COURT: Any objection to that, Mr. Alexander?

I think you guys can work that out. But, I mean,

that's at least my observation is, it puts an end to Hale Lane's involvement. I don't know regarding any other outstanding third-party defendants.

MR. ALBRIGHT: Certainly I don't know of any reason why -- why it shouldn't be certified as final, so -- 15:34

MR. ALEXANDER: We would have no objection to making it final. Normally, I think the party who would have that objection would probably be Mr. Albright's client, just because I don't know that he wants to continue litigating the case against other defendants as he's working on an appeal. 15:35 However, it does not matter to us.

MR. ALBRIGHT: Fair enough.

THE COURT: I'll leave it in your able hands.

MR. ALBRIGHT: Thank you, Your Honor.

THE COURT: Court is in recess. Thank you, gentlemen. 15:35

(Proceedings concluded.)

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

I, MARIAN S. BROWN PAVA, Certified Court Reporter in and for the State of Nevada, do hereby certify:

That the foregoing proceedings were taken by me at the time and place therein set forth; that the proceedings were recorded stenographically by me and thereafter transcribed via computer under my supervision; that the foregoing is a full, true, and correct transcription of the proceedings to the best of my knowledge, skill, and ability.

I further certify that I am not a relative nor an employee of any attorney or any of the parties, nor am I financially or otherwise interested in this action.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing statements are true and correct.

Dated this 19th day of June 2018.

/s/ Marian S. Brown Pava

Marian S. Brown Pava, CCR #169

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

MARK B. STEPPAN,

Plaintiff,

vs.

JOHN ILIESCU JR. and SONNIA ILIESCU, as Trustees of the JOHN ILIESCU, JR. AND SONNIA ILIESCU 1992 FAMILY TRUST AGREEMENT; JOHN ILIESCU, individually; DOES I-V, inclusive; and ROE CORPORATIONS VI-X, inclusive,

Defendants.

AND RELATED CLAIMS

CONSOLIDATED

Case No. CV07-00341

Dept. No. 10

ORDER GRANTING THIRD-PARTY DEFENDANT HALE LANE'S MOTION FOR SUMMARY JUDGMENT

On November 17, 2017, Third-Party Defendant HALE LANE PEEK DENNISON AND HOWARD PROFESSIONAL CORPORATION ("Hale Lane"), filed a motion for summary judgment of the third-party claims asserted against it by third-party plaintiffs JOHN ILIESCU, JR. and SONNIA ILIESCU, individually and as trustees of the ILIESCU 1992 FAMILY TRUST (collectively, "Iliescu"). Iliescu filed an opposition to Hale Lane's motion on December 18, 2017. Iliescu's opposition also included a countermotion to amend the third-party claims against Hale Lane and for further time to complete discovery. Hale Lane filed a reply in support of its motion for summary judgment on January 8, 2018, which included an opposition to Iliescu's countermotion to amend. On January 12, 2018, Iliescu filed a reply in support of the countermotion to amend and for further time to complete discovery. This Court heard oral arguments by counsel on June 6, 2018. Having considered the motion,

oppositions/countermotions, and reply briefs, along with all supporting documentation, and having considered oral argument from the parties, this Court orders as follows.

GENERAL FACTUAL BACKGROUND

The matter underlying Iliescu's third-party legal malpractice claims against Hale Lane was a lien dispute arising out of an architect's lien that had been recorded against Iliescu's real property located in downtown Reno. After the lien was recorded, Hale Lane filed an application on Iliescu's behalf to release the architect's lien, arguing that the architect, Plaintiff Mark Steppan ("Steppan"), had not provided the required pre-lien notice and that his lien was therefore invalid. Steppan then filed a complaint for foreclosure of his lien, and the two matters were consolidated into this action.

Over Hale Lane's argument to the contrary, the District Court ultimately concluded that the actual-notice exception to the pre-lien notice requirement was applicable in this case. The Court further found that Iliescu had actual notice of Steppan's architectural work, and, after a bench trial, the Court entered an Order foreclosing Steppan's lien. Iliescu appealed.

In May of 2017, the Nevada Supreme Court reversed the order foreclosing Steppan's lien and remanded the matter for entry of judgment in Iliescu's favor. The Supreme Court's Opinion was based on Steppan's failure to provide the statutorily-required pre-lien notice, holding that Steppan was not entitled to rely on the actual-notice exception to the pre-lien notice requirement.

After the successful appeal, Iliescu continues to pursue the third-party legal malpractice claims against Hale Lane. Hale Lane now moves for summary judgment of those claims.

UNDISPUTED FACTS MATERIAL TO THIS ORDER

In the third-party legal malpractice claims asserted against Hale Lane, Iliescu alleges that Hale Lane could have, and should have, taken steps to protect Iliescu from Steppan's lien. (*See* Answer and Third Party Complaint, filed September 27, 2007).

The filing that initiated this action on February 14, 2007 was Iliescu's *Application for Release of Mechanic's Lien*, which was prepared and filed by then-Hale Lane attorney, Jerry Snyder. In that Application, Hale Lane argued on Iliescu's behalf that Steppan's lien was

invalid because Steppan had not provided a notice of right to lien pursuant to NRS 108.245(6) or a notice of intent to lien pursuant to NRS 108.226(6). (*See, generally*, Application for Release of Mechanic's Lien, filed February 14, 2007).

In the *Response to Application for Release of Mechanic's Lien* (filed by attorney Gayle Kern), Steppan argued that, under *Fondren v. K/L Complex, Ltd.*, 106 Nev. 705, 800 P.2d 719 (1990), a statutory pre-lien notice was not required because Iliescu had actual knowledge of the off-site architectural work being conducted with respect to his property. (*See, generally*, Response to Application for Release of Mechanic's Lien, filed May 30, 2007)

On May 3, 2007, the District Court, Department 6, conducted a hearing on the application to release Steppan's lien. On Iliescu's behalf, Hale Lane argued that the parties' lien dispute was distinguishable from *Fondren*, and that the actual notice exception therefore did not apply. At that hearing, Mr. Snyder argued on behalf of Iliescu, in pertinent part, as follows:

> The manner in which Ms. Kern would have this court read Fondren is to have Fondren – I believe what Ms. Kern said was Fondren requires that the burden be shifted. If the owner has any notion that there might be a construction project, the burden is shifted to him to inquire. That's not what Fondren says.
>
> What Fondren says is that where the owner has actual notice of construction, the constructive notice by the pre-lien statute or the notice of right to lien statute is not required. And so in order for Fondren to obviate the need for a pre-lien notice, the actual notice has to have at least the information that would be required under the pre-lien notice, under the constructive pre-lien notice.
>
> What the pre-lien notice has to have is the identity of the lien claimant, a general description of the work, materials, equipment or services, the identity of the general contractor under whom the lien claimant is with contract.
>
> None of that information was provide to Dr. Iliescu. He did not know the identity of the lien claimant until at the earliest October of 2006 after virtually all of the work had been done. So this notion that, because he had some idea that an architect somewhere would be creating some plans, some design work or a work improvement to this property, that he was under an obligation to go dig out that information is simply untrue. That's reading Fondren so broadly as to vitiate the specific requirements of NRS 108.245, which explicitly says, if you

don't file your pre-lien notice, you don't have a lien.

(Transcript of Proceedings, May 3, 2007, pp. 47-49).

The District Court did not grant the application to release Steppan's lien. (May 3, 2007 Order). Instead, the Court ordered that the parties were to conduct discovery concerning whether Iliescu had actual knowledge of the architectural services performed by Steppan. (May 3, 2007 Order).

Shortly thereafter, other attorneys substituted in for Iliescu, in place of Hale Lane. (Substitution of Counsel, filed August 3, 2007). Iliescu then filed an answer to Steppan's complaint for foreclosure of his lien. Iliescu's answer included two third-party claims for relief against Hale Lane, entitled Professional Malpractice and Negligence. (Answer and Third Party Complaint, filed September 27, 2007, pp. 14-15). The third-party claims against Hale Lane remained stayed throughout the litigation of the lien dispute between Iliescu and Steppan.

After a bench trial, this Court determined that Iliescu had actual notice of Steppan's architectural work, and that Steppan's lien was therefore valid and enforceable. (Findings of Fact, Conclusions of Law and Decision, entered May 28, 2014). Accordingly, this Court entered an order foreclosing Steppan's lien. (Judgment, Decree and Order for Foreclosure of Mechanic's Lien, entered February 26, 2015). Iliescu appealed that ruling to the Nevada Supreme Court.

On May 25, 2017, the Nevada Supreme Court issued its Opinion in Iliescu's appeal. *Iliescu v. Steppan*, 133 Nev. Adv. Op. 25, 394 P.3d 930 (2017). It held that the actual notice exception described in *Fondren* does not apply to off-site work when no onsite work has been performed on the property. *Id.* at 934-35. It therefore reversed this Court's order foreclosing Steppan's lien and remanded the matter to this Court for entry of judgment in Iliescu's favor. *Id.* at 936.

After the successful appeal, Iliescu now continues to pursue its legal malpractice claims against Hale Lane, seeking recovery of the fees and costs incurred in successfully defending against Steppan's lien, along with other claimed damages. Hale Lane now moves for summary judgment of those claims for relief.

Hale Lane's motion is based on the principle that judicial error can, and in this case does, constitute an intervening and superseding cause of the claimed damages in a legal malpractice case. As discussed below, based on the applicable law and the undisputed material facts of this case, this Court agrees with Hale Lane that the District Court's judicial error is the intervening and superseding cause of Iliescu's claimed damages, that Hale Lane is thereby relieved from liability for alleged legal malpractice, and that summary judgment is therefore warranted.

APPLICABLE LAW

A. The Standard for Granting Summary Judgment

Summary judgment is appropriate when the pleadings, written discovery, depositions, and affidavits, if any, demonstrate that no genuine issue of material fact remains for trial. NRCP 56(c); *Wood v. Safeway, Inc.*, 121 Nev. 724, 732, 121 P.3d 1026 (2005). If the nonmoving party bears the burden of persuasion at trial, the moving party has the burden of producing evidence that negates an essential element of the nonmoving party's claim, or pointing out that there is an absence of evidence to support the nonmoving party's case. *Cuzze v. University and Community College System of Nevada*, 123 Nev. 598, 602-03, 172 P.3d 131 (2007). Once the moving party meets its burden, the nonmoving party must set forth facts demonstrating the existence of a genuine issue of material fact. In order to defeat summary judgment, "the nonmoving party must transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact." *Cuzze*, 123 Nev. at 602-03 (citations omitted).

A court may properly grant summary judgment if any of the essential elements of a claim are missing. *See, e.g., Kusmirek v. MGM Grand Hotel, Inc.*, 73 F.Supp.2d 1222 (D. Nev. 1999) (summary judgment granted where plaintiff failed to satisfy elements of duty and proximate cause). In order to establish entitlement to judgment as a matter of law, a moving defendant must show that one of the elements of the plaintiff's prima facie case is "clearly lacking as a matter of law.'" *Scialabba v. Brandise Construction Co.*, 112 Nev. 965, 968, 921 P.2d 928 (1996).

B. The Essential Elements of a Legal Malpractice Claim

Iliescu's Third-Party Complaint asserts two claims for relief against Hale Lane: (1) Professional Malpractice; and (2) Negligence. Both of Iliescu's claims are based on the same allegations and require the same legal analysis. *Morgano v. Smith*, 110 Nev. 1025, 1028 n. 2, 879 P.2d 735, 737 (1994).

In order for Iliescu to establish a prima facie case of legal malpractice, he must show: (1) the existence of an attorney/client relationship which created a duty of care; (2) a breach of that duty; (3) that Hale Lane's negligence is the proximate cause of his damages; and, (4) the existence of actual loss or damage resulting from the negligence. *Mainor v. Nault*, 120 Nev. 750, 101 P.3d 308 (2004). If any of these essential elements is lacking as a matter of law, Hale Lane is entitled to summary judgment. *See Kusmirek*, 73 F.Supp.2d at 1226-1227; and *Scialabba*, 112 Nev. at 968; *see also Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 111, 825 P.2d 588, 592 (1992) (holding that "[w]here an essential element of a claim for relief is absent, the facts, disputed or otherwise, as to other elements are rendered immaterial and summary judgment is proper.")

C. The Doctrine of Judicial Error as Superseding Cause

The Nevada Supreme Court has recognized that alleged legal malpractice damages may, in certain circumstances, be more appropriately characterized as having been proximately caused by judicial error rather than professional negligence on the part of the attorney. For example, in *Semenza v. Nevada Medical Liability Ins. Co.*, 104 Nev. 666, 765 P.2d 184 (1988), an attorney was sued for legal malpractice for negligently conducting discovery and negligently preparing for trial in an underlying medical malpractice case. 104 Nev. at 667, 765 P.2d at 185. Specifically, it was alleged that the attorney mistakenly allowed a damaging hospital memorandum into evidence. *Id.* Based largely on the admission of that memorandum, a jury awarded the medical malpractice plaintiff a substantial verdict. *Id.* The doctor's liability insurer then sued the doctor's defense lawyer for legal malpractice. *Id.* The underlying medical malpractice verdict was later reversed because the admission of the memorandum "constituted prejudicial error of a magnitude that demands reversal and a new trial." *Id.*

(quoting *Mishler v. McNally*, 102 Nev. 625, 629, 730 P.2d 432 (1986)).

Based on the Supreme Court's reversal of the medical malpractice verdict, the attorney argued that the trial court erred in finding him liable for legal malpractice. *Id.* The Supreme Court agreed. *Id.* It analyzed the legal malpractice action under accrual principles, holding that the legal malpractice cause of action did not accrue unless and until "the underlying case has been *affirmed* on appeal." *Id.* at 668, 765 P.2d at 185-86 (emphasis added). In its analysis, the Supreme Court recognized that "[a]pparent damage may vanish with successful prosecution of an appeal and ultimate vindication of an attorney's conduct by an appellate court." *Id.* (quoting *Amfac Distribution Corp. v. Miller*, 138 Ariz. 155, 673 P.2d 795, 796 (Ariz. App. 1983)).

Likewise, in *Hewitt v. Allen*, 118 Nev. 216, 43 P.3d 345 (2002), the Nevada Supreme Court recognized that a legal malpractice plaintiff's claimed damages may have been caused by judicial error, rather than an attorney's negligence. In *Hewitt*, the plaintiff was injured in a car accident for which she attempted to sue several State of Utah governmental entities. 118 Nev. at 218, 43 P.3d at 346. In filing suit, the plaintiff's lawyer failed to comply with a Utah statute requiring that notice of her claim be served on the Utah Department of Public Safety, and the plaintiff's claims against the governmental entities were therefore dismissed. *Id.* at 218-19, 43 P.3d at 346. The plaintiff appealed the dismissals, but later voluntarily dismissed her appeal when her legal counsel advised her that the appeal was futile. *Id.* at 219, 43 P.3d at 346-47. The plaintiff then sued her attorney for malpractice. *Id.* The question at issue in *Hewitt* was whether the plaintiff had abandoned her legal malpractice claim by voluntarily dismissing an appeal that may have vindicated the attorney's conduct. *Id.* at 220, 43 P.3d at 347.

Like in *Semenza*, the Supreme Court analyzed the issue by first discussing when a legal malpractice claim can be said to have accrued. *Id.* at 220-22, 43 P.3d at 347-48. Recognizing the fact that a client need not appeal an adverse ruling to preserve a legal malpractice claim, the Court analogized the client's voluntary dismissal of her appeal to a decision not to appeal in the first place. *Id.* at 222, 43 P.3d at 348-49. It thus concluded that voluntarily dismissing a futile appeal does not amount to abandonment of a legal malpractice claim. *Id.* In reaching its conclusion, the *Hewitt* Court observed as follows:

> In cases where no appeal from an adverse ruling was filed, the defendants in the legal malpractice action are able to assert, as an affirmative defense, that the proximate cause of the damages was not the attorney's negligence, but judicial error that could have been corrected on appeal. This issue is commonly raised under theories of abandonment or failure to mitigate damages, but can also be asserted as part of a claim that the malpractice action is premature. Moreover, because the issue is raised in the context of an affirmative defense, the attorney defendant has the burden of proof to establish that an appeal would have been successful. Finally, whether an appeal is likely to succeed is a question of law to be decided by the trial court.

Hewitt, 118 Nev. at 222, 43 P.3d at 348-49.

Although the Nevada Supreme Court has acknowledged that judicial error can constitute the intervening and superseding cause of damages in a legal malpractice case, the Court has not yet taken the opportunity to address the issue in depth. Courts in our sister states have fleshed out the doctrine in greater detail, and there appear to be two prevailing approaches to determining the legal effect of a judicial error in a legal malpractice action.

Under the first approach, "judicial error resulting in an adverse ruling is a superseding cause that relieves a negligent attorney from liability for legal malpractice *without regard to whether the judicial error was foreseeable*." *Kiribati Seafood Co. v. Dechert LLP*, 2016 WL 1426297, *12 (Mass. 2016) (emphasis added). This approach applies "where the attorney has presented the necessary legal arguments and the judge, albeit in error, rejects them." *Id.* (quoting *Crestwood Cove Apartments Business Trust v. Turner*, 164 P.3d 1247, 1256 (Utah 2007).

In *Crestwood Cove*, the Supreme Court of Utah considered the proximate cause issue in a legal malpractice case where the trial court had erred in issuing a ruling that harmed the client. It stated as follows:

> Accordingly, summary judgment is appropriate where there is no doubt that judicial error, rather than attorney malpractice, caused a client's losses. As previously discussed, some jurisdictions, often through the guise of an abandonment doctrine, have concluded that a plaintiff cannot establish a claim for legal malpractice where judicial error was the proximate cause of the adverse result. We agree. Where an attorney has raised and preserved all relevant legal considerations in an appropriate procedural manner and a court nevertheless commits judicial error, the attorney's actions cannot be considered the proximate cause of the client's loss. Although a client may believe that an attorney has not litigated a case in the most effective manner possible, such

> beliefs are irrelevant where the attorney has presented the necessary arguments and the judge, albeit in error, rejects them. Were it otherwise, an attorney would be subject to liability every time a judge erroneously ruled against the attorney's client. In effect, an attorney would become a guarantor of correct judicial decisionmaking—a result we cannot accept.

Crestwood Cove, 164 P.3d at 1255-56 (internal citations omitted); *see also Pa. Ins. Guar. Ass'n v. Sikes*, 590 So.2d 1051, 1052 (Fla. App. 1991) ("A reversal of a trial court's order that denies an attorney the opportunity to cure a nonprejudicial defect and enters judgment for the opposing side because of the alleged defect, determines, essentially, that there was judicial error rather than legal malpractice"); *Cedeno v. Gumbiner*, 347 Ill.App.3d 169, 806 N.E.2d 1188, 1194 (2004) (finding that where the court's "misapplication of the law served as an intervening cause, it cannot be said that plaintiff's damages proximately resulted from" the attorney's actions, and summary judgment was therefore appropriate.)

Although the *Crestwood Cove* Court stopped short of holding that judicial error always forecloses a plaintiff from bringing a malpractice suit, it did observe that "when an attorney has raised the appropriate arguments and the court nevertheless commits judicial error, a plaintiff's suit can be appropriately dismissed on summary judgment." *Id. at* 1256. In other words, as long as the attorney asserts the appropriate legal arguments, judicial error is regarded as a *per se* superseding cause in a legal malpractice action. *Id.*

Under the second approach, the foreseeability of the District Court's judicial error is a relevant consideration. Importantly, however, a judicial error is only regarded as foreseeable under very limited circumstances. This approach was explained and applied by the Supreme Court of Texas in *Stanfield v. Neubaum*, 494 S.W.3d 90 (2016). The *Stanfield* Court began its opinion with the following preface:

> Litigation rarely results in complete satisfaction for those involved. When a lawyer makes a mistake and the client loses as a result, the law affords a remedy. What happens, however, when the lawyer pursues a winning strategy (perhaps with some strategic missteps), but the trial judge errs, and the error requires a costly appeal to correct? Is the lawyer liable for the appellate costs incurred to correct the error? Although the question presents a novel issue, the answer is governed by well-established causation principles.

Stanfield, 494 S.W.3d at 93.

Stanfield involved an underlying usury case in which the defendants, the Neubaums, were alleged to have loaned money at usurious interest rates to Buck Glove Company, through an agent, Marvin March. *Id.* at 94. The Neubaums' lawyers argued, in pertinent part, that March was not acting as their agent when he made the subject loans. *Id.* After a jury trial, the jury found that March had served as the Neubaums' agent in making the usurious loans, and the trial court entered judgment against the Neubaums. *Id.* The Neubaums' attorneys then moved for a new trial or reformation of the judgment, again arguing that there was no evidence to support the plaintiff's agency theory. *Id.* at 94-95. That motion was denied. *Id.* at 95.

The Neubaums then hired new counsel to appeal the adverse usury judgment, and the appeal was successful. *Id.* The appellate court reversed the usury judgment, concluding that there was legally insufficient evidence that March made the loans as the Neubaums' agent. *Id.* When all was said and done, the Neubaums had spent $140,000 in appellate attorney's fees to obtain a favorable resolution of the usury case. *Id.* The Neubaums then sued their trial attorneys for legal malpractice, seeking to recover the amounts expended to overturn the erroneous trial court judgment. *Id.*

In their defense of the malpractice action, the attorney-defendants maintained that the trial court's error in the underlying usury case was an intervening and superseding cause of the Neubaums' damages. *Stanfield*, 494 S.W.3d at 95-96. The Supreme Court of Texas agreed. The court held that "[t]o break the causal connection between an attorney's negligence and the plaintiff's harm, the judicial error must not be foreseeable." *Id.* at 99. It explained that a judicial error is reasonably foreseeable if an "unbroken connection" exists between the attorney's negligence and the judicial error, "such as when the attorney's negligence directly contributed to and cooperated with the judicial error, rendering the error part of 'a continuous succession of events' that foreseeably resulted in the harm." *Id.* at 100.

Importantly, "merely furnishing a condition that allows judicial error to occur does not establish the ensuing harm was a reasonably foreseeable result of the defendant's negligence." *Id.* (emphasis added). Thus, for a judicial error to be foreseeable, the attorney must have done more than merely furnish a condition that allows the judicial error to occur; the attorney must

have directly contributed to and cooperated with the judicial error. *Id.* *Stanfield*'s explanation of when judicial error is foreseeable applies where a legal malpractice defendant has, in effect, invited the judicial error by advocating a legally erroneous principle that the court accepts. Essentially, a lawyer cannot invite judicial error and then escape responsibility for the financial consequences thereof by disavowing the attorney's inducement or encouragement of that error.

APPLICATION OF THE LAW TO THE UNDISPUTED FACTS

On May 3, 2007, the District Court determined that Steppan's lien may be upheld, over Hale Lane's objection regarding the lack of a pre-lien notice, if it was shown that Iliescu had actual notice of Steppan's architectural services. Over 10 years later, on May 25, 2017, the Nevada Supreme Court held that Steppan was not entitled to rely on the actual-notice exception to the pre-lien notice requirement because the actual-notice exception does not apply to off-site work when no onsite work has been performed on the property. Thus, the May 2007 ruling and all subsequent District Court rulings founded upon this faulty premise were determined to have been judicial error. The issue now presented to this Court is to determine the legal (i.e., causal) effect of the judicial error on this legal malpractice action.

This Court concludes that, under either of the prevailing approaches to the judicial-error-as-superseding-cause analysis, Hale Lane is entitled to summary judgment. Hale Lane did not invite the District Court's judicial error, nor did Hale Lane cooperate with such judicial error. To the contrary, Hale Lane argued directly against the ruling that was ultimately held to have been in error.

It is undisputed that Hale Lane argued that a pre-lien notice was a necessary predicate to Steppan's lien, and that the lien was invalid specifically because of Steppan's failure to provide such a notice. Indeed, Hale Lane went much further in its argument. When presented with Steppan's contention, under *Fondren*, that actual notice was an exception to the pre-lien notice requirement, Hale Lane drew the appropriate distinction between this case and *Fondren*. Although Hale Lane did not draw the distinction in the strict terms of "onsite" versus "off-site" work, it made the same basic point—i.e., that actual notice of off-site work does <u>not</u> provide a property owner with the same information as does actual notice of onsite work. At the oral

argument hearing on May 3, 2007, Hale Lane attorney Jerry Snyder argued, in pertinent part:

> I believe what Ms. Kern said was Fondren requires that the burden be shifted. If the owner has any notion that there might be a construction project, the burden is shifted to him to inquire. That's not what Fondren says.
>
> What Fondren says is that where the owner has actual notice of construction, the constructive notice by the pre-lien statute or the notice of right to lien statute is not required. And so in order for Fondren to obviate the need for a pre-lien notice, the actual notice has to have at least the information that would be required under the pre-lien notice, under the constructive pre-lien notice.
>
> What the pre-lien notice has to have is the identity of the lien claimant, a general description of the work, materials, equipment or services, the identity of the general contractor under whom the lien claimant is with contract.
>
> None of that information was provide to Dr. Iliescu. He did not know the identity of the lien claimant until at the earliest October of 2006 after virtually all of the work had been done. So this notion that, because he had some idea that an architect somewhere would be creating some plans, some design work or a work improvement to this property, that he was under an obligation to go dig out that information is simply untrue. That's reading Fondren so broadly as to vitiate the specific requirements of NRS 108.245, which explicitly says, if you don't file your pre-lien notice, you don't have a lien.

The same rationale argued by Snyder in May of 2007 formed the basis of the Nevada Supreme Court's Opinion in May of 2017. In fact, juxtaposing Snyder's 2007 argument with the Nevada Supreme Court's 2017 reasoning reveals that the two are nearly identical. In its decision of Iliescu's previous appeal, the Nevada Supreme Court wrote:

> We further explained that NRS 108.245 "protect[s] owners from hidden claims and ... [t]his purpose would be frustrated if mere knowledge of construction is sufficient to invoke the actual knowledge exception against an owner by a contractor. Otherwise, the exception would swallow the rule."
>
> This rationale equally pertains to offsite architectural work performed pursuant to an agreement with a prospective buyer when there is no indication that onsite work has begun on the property, and no showing has been made that the offsite architectural work has benefited the owner or improved its property. As this 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. As the *Hardy* court recognized, to conclude otherwise would frustrate the purpose of NRS 108.245, and the actual notice exception would swallow the rule.

Iliescu v. Steppan, 133 Nev. Adv. Op. 25, 394 P.3d 930, 934-35 (2017) (internal citations omitted).

The similarity between Hale Lane's 2007 argument and the Nevada Supreme Court's 2017 reasoning reveals, unequivocally, that Hale Lane "presented the necessary legal arguments and the judge, albeit in error, reject[ed] them." *Kiribati Seafood*, 2016 WL 1426297, *12 (Mass. 2016) (quoting *Crestwood Cove*, 164 P.3d at 1256 (Utah 2007).

The similarity further shows that Hale Lane did not contribute to or cooperate with the judicial error. *See Stanfield*, 494 S.W.3d at 100. Stated differently, Hale Lane did not invite the judicial error by advocating a legally erroneous principle that the Court accepted. *Id.* To the contrary, the District Court made its erroneous ruling despite Hale Lane's appropriate, and ultimately correct, legal argument.

Accordingly, the District Court's judicial error is the intervening and superseding cause of Iliescu's claimed damages. The legal effect of the District Court's judicial error is to sever the causal connection between the alleged legal malpractice and Iliescu's claimed damages. Because the element of causation is lacking as a matter of law in this case, Hale Lane is entitled to summary judgment.

ILIESCU'S COUNTERMOTION TO AMEND IS DENIED AS FUTILE

In opposing Hale Lane's summary judgment motion, Iliescu filed a countermotion for leave to amend and to conduct further discovery. Iliescu's proposed amended third-party complaint, insofar as it pertains to Hale Lane, is essentially a list of steps Hale Lane allegedly could have or should have taken to protect Iliescu from the possibility that Steppan would later assert a lien against Iliescu's property. (Exhibit 1 to Iliescu's Opposition/Countermotion, pp. 18-21, ¶¶ 97(i) – (xvii)). Iliescu further proposes to add an additional claim against Hale Lane for breach of contract. (Exhibit 1 to Iliescu's Opposition/Countermotion, pp. 23-24)

NRCP 15(a) provides that leave to amend a complaint shall be freely given when justice so requires. "However, leave to amend should not be granted if the proposed amendment

would be futile." *Halcrow, Inc. v. Eighth Judicial District Court*, 129 Nev. Adv. Op. 42, 302 P.3d 1148, 1152 (2013). The futility exception to NRCP 15(a) "is intended to mean that an amendment should not be allowed if it inevitably will be considered a waste of time and resources on which the movant has no realistic chance of prevailing at trial." *Nutton v. Sunset Station, Inc.*, 131 Nev. Adv. Op. 34, 357 P.3d 966, 973 (2015).

The above-outlined issue (judicial error as an intervening and superseding cause) is purely an issue of law, and the facts bearing on the issue are undisputed. Even if Iliescu's amended allegations are accepted as true, the fact remains that Hale Lane's 2007 application to release Steppan's lien should have been granted. No matter what Hale Lane allegedly could have done to preclude Steppan from asserting a lien, the District Court's judicial error will always constitute an intervening and superseding cause of Iliescu's claimed damages. Accordingly, as a matter of law, Iliescu cannot establish the causation element of his legal malpractice claim, even as prospectively amended.

Furthermore, Iliescu's inclusion of a separate breach of contract claim against Hale Lane in his proposed amended pleading does not relieve Iliescu of the requirement that he prove the element of causation. Claims not labeled "legal malpractice" are still regarded under the law as legal malpractice claims if they are "premised on [an attorney] allegedly breaching 'duties that would not exist but for the attorney-client relationship.'" *Stoffel v. Eighth Judicial District Court*, 2017 WL 1078662, *1 (Nev. 2017) (quoting *Stalk v. Mushkin*, 125 Nev. 21, 29, 199 P.3d 838, 843 (2009)). Thus, Iliescu cannot get around the obligation to prove the element of causation simply by labeling one of his claims something other than "legal malpractice." Iliescu's inability to prove the element of causation is fatal to all his claims against Hale Lane, no matter what he labels those claims and regardless of whether his pleading is amended. Iliescu's countermotion to amend and for further discovery is therefore denied as futile.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. That Hale Lane's Motion for Summary Judgment of Iliescu's Fifth and Sixth Claims for Relief is **GRANTED**.

2. That Iliescu's countermotion to amend and for further discovery is **DENIED**.

IT IS FURTHER ORDERED that this Court has expressly determined that there is no just reason for delay and directs the entry of final judgment as to Third-Party Defendant Hale Lane, pursuant to NRCP 54(b).

DATED: June 12, 2018.

By: _____
DISTRICT JUDGE

2540
Todd R. Alexander, Esq. NSB #10846
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Attorneys for Third Party Defendants

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

MARK B. STEPPAN, Plaintiff, vs. JOHN ILIESCU JR. and SONNIA ILIESCU, as Trustees of the JOHN ILIESCU, JR. AND SONNIA ILIESCU 1992 FAMILY TRUST AGREEMENT; JOHN ILIESCU, individually; DOES I-V, inclusive; and ROE CORPORATIONS VI-X, inclusive, Defendants. AND RELATED CLAIMS.	CONSOLIDATED Case No. CV07-00341 Dept. No. 10

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that the Order Granting Third-Party Defendant Hale Lane's Motion for Summary Judgment was entered on June 12, 2018. A copy of said Order is attached hereto as **Exhibit 1**.

The undersigned affirms that this document does not contain the social security number of any person.

Dated: June 12, 2018.

Lemons, Grundy & Eisenberg

By: _____
Todd R. Alexander, Esq.
Attorneys for Third Party Defendants

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& EISENBERG
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the law office of Lemons, Grundy & Eisenberg and that on June 12, 2018, I e-filed a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER**, with the Clerk of the Court through the Court's eFlex electronic filing system and notice will be sent electronically by the Court to the following:

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INDEX OF EXHIBITS

Exhibit No.	*Description*	*Length of Exhibit*
1	Order Granting Third-Party Defendant Hale Lane's Motion for Summary Judgment	15 pages

EXHIBIT 1

EXHIBIT 1

FILED
Electronically
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2018-06-12 02:30:48 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6724832

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

MARK B. STEPPAN,

Plaintiff,

vs.

JOHN ILIESCU JR. and SONNIA ILIESCU, as Trustees of the JOHN ILIESCU, JR. AND SONNIA ILIESCU 1992 FAMILY TRUST AGREEMENT; JOHN ILIESCU, individually; DOES I-V, inclusive; and ROE CORPORATIONS VI-X, inclusive,

Defendants.

AND RELATED CLAIMS

CONSOLIDATED

Case No. CV07-00341

Dept. No. 10

ORDER GRANTING THIRD-PARTY DEFENDANT HALE LANE'S MOTION FOR SUMMARY JUDGMENT

On November 17, 2017, Third-Party Defendant HALE LANE PEEK DENNISON AND HOWARD PROFESSIONAL CORPORATION ("Hale Lane"), filed a motion for summary judgment of the third-party claims asserted against it by third-party plaintiffs JOHN ILIESCU, JR. and SONNIA ILIESCU, individually and as trustees of the ILIESCU 1992 FAMILY TRUST (collectively, "Iliescu"). Iliescu filed an opposition to Hale Lane's motion on December 18, 2017. Iliescu's opposition also included a countermotion to amend the third-party claims against Hale Lane and for further time to complete discovery. Hale Lane filed a reply in support of its motion for summary judgment on January 8, 2018, which included an opposition to Iliescu's countermotion to amend. On January 12, 2018, Iliescu filed a reply in support of the countermotion to amend and for further time to complete discovery. This Court heard oral arguments by counsel on June 6, 2018. Having considered the motion,

oppositions/countermotions, and reply briefs, along with all supporting documentation, and having considered oral argument from the parties, this Court orders as follows.

GENERAL FACTUAL BACKGROUND

The matter underlying Iliescu's third-party legal malpractice claims against Hale Lane was a lien dispute arising out of an architect's lien that had been recorded against Iliescu's real property located in downtown Reno. After the lien was recorded, Hale Lane filed an application on Iliescu's behalf to release the architect's lien, arguing that the architect, Plaintiff Mark Steppan ("Steppan"), had not provided the required pre-lien notice and that his lien was therefore invalid. Steppan then filed a complaint for foreclosure of his lien, and the two matters were consolidated into this action.

Over Hale Lane's argument to the contrary, the District Court ultimately concluded that the actual-notice exception to the pre-lien notice requirement was applicable in this case. The Court further found that Iliescu had actual notice of Steppan's architectural work, and, after a bench trial, the Court entered an Order foreclosing Steppan's lien. Iliescu appealed.

In May of 2017, the Nevada Supreme Court reversed the order foreclosing Steppan's lien and remanded the matter for entry of judgment in Iliescu's favor. The Supreme Court's Opinion was based on Steppan's failure to provide the statutorily-required pre-lien notice, holding that Steppan was not entitled to rely on the actual-notice exception to the pre-lien notice requirement.

After the successful appeal, Iliescu continues to pursue the third-party legal malpractice claims against Hale Lane. Hale Lane now moves for summary judgment of those claims.

UNDISPUTED FACTS MATERIAL TO THIS ORDER

In the third-party legal malpractice claims asserted against Hale Lane, Iliescu alleges that Hale Lane could have, and should have, taken steps to protect Iliescu from Steppan's lien. (*See* Answer and Third Party Complaint, filed September 27, 2007).

The filing that initiated this action on February 14, 2007 was Iliescu's *Application for Release of Mechanic's Lien*, which was prepared and filed by then-Hale Lane attorney, Jerry Snyder. In that Application, Hale Lane argued on Iliescu's behalf that Steppan's lien was

invalid because Steppan had not provided a notice of right to lien pursuant to NRS 108.245(6) or a notice of intent to lien pursuant to NRS 108.226(6). (*See, generally*, Application for Release of Mechanic's Lien, filed February 14, 2007).

In the *Response to Application for Release of Mechanic's Lien* (filed by attorney Gayle Kern), Steppan argued that, under *Fondren v. K/L Complex, Ltd.*, 106 Nev. 705, 800 P.2d 719 (1990), a statutory pre-lien notice was not required because Iliescu had actual knowledge of the off-site architectural work being conducted with respect to his property. (*See, generally*, Response to Application for Release of Mechanic's Lien, filed May 30, 2007)

On May 3, 2007, the District Court, Department 6, conducted a hearing on the application to release Steppan's lien. On Iliescu's behalf, Hale Lane argued that the parties' lien dispute was distinguishable from *Fondren*, and that the actual notice exception therefore did not apply. At that hearing, Mr. Snyder argued on behalf of Iliescu, in pertinent part, as follows:

> The manner in which Ms. Kern would have this court read Fondren is to have Fondren – I believe what Ms. Kern said was Fondren requires that the burden be shifted. If the owner has any notion that there might be a construction project, the burden is shifted to him to inquire. That's not what Fondren says.
>
> What Fondren says is that where the owner has actual notice of construction, the constructive notice by the pre-lien statute or the notice of right to lien statute is not required. And so in order for Fondren to obviate the need for a pre-lien notice, the actual notice has to have at least the information that would be required under the pre-lien notice, under the constructive pre-lien notice.
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> None of that information was provide to Dr. Iliescu. He did not know the identity of the lien claimant until at the earliest October of 2006 after virtually all of the work had been done. So this notion that, because he had some idea that an architect somewhere would be creating some plans, some design work or a work improvement to this property, that he was under an obligation to go dig out that information is simply untrue. That's reading Fondren so broadly as to vitiate the specific requirements of NRS 108.245, which explicitly says, if you

don't file your pre-lien notice, you don't have a lien.

(Transcript of Proceedings, May 3, 2007, pp. 47-49).

The District Court did not grant the application to release Steppan's lien. (May 3, 2007 Order). Instead, the Court ordered that the parties were to conduct discovery concerning whether Iliescu had actual knowledge of the architectural services performed by Steppan. (May 3, 2007 Order).

Shortly thereafter, other attorneys substituted in for Iliescu, in place of Hale Lane. (Substitution of Counsel, filed August 3, 2007). Iliescu then filed an answer to Steppan's complaint for foreclosure of his lien. Iliescu's answer included two third-party claims for relief against Hale Lane, entitled Professional Malpractice and Negligence. (Answer and Third Party Complaint, filed September 27, 2007, pp. 14-15). The third-party claims against Hale Lane remained stayed throughout the litigation of the lien dispute between Iliescu and Steppan.

After a bench trial, this Court determined that Iliescu had actual notice of Steppan's architectural work, and that Steppan's lien was therefore valid and enforceable. (Findings of Fact, Conclusions of Law and Decision, entered May 28, 2014). Accordingly, this Court entered an order foreclosing Steppan's lien. (Judgment, Decree and Order for Foreclosure of Mechanic's Lien, entered February 26, 2015). Iliescu appealed that ruling to the Nevada Supreme Court.

On May 25, 2017, the Nevada Supreme Court issued its Opinion in Iliescu's appeal. *Iliescu v. Steppan*, 133 Nev. Adv. Op. 25, 394 P.3d 930 (2017). It held that the actual notice exception described in *Fondren* does not apply to off-site work when no onsite work has been performed on the property. *Id.* at 934-35. It therefore reversed this Court's order foreclosing Steppan's lien and remanded the matter to this Court for entry of judgment in Iliescu's favor. *Id.* at 936.

After the successful appeal, Iliescu now continues to pursue its legal malpractice claims against Hale Lane, seeking recovery of the fees and costs incurred in successfully defending against Steppan's lien, along with other claimed damages. Hale Lane now moves for summary judgment of those claims for relief.

Hale Lane's motion is based on the principle that judicial error can, and in this case does, constitute an intervening and superseding cause of the claimed damages in a legal malpractice case. As discussed below, based on the applicable law and the undisputed material facts of this case, this Court agrees with Hale Lane that the District Court's judicial error is the intervening and superseding cause of Iliescu's claimed damages, that Hale Lane is thereby relieved from liability for alleged legal malpractice, and that summary judgment is therefore warranted.

APPLICABLE LAW

A. The Standard for Granting Summary Judgment

Summary judgment is appropriate when the pleadings, written discovery, depositions, and affidavits, if any, demonstrate that no genuine issue of material fact remains for trial. NRCP 56(c); *Wood v. Safeway, Inc.*, 121 Nev. 724, 732, 121 P.3d 1026 (2005). If the nonmoving party bears the burden of persuasion at trial, the moving party has the burden of producing evidence that negates an essential element of the nonmoving party's claim, or pointing out that there is an absence of evidence to support the nonmoving party's case. *Cuzze v. University and Community College System of Nevada*, 123 Nev. 598, 602-03, 172 P.3d 131 (2007). Once the moving party meets its burden, the nonmoving party must set forth facts demonstrating the existence of a genuine issue of material fact. In order to defeat summary judgment, "the nonmoving party must transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact." *Cuzze*, 123 Nev. at 602-03 (citations omitted).

A court may properly grant summary judgment if any of the essential elements of a claim are missing. *See, e.g., Kusmirek v. MGM Grand Hotel, Inc.*, 73 F.Supp.2d 1222 (D. Nev. 1999) (summary judgment granted where plaintiff failed to satisfy elements of duty and proximate cause). In order to establish entitlement to judgment as a matter of law, a moving defendant must show that one of the elements of the plaintiff's prima facie case is "clearly lacking as a matter of law.'" *Scialabba v. Brandise Construction Co.*, 112 Nev. 965, 968, 921 P.2d 928 (1996).

B. The Essential Elements of a Legal Malpractice Claim

Iliescu's Third-Party Complaint asserts two claims for relief against Hale Lane: (1) Professional Malpractice; and (2) Negligence. Both of Iliescu's claims are based on the same allegations and require the same legal analysis. *Morgano v. Smith*, 110 Nev. 1025, 1028 n. 2, 879 P.2d 735, 737 (1994).

In order for Iliescu to establish a prima facie case of legal malpractice, he must show: (1) the existence of an attorney/client relationship which created a duty of care; (2) a breach of that duty; (3) that Hale Lane's negligence is the proximate cause of his damages; and, (4) the existence of actual loss or damage resulting from the negligence. *Mainor v. Nault*, 120 Nev. 750, 101 P.3d 308 (2004). If any of these essential elements is lacking as a matter of law, Hale Lane is entitled to summary judgment. *See Kusmirek*, 73 F.Supp.2d at 1226-1227; and *Scialabba*, 112 Nev. at 968; *see also Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 111, 825 P.2d 588, 592 (1992) (holding that "[w]here an essential element of a claim for relief is absent, the facts, disputed or otherwise, as to other elements are rendered immaterial and summary judgment is proper.")

C. The Doctrine of Judicial Error as Superseding Cause

The Nevada Supreme Court has recognized that alleged legal malpractice damages may, in certain circumstances, be more appropriately characterized as having been proximately caused by judicial error rather than professional negligence on the part of the attorney. For example, in *Semenza v. Nevada Medical Liability Ins. Co.*, 104 Nev. 666, 765 P.2d 184 (1988), an attorney was sued for legal malpractice for negligently conducting discovery and negligently preparing for trial in an underlying medical malpractice case. 104 Nev. at 667, 765 P.2d at 185. Specifically, it was alleged that the attorney mistakenly allowed a damaging hospital memorandum into evidence. *Id.* Based largely on the admission of that memorandum, a jury awarded the medical malpractice plaintiff a substantial verdict. *Id.* The doctor's liability insurer then sued the doctor's defense lawyer for legal malpractice. *Id.* The underlying medical malpractice verdict was later reversed because the admission of the memorandum "constituted prejudicial error of a magnitude that demands reversal and a new trial." *Id.*

(quoting *Mishler v. McNally*, 102 Nev. 625, 629, 730 P.2d 432 (1986)).

Based on the Supreme Court's reversal of the medical malpractice verdict, the attorney argued that the trial court erred in finding him liable for legal malpractice. *Id.* The Supreme Court agreed. *Id.* It analyzed the legal malpractice action under accrual principles, holding that the legal malpractice cause of action did not accrue unless and until "the underlying case has been *affirmed* on appeal." *Id.* at 668, 765 P.2d at 185-86 (emphasis added). In its analysis, the Supreme Court recognized that "[a]pparent damage may vanish with successful prosecution of an appeal and ultimate vindication of an attorney's conduct by an appellate court." *Id.* (quoting *Amfac Distribution Corp. v. Miller*, 138 Ariz. 155, 673 P.2d 795, 796 (Ariz. App. 1983)).

Likewise, in *Hewitt v. Allen*, 118 Nev. 216, 43 P.3d 345 (2002), the Nevada Supreme Court recognized that a legal malpractice plaintiff's claimed damages may have been caused by judicial error, rather than an attorney's negligence. In *Hewitt*, the plaintiff was injured in a car accident for which she attempted to sue several State of Utah governmental entities. 118 Nev. at 218, 43 P.3d at 346. In filing suit, the plaintiff's lawyer failed to comply with a Utah statute requiring that notice of her claim be served on the Utah Department of Public Safety, and the plaintiff's claims against the governmental entities were therefore dismissed. *Id.* at 218-19, 43 P.3d at 346. The plaintiff appealed the dismissals, but later voluntarily dismissed her appeal when her legal counsel advised her that the appeal was futile. *Id.* at 219, 43 P.3d at 346-47. The plaintiff then sued her attorney for malpractice. *Id.* The question at issue in *Hewitt* was whether the plaintiff had abandoned her legal malpractice claim by voluntarily dismissing an appeal that may have vindicated the attorney's conduct. *Id.* at 220, 43 P.3d at 347.

Like in *Semenza*, the Supreme Court analyzed the issue by first discussing when a legal malpractice claim can be said to have accrued. *Id.* at 220-22, 43 P.3d at 347-48. Recognizing the fact that a client need not appeal an adverse ruling to preserve a legal malpractice claim, the Court analogized the client's voluntary dismissal of her appeal to a decision not to appeal in the first place. *Id.* at 222, 43 P.3d at 348-49. It thus concluded that voluntarily dismissing a futile appeal does not amount to abandonment of a legal malpractice claim. *Id.* In reaching its conclusion, the *Hewitt* Court observed as follows:

> In cases where no appeal from an adverse ruling was filed, the defendants in the legal malpractice action are able to assert, as an affirmative defense, that the proximate cause of the damages was not the attorney's negligence, but judicial error that could have been corrected on appeal. This issue is commonly raised under theories of abandonment or failure to mitigate damages, but can also be asserted as part of a claim that the malpractice action is premature. Moreover, because the issue is raised in the context of an affirmative defense, the attorney defendant has the burden of proof to establish that an appeal would have been successful. Finally, whether an appeal is likely to succeed is a question of law to be decided by the trial court.

Hewitt, 118 Nev. at 222, 43 P.3d at 348-49.

Although the Nevada Supreme Court has acknowledged that judicial error can constitute the intervening and superseding cause of damages in a legal malpractice case, the Court has not yet taken the opportunity to address the issue in depth. Courts in our sister states have fleshed out the doctrine in greater detail, and there appear to be two prevailing approaches to determining the legal effect of a judicial error in a legal malpractice action.

Under the first approach, "judicial error resulting in an adverse ruling is a superseding cause that relieves a negligent attorney from liability for legal malpractice *without regard to whether the judicial error was foreseeable*." *Kiribati Seafood Co. v. Dechert LLP*, 2016 WL 1426297, *12 (Mass. 2016) (emphasis added). This approach applies "where the attorney has presented the necessary legal arguments and the judge, albeit in error, rejects them." *Id.* (quoting *Crestwood Cove Apartments Business Trust v. Turner*, 164 P.3d 1247, 1256 (Utah 2007).

In *Crestwood Cove*, the Supreme Court of Utah considered the proximate cause issue in a legal malpractice case where the trial court had erred in issuing a ruling that harmed the client. It stated as follows:

> Accordingly, summary judgment is appropriate where there is no doubt that judicial error, rather than attorney malpractice, caused a client's losses. As previously discussed, some jurisdictions, often through the guise of an abandonment doctrine, have concluded that a plaintiff cannot establish a claim for legal malpractice where judicial error was the proximate cause of the adverse result. We agree. Where an attorney has raised and preserved all relevant legal considerations in an appropriate procedural manner and a court nevertheless commits judicial error, the attorney's actions cannot be considered the proximate cause of the client's loss. Although a client may believe that an attorney has not litigated a case in the most effective manner possible, such

> beliefs are irrelevant where the attorney has presented the necessary arguments and the judge, albeit in error, rejects them. Were it otherwise, an attorney would be subject to liability every time a judge erroneously ruled against the attorney's client. In effect, an attorney would become a guarantor of correct judicial decisionmaking—a result we cannot accept.

Crestwood Cove, 164 P.3d at 1255-56 (internal citations omitted); *see also Pa. Ins. Guar. Ass'n v. Sikes*, 590 So.2d 1051, 1052 (Fla. App. 1991) ("A reversal of a trial court's order that denies an attorney the opportunity to cure a nonprejudicial defect and enters judgment for the opposing side because of the alleged defect, determines, essentially, that there was judicial error rather than legal malpractice"); *Cedeno v. Gumbiner*, 347 Ill.App.3d 169, 806 N.E.2d 1188, 1194 (2004) (finding that where the court's "misapplication of the law served as an intervening cause, it cannot be said that plaintiff's damages proximately resulted from" the attorney's actions, and summary judgment was therefore appropriate.)

Although the *Crestwood Cove* Court stopped short of holding that judicial error always forecloses a plaintiff from bringing a malpractice suit, it did observe that "when an attorney has raised the appropriate arguments and the court nevertheless commits judicial error, a plaintiff's suit can be appropriately dismissed on summary judgment." *Id. at* 1256. In other words, as long as the attorney asserts the appropriate legal arguments, judicial error is regarded as a *per se* superseding cause in a legal malpractice action. *Id.*

Under the second approach, the foreseeability of the District Court's judicial error is a relevant consideration. Importantly, however, a judicial error is only regarded as foreseeable under very limited circumstances. This approach was explained and applied by the Supreme Court of Texas in *Stanfield v. Neubaum*, 494 S.W.3d 90 (2016). The *Stanfield* Court began its opinion with the following preface:

> Litigation rarely results in complete satisfaction for those involved. When a lawyer makes a mistake and the client loses as a result, the law affords a remedy. What happens, however, when the lawyer pursues a winning strategy (perhaps with some strategic missteps), but the trial judge errs, and the error requires a costly appeal to correct? Is the lawyer liable for the appellate costs incurred to correct the error? Although the question presents a novel issue, the answer is governed by well-established causation principles.

Stanfield, 494 S.W.3d at 93.

Stanfield involved an underlying usury case in which the defendants, the Neubaums, were alleged to have loaned money at usurious interest rates to Buck Glove Company, through an agent, Marvin March. *Id.* at 94. The Neubaums' lawyers argued, in pertinent part, that March was not acting as their agent when he made the subject loans. *Id.* After a jury trial, the jury found that March had served as the Neubaums' agent in making the usurious loans, and the trial court entered judgment against the Neubaums. *Id.* The Neubaums' attorneys then moved for a new trial or reformation of the judgment, again arguing that there was no evidence to support the plaintiff's agency theory. *Id.* at 94-95. That motion was denied. *Id.* at 95.

The Neubaums then hired new counsel to appeal the adverse usury judgment, and the appeal was successful. *Id.* The appellate court reversed the usury judgment, concluding that there was legally insufficient evidence that March made the loans as the Neubaums' agent. *Id.* When all was said and done, the Neubaums had spent $140,000 in appellate attorney's fees to obtain a favorable resolution of the usury case. *Id.* The Neubaums then sued their trial attorneys for legal malpractice, seeking to recover the amounts expended to overturn the erroneous trial court judgment. *Id.*

In their defense of the malpractice action, the attorney-defendants maintained that the trial court's error in the underlying usury case was an intervening and superseding cause of the Neubaums' damages. *Stanfield*, 494 S.W.3d at 95-96. The Supreme Court of Texas agreed. The court held that "[t]o break the causal connection between an attorney's negligence and the plaintiff's harm, the judicial error must not be foreseeable." *Id.* at 99. It explained that a judicial error is reasonably foreseeable if an "unbroken connection" exists between the attorney's negligence and the judicial error, "such as when the attorney's negligence directly contributed to and cooperated with the judicial error, rendering the error part of 'a continuous succession of events' that foreseeably resulted in the harm." *Id.* at 100.

Importantly, "merely furnishing a condition that allows judicial error to occur does not establish the ensuing harm was a reasonably foreseeable result of the defendant's negligence." *Id.* (emphasis added). Thus, for a judicial error to be foreseeable, the attorney must have done more than merely furnish a condition that allows the judicial error to occur; the attorney must

have directly contributed to and cooperated with the judicial error. *Id.* *Stanfield*'s explanation of when judicial error is foreseeable applies where a legal malpractice defendant has, in effect, invited the judicial error by advocating a legally erroneous principle that the court accepts. Essentially, a lawyer cannot invite judicial error and then escape responsibility for the financial consequences thereof by disavowing the attorney's inducement or encouragement of that error.

APPLICATION OF THE LAW TO THE UNDISPUTED FACTS

On May 3, 2007, the District Court determined that Steppan's lien may be upheld, over Hale Lane's objection regarding the lack of a pre-lien notice, if it was shown that Iliescu had actual notice of Steppan's architectural services. Over 10 years later, on May 25, 2017, the Nevada Supreme Court held that Steppan was not entitled to rely on the actual-notice exception to the pre-lien notice requirement because the actual-notice exception does not apply to off-site work when no onsite work has been performed on the property. Thus, the May 2007 ruling and all subsequent District Court rulings founded upon this faulty premise were determined to have been judicial error. The issue now presented to this Court is to determine the legal (i.e., causal) effect of the judicial error on this legal malpractice action.

This Court concludes that, under either of the prevailing approaches to the judicial-error-as-superseding-cause analysis, Hale Lane is entitled to summary judgment. Hale Lane did not invite the District Court's judicial error, nor did Hale Lane cooperate with such judicial error. To the contrary, Hale Lane argued directly against the ruling that was ultimately held to have been in error.

It is undisputed that Hale Lane argued that a pre-lien notice was a necessary predicate to Steppan's lien, and that the lien was invalid specifically because of Steppan's failure to provide such a notice. Indeed, Hale Lane went much further in its argument. When presented with Steppan's contention, under *Fondren*, that actual notice was an exception to the pre-lien notice requirement, Hale Lane drew the appropriate distinction between this case and *Fondren*. Although Hale Lane did not draw the distinction in the strict terms of "onsite" versus "off-site" work, it made the same basic point—i.e., that actual notice of off-site work does <u>not</u> provide a property owner with the same information as does actual notice of onsite work. At the oral

argument hearing on May 3, 2007, Hale Lane attorney Jerry Snyder argued, in pertinent part:

> I believe what Ms. Kern said was Fondren requires that the burden be shifted. If the owner has any notion that there might be a construction project, the burden is shifted to him to inquire. That's not what Fondren says.
>
> What Fondren says is that where the owner has actual notice of construction, the constructive notice by the pre-lien statute or the notice of right to lien statute is not required. And so in order for Fondren to obviate the need for a pre-lien notice, the actual notice has to have at least the information that would be required under the pre-lien notice, under the constructive pre-lien notice.
>
> What the pre-lien notice has to have is the identity of the lien claimant, a general description of the work, materials, equipment or services, the identity of the general contractor under whom the lien claimant is with contract.
>
> None of that information was provide to Dr. Iliescu. He did not know the identity of the lien claimant until at the earliest October of 2006 after virtually all of the work had been done. So this notion that, because he had some idea that an architect somewhere would be creating some plans, some design work or a work improvement to this property, that he was under an obligation to go dig out that information is simply untrue. That's reading Fondren so broadly as to vitiate the specific requirements of NRS 108.245, which explicitly says, if you don't file your pre-lien notice, you don't have a lien.

The same rationale argued by Snyder in May of 2007 formed the basis of the Nevada Supreme Court's Opinion in May of 2017. In fact, juxtaposing Snyder's 2007 argument with the Nevada Supreme Court's 2017 reasoning reveals that the two are nearly identical. In its decision of Iliescu's previous appeal, the Nevada Supreme Court wrote:

> We further explained that NRS 108.245 "protect[s] owners from hidden claims and ... [t]his purpose would be frustrated if mere knowledge of construction is sufficient to invoke the actual knowledge exception against an owner by a contractor. Otherwise, the exception would swallow the rule."
>
> This rationale equally pertains to offsite architectural work performed pursuant to an agreement with a prospective buyer when there is no indication that onsite work has begun on the property, and no showing has been made that the offsite architectural work has benefited the owner or improved its property. As this 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. As the *Hardy* court recognized, to conclude otherwise would frustrate the purpose of NRS 108.245, and the actual notice exception would swallow the rule.

Iliescu v. Steppan, 133 Nev. Adv. Op. 25, 394 P.3d 930, 934-35 (2017) (internal citations omitted).

The similarity between Hale Lane's 2007 argument and the Nevada Supreme Court's 2017 reasoning reveals, unequivocally, that Hale Lane "presented the necessary legal arguments and the judge, albeit in error, reject[ed] them." *Kiribati Seafood*, 2016 WL 1426297, *12 (Mass. 2016) (quoting *Crestwood Cove*, 164 P.3d at 1256 (Utah 2007).

The similarity further shows that Hale Lane did not contribute to or cooperate with the judicial error. *See Stanfield*, 494 S.W.3d at 100. Stated differently, Hale Lane did not invite the judicial error by advocating a legally erroneous principle that the Court accepted. *Id.* To the contrary, the District Court made its erroneous ruling despite Hale Lane's appropriate, and ultimately correct, legal argument.

Accordingly, the District Court's judicial error is the intervening and superseding cause of Iliescu's claimed damages. The legal effect of the District Court's judicial error is to sever the causal connection between the alleged legal malpractice and Iliescu's claimed damages. Because the element of causation is lacking as a matter of law in this case, Hale Lane is entitled to summary judgment.

ILIESCU'S COUNTERMOTION TO AMEND IS DENIED AS FUTILE

In opposing Hale Lane's summary judgment motion, Iliescu filed a countermotion for leave to amend and to conduct further discovery. Iliescu's proposed amended third-party complaint, insofar as it pertains to Hale Lane, is essentially a list of steps Hale Lane allegedly could have or should have taken to protect Iliescu from the possibility that Steppan would later assert a lien against Iliescu's property. (Exhibit 1 to Iliescu's Opposition/Countermotion, pp. 18-21, ¶¶ 97(i) – (xvii)). Iliescu further proposes to add an additional claim against Hale Lane for breach of contract. (Exhibit 1 to Iliescu's Opposition/Countermotion, pp. 23-24)

NRCP 15(a) provides that leave to amend a complaint shall be freely given when justice so requires. "However, leave to amend should not be granted if the proposed amendment

would be futile." *Halcrow, Inc. v. Eighth Judicial District Court*, 129 Nev. Adv. Op. 42, 302 P.3d 1148, 1152 (2013). The futility exception to NRCP 15(a) "is intended to mean that an amendment should not be allowed if it inevitably will be considered a waste of time and resources on which the movant has no realistic chance of prevailing at trial." *Nutton v. Sunset Station, Inc.*, 131 Nev. Adv. Op. 34, 357 P.3d 966, 973 (2015).

The above-outlined issue (judicial error as an intervening and superseding cause) is purely an issue of law, and the facts bearing on the issue are undisputed. Even if Iliescu's amended allegations are accepted as true, the fact remains that Hale Lane's 2007 application to release Steppan's lien should have been granted. No matter what Hale Lane allegedly could have done to preclude Steppan from asserting a lien, the District Court's judicial error will always constitute an intervening and superseding cause of Iliescu's claimed damages. Accordingly, as a matter of law, Iliescu cannot establish the causation element of his legal malpractice claim, even as prospectively amended.

Furthermore, Iliescu's inclusion of a separate breach of contract claim against Hale Lane in his proposed amended pleading does not relieve Iliescu of the requirement that he prove the element of causation. Claims not labeled "legal malpractice" are still regarded under the law as legal malpractice claims if they are "premised on [an attorney] allegedly breaching 'duties that would not exist but for the attorney-client relationship.'" *Stoffel v. Eighth Judicial District Court*, 2017 WL 1078662, *1 (Nev. 2017) (quoting *Stalk v. Mushkin*, 125 Nev. 21, 29, 199 P.3d 838, 843 (2009)). Thus, Iliescu cannot get around the obligation to prove the element of causation simply by labeling one of his claims something other than "legal malpractice." Iliescu's inability to prove the element of causation is fatal to all his claims against Hale Lane, no matter what he labels those claims and regardless of whether his pleading is amended. Iliescu's countermotion to amend and for further discovery is therefore denied as futile.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. That Hale Lane's Motion for Summary Judgment of Iliescu's Fifth and Sixth Claims for Relief is **GRANTED.**

2. That Iliescu's countermotion to amend and for further discovery is **DENIED**.

IT IS FURTHER ORDERED that this Court has expressly determined that there is no just reason for delay and directs the entry of final judgment as to Third-Party Defendant Hale Lane, pursuant to NRCP 54(b).

DATED: June 12, 2018.

By: _____
DISTRICT JUDGE

CODE: $2515
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

JOHN ILIESCU, JR.; et al,

Applicants,

vs.

MARK B. STEPPAN,

Respondent.

MARK B. STEPPAN,

Plaintiff,

vs.

JOHN ILIESCU, JR., et al.,

Defendants.

JOHN ILIESCU, JR. and SONNIA ILIESCU, et al.,

Third-Party Plaintiffs,

vs.

HALE LANE PEEK DENNISON AND HOWARD PROFESSIONAL CORPORATION, a Nevada professional corporation, dba HALE LANE; et al.,

Third-Party Defendants.

CASE NO. CV07-00341
(Consolidated w/CV07-01021)

DEPT NO. 10

NOTICE OF APPEAL OF SUMMARY JUDGMENT DISMISSAL OF THIRD-PARTY CLAIMS

NOTICE is hereby given that JOHN ILIESCU, JR., individually, and JOHN ILIESCU AND SONNIA SANTEE ILIESCU as Trustees of the JOHN ILIESCU, JR. AND SONNIA ILIESCU 1992 FAMILY TRUST AGREEMENT, Third-Party Plaintiffs in Case No. CV07-01021, hereby

appeal to the Supreme Court of the State of Nevada from the rulings set forth in the June 12, 2018 "Order Granting Third-Party Defendant Hale Lane's Motion for Summary Judgment" (Washoe County Transaction #6724832), which Order was entered against them and in favor of Third-Party Defendant, HALE LANE PEEK DENNISON AND HOWARD PROFESSIONAL CORPORATION ("Hale Lane" or "Third-Party Defendant"), which will be the Respondent in these appellate proceedings. This Notice of Appeal appeals both the ruling granting Hale Lane's Motion for Summary Judgment and also the ruling denying the Iliescus' Countermotions for leave to amend and for more time for discovery, which rulings are all contained within said same Order.

DATED this 15th day of June, 2018.

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

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Counsel for Appellants

AFFIRMATION

The undersigned does hereby affirm that the preceding document filed in the Second Judicial District Court does not contain the social security number of any person.

DATED this 15th day of June, 2018.

By

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT and that on this 15th day of June, 2018, service was made by the following mode/method a true and correct copy of the foregoing **NOTICE OF APPEAL OF SUMMARY JUDGMENT DISMISSAL OF THIRD-PARTY CLAIMS** to the following person(s):

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

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Third-Party Plaintiffs,

vs.

HALE LANE PEEK DENNISON AND HOWARD PROFESSIONAL CORPORATION, a Nevada professional corporation, dba HALE LANE; et al.,

Third-Party Defendants.

CASE NO. CV07-00341
(Consolidated w/CV07-01021)

DEPT NO. 10

CASE APPEAL STATEMENT

NOTICE is hereby given that JOHN ILIESCU, JR., individually, and JOHN ILIESCU AND SONNIA SANTEE ILIESCU as Trustees of the JOHN ILIESCU, JR. AND SONNIA ILIESCU

1992 FAMILY TRUST AGREEMENT, Third-Party Plaintiffs in Case No. CV07-01021, hereby appeal to the Supreme Court of the State of Nevada from the following orders, judgments and rulings entered against them and in favor of Third-Party Defendant, HALE LANE PEEK DENNISON AND HOWARD PROFESSIONAL CORPORATION ("Hale Lane" or "Third-Party Defendant"), the Respondent in these appellate proceedings:

1. The names of the Appellants filing this Case Appeal Statement are: John Iliescu, Jr., individually, and John Iliescu and Sonnia Santee Iliescu as Trustees of the John Iliescu, Jr. and Sonnia Iliescu 1992 Family Trust Agreement, which Appellants were the Third-Party Plaintiffs in Consolidated Case No. CV07-01021.

2. The following Judge issued the decision(s), judgment(s), or order(s) appealed from: The Honorable Elliott A. Sattler, Second Judicial District Court, Washoe County, Nevada.

3. The identity of each Appellant and the name and address of counsel for each Appellant are as follows:

APPELLANTS:	John Iliescu, Jr., individually, and John Iliescu and Sonnia Santee Iliescu as Trustees of the John Iliescu, Jr. and Sonnia Iliescu 1992 Family Trust Agreement, the Third-Party Plaintiffs in Consolidated Case No. CV07-01021.
APPELLANTS' COUNSEL:	G. Mark Albright, Esq. Nevada Bar No. 001394 D. Chris Albright, Esq. Nevada Bar No. 004904 ALBRIGHT, STODDARD, WARNICK & ALBRIGHT 801 South Rancho Drive, Suite D-4 Las Vegas, Nevada 89106 Tel: (702) 384-7111 Fax: (702) 384-0605 gma@albrightstoddard.com dca@albrightstoddard.com

4. The identify of each Respondent and the name and address of anticipated appellate counsel, which was also district court counsel, for each Respondent are as follows:

RESPONDENT:	Hale Lane Peek Dennison and Howard Professional Corporation (dba Hale Lane)

LAW OFFICES
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A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-4
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

RESPONDENT'S COUNSEL: David R. Grundy, Esq.
Todd R. Alexander, Esq.,
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Third Floor
Reno, Nevada 89519
Tel: (775) 786-6868
drg@lge.net / tra@lge.net

5. All counsel identified in paragraphs 3 and 4 above are licensed to practice law in the State of Nevada.

6. Appellants were represented by retained counsel in the district court.

7. Appellants are represented by retained counsel on appeal.

8. Appellants have not sought nor have they been granted leave to proceed in forma pauperis.

9. The date(s) the proceedings commenced in the district court are as follows: The Iliescus' Application for release of Steppan's mechanic's lien, commencing Case No. CV07-00341, was filed on February 14, 2007 (said Application has since been fully adjudicated and is not the subject of this appeal); Mark A. Steppan's Complaint to foreclose his mechanic's lien, commencing Case No. CV07-01021 (subsequently consolidated with Case No. CV07-00341) was filed on May 4, 2007 (said Complaint has since been fully adjudicated and is not the subject of this appeal). The Iliescus' Answer containing a Third-Party Complaint alleging legal malpractice claims against Hale Lane was filed on September 27, 2007. These third-party claims were dismissed by the June 12, 2018 Summary Judgment Order which is the subject of this appeal.

10. A brief description of the nature of the action and result in the district court, including the type of judgment and orders being appealed and the relief granted by the district court follows:

These two consolidated cases involved Mark A. Steppan's mechanic's lien against certain property owned by the Appellants. Said mechanic's lien was ultimately invalidated by Nevada Supreme Court decision, *Iliescu v. Steppan*, 394 P.3d 930 (May 25, 2017) Docket No. 68346.

In the meantime, the Iliescus had asserted third-party legal malpractice claims against Respondent Hale Lane arising from the Steppan mechanic's lien. Said claims were stayed by stipulation pending the outcome of the Steppan lien litigation. After Steppan's lien was rejected, Hale Lane filed a motion for summary judgment dismissal of the malpractice claims. The Iliescus opposed said motion and filed a countermotion for leave to amend and for further time to complete

discovery. The district court granted the Hale Lane motion for summary judgment and denied the countermotions. This is an appeal from that decision.

11(A). This case has previously been the subject of an appeal to the Supreme Court, under Nevada Supreme Court Case No. 60036, with the following caption:

> Mark B. Steppan, Appellant
>
> vs.
>
> John Iliescu, Jr. and Sonnia Santee Iliescu as Trustees of the John Iliescu, Jr. and Sonnia Iliescu 1992 Family Trust Agreement; Holland & Hart; Karen Denise Dennison; R. Craig Howard; Jerry M. Snyder; Hale Lane Peek Dennison Howard and Anderson; and John Schleining, Respondents
>
> ---
>
> John Iliescu, Jr. and Sonnia Santee Iliescu as Trustees of the John Iliescu, Jr. and Sonnia Iliescu 1992 Family Trust Agreement, Appellants
>
> vs.
>
> Holland & Hart; Karen Denise Dennison; R. Craig Howard; Jerry M. Snyder; Hale Lane Peek Dennison Howard & Anderson, Respondents

11(B). This case has also previously been the subject of an appeal to the Supreme Court, under Nevada Supreme Court Case No. 68346, with the following caption:

> JOHN ILIESCU, 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.

12. This appeal does not involve child custody or visitation.

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13. It is unknown at this time whether this appeal involves the possibility of settlement.

DATED this 15th day of June, 2018.

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

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AFFIRMATION

The undersigned does hereby affirm that the preceding document filed in the Second Judicial District Court does not contain the social security number of any person.

DATED this 15th day of June, 2018.

By

G. MARK ALBRIGHT, ESQ.
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D. CHRIS ALBRIGHT, ESQ.
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Counsel for Appellants

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT and that on this 15th day of June, 2018, service was made by the following mode/method a true and correct copy of the foregoing **CASE APPEAL STATEMENT** to the following person(s):

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Todd R. Alexander, Esq.,
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Attorneys for Third-Party Defendant Hale Lane

_____ Certified Mail
__X__ Electronic Filing/Service
_____ Email
_____ Facsimile
_____ Hand Delivery
_____ Regular Mail

An employee of Albright, Stoddard, Warnick & Albright

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Court Reporter

SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE ELLIOTT A. SATTLER, DISTRICT JUDGE

--oOo--

MARK B. STEPPAN,

Plaintiff,

vs.

JOHN ILIESCU et al.,

Defendants.

Case No. CV07-00341

Dept. No. 10

TRANSCRIPT OF PROCEEDINGS
TRIAL - DAY 3
Wednesday, December 11, 2013

KAREN DENNISON,

called as a witness herein, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PEREOS:

Q. Please state your name.

A. Karen Dennison, D-e-n-n-i-s-o-n.

Q. The nature of your occupation or profession?

A. I'm a lawyer.

Q. And how long have you been so engaged?

A. Since April of 1972.

Q. Are you currently affiliated with a law firm?

A. Yes.

Q. The name of the law firm to which you are currently affiliated?

A. Holland & Hart.

Q. Is there a relationship between the law firm of Hale, Lane, Peek, Dennison & Howard and Holland & Hart?

A. Yes.

Q. What is the nature of that relationship?

A. The two firms combined in mid 2008.

Q. Okay. Were you the "Dennison" in the law firm of Hale, Lane, Peek, Dennison & Howard?

A. Yes.

Q. All right. In the last quarter of 2005, did you have occasion to counsel with John Iliescu in connection with the sale of land located on Court Street?

A. I had occasion to counsel John Iliescu in 2005. I'm not sure that it was the last quarter of 2005.

Q. Okay. Was it within the last half of 2005?

A. That sounds right.

Q. Okay. All right. At that time were you affiliated with a law firm?

A. Yes.

Q. And the law firm you were then affiliated with was what?

A. Hale, Lane, Peek, Dennison & Howard.

Q. At any time during your counseling, did you ever advise John Iliescu that Mark Steppan was an architect working on the project --

A. No.

Q. -- on the project at Court Street?

A. No.

Q. Okay. At any time that you counseled with John Iliescu, did you ever advise Mr. Iliescu that Fisher-Friedman Associates was an architectural firm working on the property, on Court Street?

A. No.

Q. Did you ever come to learn whether or not, okay, a pre-lien notice was recorded in connection with -- in connection with the work that was done by Mark Steppan on the subject property?

A. No, I was not aware of that.

Q. Okay. Are you familiar with the case of Fondren versus K/L Complex?

A. Yes.

Q. Are you familiar with the pre-lien notice as it existed in the -- strike that -- the statutes regarding a pre-lien notice as they existed in the year 2005?

A. Yes.

Q. Okay. Did the Fondren versus K/L Complex case predate the pre-lien notice statute as it -- as it existed in 2005?

A. I don't know.

MR. PEREOS: Fine. No further questions.

THE COURT: Any cross-examination?

MR. HOY: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. HOY:

Q. Ms. Dennison, was there an associate at your firm called Sarah Class?

A. In 2005?

Q. Yes.

A. Yes.

Q. All right. Do you know whether or not Ms. Class did any work for the developers named Sam Caniglia, Mr. Bosma, Mr. Baty and so forth?

Do you know whether or not Sarah Class looked at a design contract on behalf of those developers?

A. I came to find out after this particular lawsuit was filed that Sarah Class had looked at a form of architectural contract, which was later, apparently, used in connection with the Court Street property.

Q. But Ms. Class never told you about that -- that work assignment?

A. No.

Q. And so Ms. Class never told you that Mark Steppan and Fisher-Friedman were negotiating with your other client for an architectural design agreement?

A. No, she did not.

MR. HOY: All right. Nothing further. Thank you.

THE COURT: So just so I'm clear, Ms. Dennison, you were unaware that your -- strike that.

Were you unaware that your firm was providing legal advice both to Dr. Iliescu and to the other party at the same time?

THE WITNESS: Yes. At the time Sarah Class was doing

her work, I was unaware that she was doing that work.

THE COURT: Thank you.

Any redirect?

MR. PEREOS: No, no redirect.

THE COURT: Any recross, based on my question?

MR. HOY: Nothing further, your Honor.

THE COURT: Mr. Grundy, I don't think anyone was abused, and I appreciate your being here today.

MR. GRUNDY: It was a pleasant variation from what I've been doing all day.

THE COURT: Thank you.

And thank you, as well, Ms. Dennison, I appreciate your time. Hopefully you didn't have to wait too long.

MR. PEREOS: Is Don Clark outside?

Okay. The next witness will be Sonia Iliescu.

THE COURT: Okay.

SONNIA ILIESCU,

called as a witness herein, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PEREOS:

Q. Please state your name.

A. Sonnia Santee Iliescu. Sonnia is spelled with two Ns, S-o-n-n-i-a; Santee, S-a-n-t-e-e; Iliescu.