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)

APPELLANTS' OPENING BRIEF

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RULE 26.1 DISCLOSURE STATEMENT

I certify that the following are persons and entities described in NRAP 26.1, that must be disclosed:

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

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These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 21st day of November, 2018.

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JURISDICTIONAL STATEMENT

This is an appeal from a final Summary Judgment dismissal of third-party legal malpractice claims, entered on June 12, 2018. *See* Joint Appendix filed concurrently herewith at Volume XIII, pages JA2497-2511 (hereinafter cited by volume no., and "JA" page number). The basis for appellate jurisdiction herein is NRAP 3A(b)(1). Notice of Entry of the final Judgment was served on June 12, 2018. XIII JA2512-2530. Notice of Appeal was then filed within thirty (30) days on June 15, 2018. XIII JA2531-2533.

ROUTING STATEMENT

This case should be retained by the Nevada Supreme Court pursuant to NRAP 17(10) and (11) as involving a principal question which is an issue of first impression under Nevada common law; and a question of statewide public importance.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in granting summary judgment to the Respondent law firm, dismissing the Appellants' Third-Party legal malpractice suit against Respondents, by accepting a judicial error as superceding/intervening proximate cause defense, even though genuine issues of material fact remained to be adjudicated for the trier-of-fact as to the true proximate cause of the Appellants' damages stemming from the Respondent law firm's malpractice.

2. Whether the district court erred in dismissing the Appellants' *transactional* malpractice claims by accepting a judicial-error as superceding/intervening proximate cause defense, which properly applies to only *litigation* malpractice claims.

3. Whether the district court erred in dismissing the Appellants' *litigation* malpractice claims by accepting a judicial-error as superceding/intervening proximate cause defense, even though the legal conditions to said defense were not shown, as the law firm Respondent (a) failed to make the argument upon which the Appellants ultimately prevailed, and (b) made contrary arguments which invited the judicial error.

4. Whether the district court's ruling improperly deprived the Appellants, who met their legal duty to mitigate their losses, of their correlative right to seek reimbursement for their mitigation expenses, thereby rewarding Respondent for Appellants' successful mitigation efforts, without reimbursement by Respondent for the costs incurred by Appellants to mitigate the losses caused by Respondent.

5. Whether the district court abused its discretion in rejecting the Appellants' repeated NRCP 15(a) requests to amend their Third-Party Complaint as well as their NRCP 56(f) request to be provided additional time to complete discovery, before Summary Judgment was granted.

STATEMENT OF THE CASE

Appellants (herein the "Iliescus"), owned certain property in downtown Reno (the "Property"), which they agreed to sell for $7.5 million dollars to a would-be purchaser (VI JA1281-1306) who intended to develop a multi-use condominium project on the Property. The Iliescus retained Respondent law firm (herein "Hale Lane") to assist them in drawing up certain purchase agreement documents related to that transaction. VII JA1309-1326. Hale Lane also accepted conflicting representation of the buyer. X JA2013; XI JA2147-2155. The Iliescus allege that Hale Lane committed *transactional malpractice* during its work on the purchase agreement documents, including by failing to warn and advise them how

to protect themselves from the danger of a mechanic's lien being recorded against their Property for offsite design services provided to the buyer during escrow.

The purchase transaction failed to close and the Appellants received their unimproved Property out of escrow encumbered by a significant mechanic's lien for architectural services provided to the would-be buyer, recorded in the name of Mark A. Steppan ("Steppan"). VI JA1201-1218.

Hale Lane filed an Application on behalf of the Iliescus for Release of that Steppan lien on February 14, 2007. I JA0001-0006. This Application was not granted after a hearing thereon, and, instead, the district court ordered discovery to proceed on an allegedly material question of fact. I JA0167-0168. The Iliescus allege below and herein that Hale Lane's Application and the oral arguments thereon were inadequate and constituted *litigation malpractice*. X JA2068-2070; JA2082-2084; JA2087-2112.

Steppan then sued to foreclose on the architectural mechanic's lien (which suit was consolidated with the Iliescus' suit). I JA0170-0175; JA0216-0219. The Iliescus retained new counsel and filed an Answer to the Steppan lien foreclosure Complaint (II JA0220-0253), which included the third-party legal malpractice claim against Hale Lane. *Id.*

The Steppan suit against the Iliescus was initially dismissed in late 2011, as was the Iliescu suit against Hale Lane (V JA0911-0920; JA0970-0977). However,

these suits were then reinstated in early to mid 2012 after the appeal of these dismissals resulted in a remand and subsequent reconsideration orders. (V JA1005-1081.) The third-party malpractice claims against Hale Lane were then stayed by stipulation (VI JA1085-1091) pending the outcome of the Iliescus' dispute with Steppan.

A $4,536,263.45 Judgment in favor of Steppan, upholding his mechanic's lien and ordering a sale thereon, was entered on February 26, 2015. VII JA1347-1349. That Judgment was appealed by the Iliescus and was then reversed by this Court on May 25, 2017. VIII JA1721-1732. *Iliescu v. Steppan*, 394 P.3d 930 (Nev. 2017). Remittitur issued and was filed with the district court, on October 17, 2017 (VIII JA1735), leading to entry of a new Judgment in favor of the Iliescus, and expunging the Steppan lien, on January 3, 2018. XI JA2235-2238.

The district court then denied the Iliescus' attempts to seek their substantial costs and attorneys' fees from lien claimant Steppan. XIII JA2406-2412; JA2413-2435.

Shortly after Remittitur issued, Hale Lane filed a Motion for Summary Judgment dismissal of the previously stayed third party legal malpractice claims (X JA1923-2050). The Iliescus opposed this motion and counter-moved for additional time to complete discovery on the previously stayed case, before summary judgment was allowed, and also for leave to amend their Third-Party

Complaint. X JA2055-XI JA2234. The Hale Lane Summary Judgment Motion was granted, and the Iliescus' countervailing requests were denied. XIII JA2512-2530. This is an appeal from that district court order. XIII JA2531-2539.

SUMMARY OF THE ARGUMENT[1]

The Iliescus retained Respondent Hale Lane to represent their interests in preparing purchase agreement documents to sell their Property to a would-be buyer. During escrow, the purchaser of the Property retained an architectural firm and its Nevada licensed employee, Mark Steppan, to provide architectural services for the purchaser's planned future development at the Property. Hale Lane also came to represent the purchaser which was to acquire the Property, and was less than timely or fully forthcoming in advising the Iliescus as to the timing, scope, and nature of this conflicting representation, or of information learned by Hale Lane from that conflicting representation.

In the course of providing the Iliescus with transactional representation Hale Lane failed to ever adequately *inform* or *warn* the Iliescus of information known to Hale Lane which rendered the Iliescus' real Property vulnerable to a significant mechanic's lien being recorded against it, for architectural services provided to the would-be purchaser during escrow. Hale Lane also failed to ever *advise* the

[1] As this section of this brief merely summarizes the arguments, citations to the appendix/record are not included herein, but are provided in the more detailed Statement of Facts, below.

Iliescus as to methods for mitigating against this danger.

Ultimately, the transaction never closed and the Iliescus received their wholly unimproved Property back out of escrow encumbered by a major mechanic's lien which had been recorded against it in Steppan's name, for offsite architectural services provided to the purchaser with respect to a proposed but never-commenced development at the Property.

Hale Lane then agreed to contest this Mechanic's Lien on behalf of the Iliescus, and filed a short and half-hearted Application for release thereof. This Application argued that the lien should be expunged due to Steppan's failure to have ever served the Iliescus with a right-to-lien notice as mandated by NRS 108.245, within 31 days of any work for which a lien might be sought. This Application was opposed on the grounds that, if the Iliescus had sufficient knowledge of the potential architectural services, the lien claimant could be excused for violating NRS 108.245, pursuant to certain cases of this Court establishing what has sometimes been termed the "actual notice exception" or "*Fondren* exception" to the mandates of NRS 108.245 (sometimes hereinafter the "*Fondren* actual notice cases").[2]

[2] The *Fondren* actual notice cases consist of, *Board of Trustees v. Durable Developers*, 102 Nev. 401, 724 P.2d 736 (1986); and *Fondren v. KL Complex, Ltd.*, 106 Nev. 705, 800 P.2d 719 (1990); --*see also, Hardy Companies Inc. vs. SNMARK, LLC*, 126 Nev. 528, 540 245 P.3d 1149, 1157 (2010), decided after the Hale Lane application was filed and argued.

Hale Lane could have argued, in response, that the *Fondren* actual notice exception to NRS 108.245 does not apply to offsite services. But Hale Lane did not make this argument. Instead, Hale Lane conceded that sufficient actual knowledge might excuse Steppan's failure to comply with NRS 108.245, but argued that the Iliescus had insufficient knowledge for that exception to apply.

As demonstrated by the ultimate outcome of the Steppan lien litigation, this concession need not have been made by Hale Lane, which should instead have argued, at least in the alternative, that *Fondren* did not apply, as a matter of law, to a lien claimant providing offsite services.

But, based on the arguments which were in fact actually made by Hale Lane, the district court did not grant the Application, but instead ordered discovery to take place, with respect to the allegedly material factual question of the Iliescus' knowledge, if any, of the lien claimant's services. Hale Lane now contends this decision was a judicial error. The Application lawsuit was then consolidated with Steppan's mechanic's lien foreclosure suit. The Iliescus then retained new counsel and named Hale Lane as a third-party defendant in that suit, for legal malpractice.

The malpractice claims were then stayed, while the district court thereafter kept this case on the track it was placed by Hale Lane's initial omitted argument and concession, over the course of the subsequent years, in subsequently entered partial summary judgment rulings and after a trial on the merits. Based thereon,

the Iliescus ultimately lost the Steppan mechanic's lien lawsuit after trial.

But then the Iliescus obtained a reversal on appeal. That reversal was based on this Court's analysis indicating that: (1) Steppan had failed to serve a right-to-lien notice as mandated by NRS 108.245 such that his mechanic's lien was invalid. (2) Steppan could not rely on the *Fondren* actual notice cases to excuse this failure on his part, as said cases did not apply, legally, to the lien claimant's offsite work, such that the extent of the Iliescus' knowledge, if any, as to such work, was a legally irrelevant factual question. Hale Lane had only made the first, but not the second, of these points in its prior Application and in its oral argument thereon to the district court.

Nevertheless, once the Iliescus were successful in their appeal, Hale Lane immediately filed a Motion for Summary Judgment, to prevent the Iliescus from seeking to recoup their costs and fees incurred defending against the Steppan lien from Hale Lane. Hale Lane argued that its initial Application should have been granted years before, such that: (1) Hale Lane had no duty to warn the Iliescus about the risks of the architectural mechanic's lien, since that lien was invalid, and a transactional law firm has no duty to warn against potential invalid claims; and (2) that Hale Lane's errors were not the proximate cause of the Iliescus' damages, which were instead caused by intervening and superceding judicial error.

Hale Lane's counsel ultimately withdrew its first argument, and focused instead on its second defense: judicial error as an intervening and superceding cause of the Iliescus' damages, such that Hale Lane's conduct was allegedly not the proximate cause of the Iliescus' litigations costs and expenses, or the Iliescus' other claimed damages (such as the economic value losses from having real property tied up by a lis pendens for many years). The district court granted Hale Lane summary judgment dismissal solely on the basis of that second argument.

This decision was in error on several points:

First of all, the "judicial error as superceding proximate cause" argument should never have been applied to the Iliescus' transactional malpractice claims, but is a legal theory applicable solely to litigation malpractice. Thus, upon Hale Lane correctly abandoning its first argument, which was asserted in defense of the Iliescus' transactional malpractice claims, those transactional malpractice claims should have survived summary judgment: numerous authorities recognize that a lawyer may be sued for transactional errors that caused the client to incur litigation costs and fees.

Moreover, the judicial error as proximate cause argument should not have been accepted, as to either the transactional malpractice claims or the litigation malpractice claims. Genuine issues of material fact clearly existed, and continue to exist, as to the foreseeability, and true proximate cause of the Iliescus' damages.

Indeed, the district court's ruling ignored this Court's case law indicating that proximate cause need not be the only cause of loss, if it is a substantial factor contributing to foreseeable harm, and is almost always a question of fact for trial, rarely to be adjudicated as a matter of law on summary judgment.

Furthermore, according to the very cases on which Hale Lane relied in support of its motion, a legal malpractice defendant who wishes to successfully claim a "judicial error as proximate cause" defense, must demonstrate (1) that the law firm made the necessary argument and the judge committing judicial error failed to accept it; and (2) that said law firm did not invite the judicial error in its own arguments. Hale Lane fails either test:

(1) Hale Lane did not make the second part of the argument on which the Iliescus would ultimately prevail. Hale Lane argued that Steppan's failure to provide NRS 108.245 notice should bar the Steppan lien, but did *not* argue that the *Fondren* actual notice exception to that statutory requirement should only apply to lien claimants providing offsite work.

(2) Indeed, Hale Lane invited judicial error on this point by making just the opposite argument, and convincing the district court that what the Iliescus knew and when they knew it was a material issue of fact in this case, even though said question was ultimately ruled (on appeal) by this Court to be legally irrelevant. Hale Lane argued that *Fondren* did not apply because of the Iliescus'

lack of sufficient knowledge, thereby raising a factual issue causing the district court to order discovery rather than grant the Application, instead of properly arguing that this fact was legally irrelevant.

Based thereon, the district court erred in granting summary judgment dismissal to Hale Lane.

Furthermore, the district court's ruling violates the legal principle that claimants who mitigate their damages are entitled to be reimbursed for the costs of that mitigation, from the defendant who caused the need for such mitigation.

The Iliescus' requests to amend their Third-Party claim, and for time to complete discovery, should also have been granted, before and in lieu of granting summary judgment dismissal of their malpractice claim.

STATEMENT OF FACTS

A. Hale Lane's Transactional Legal Services Provided to the Iliescus.

(i) The Property Sale.

The Iliescu Appellants were the owners of vacant and unimproved real Property in downtown Reno, as described in the mechanics lien previously at issue herein (the "Property"). VI JA1201-1218. Appellants entered into a Land Purchase Agreement and Addendums (VI JA1281-1308 *et seq*.) to sell the Property to a would-be purchaser, Consolidated Pacific Development ("Consolidated"), which

eventually assigned its purchase rights to an entity known as BSC. (I JA0115)[3] (Consolidated and BSC are sometimes jointly hereinafter referred to as "BSC," or as the "purchaser" or "developer"). BSC planned to develop a multi-use high-rise development to be known as the "Wingfield Towers" at the Property. *Id*.

The Iliescus retained Respondent Hale Lane to represent them in negotiating certain of the purchase agreement documents for this transaction.

(ii) Addendum No. 3.

Hale Lane attorney Karen Dennison provided these services to the Iliescus and prepared an October 2005 Addendum No. 3 to the purchase agreement, on their behalf. VII JA1309-1324. This Addendum included, at Paragraph 1, a modification of certain terms relating to any extensions of the close of escrow date; and also included, at Paragraph 7, an indication that obtaining the necessary entitlements, including any required zoning variances or special use permits, was a condition precedent to the parties' obligations, which entitlements were required to be obtained by and "at buyer's expense" and also noted the potential involvement of an architect for that process, at paragraph 8(1). *Id*.

[3] To include BSC Investments (I JA0116 at l. 24) including under its apparent d/b/a name of "BSC Financial, LLC." (VII JA1328; 1329) [A review of Secretary of State filings and a Nevada bankruptcy petition beyond the scope of this particular record suggest that BSC Investments, LLC was an Oregon entity, and that "BSC Financial" must have been a d/b/a, without separate existence.]

Based on these and other provisions, the Hale Lane attorneys, including Dennison, knew, or should have known, at the time this Addendum was drawn up, that architectural and design services would eventually be commencing with respect to the project. X JA2092-2094. Since Nevada law allows architects and other providers of design services to lien real property for their services (NRS 108.2214(1)), these provisions put the Iliescus at special risk of having their property title clouded by an architectural mechanic's lien, before any financing was in place to ensure closing. Hale Lane therefore had a duty to warn and inform the Iliescus of this risk, and to advise the Iliescus to include language within this Addendum No. 3 which would protect the Iliescus from such liens.

For example, the Addendum could have required the establishment of a surety bond for the payment of architectural fees, or the establishment of a construction control account to ensure any design professionals were being regularly paid and signing unconditional progress payment lien releases, etc., or could have required the buyer to inform the seller before entering into design services contracts, with a right to review and approve the same, so the seller could be protected against onerous provisions (such as exorbitant flat fee invoicing, tied to the cost of construction – which in this case never actually commenced) therein. X JA2092-2094. Moreover, the Paragraph 1 terms of the Addendum, referencing escrow closing extensions, could have been made contingent upon any design

professionals providing progress payment lien releases for all work performed through the date of any such extension. *Id*.

However, Hale Lane failed to *inform* the Iliescus of the relevant facts as to these issues, to *warn* the Iliescus regarding the risks they faced under those facts, or to *advise* the Iliescus to include provisions in Addendum No. 3 to deal with this red flag issue. *Id*. Thus, no such provisions or protections were included within Addendum No. 3. VII JA1309-1324. While Hale Lane did include some boilerplate language about the duty of the buyer to protect and indemnify the seller from liens against the property (*id*.), such language is essentially worthless, since the whole point of statutory mechanic's liens is to ensure the provider of services has security for payment, if the party with whom he contracted cannot pay, in which event that same party will also be unable to pay on any indemnity obligation.

(iii) <u>The Hale Lane conflict of interest.</u>

Shortly after this Addendum No. 3 work was performed, the investors who were seeking to buy the Iliescus' land (eventually under the BSC name), also retained Hale Lane to provide assistance relating to the Property. These legal services commenced in at least November of 2005, and included reviewing BSC's proposed future contract with its hired architect. VI JA1266-1273. Hale Lane attorney R. Craig Howard accepted the assignment from Sam Caniglia of the

purchaser, in November 2005, and delegated the work to be performed thereon to Hale Lane attorney Sarah Class. X JA2059; JA2133-2145; XI JA2149-2151.

Hale Lane thus placed itself in the highly unusual and troubling role of concurrently representing both the buyer and also the seller on this multi-million dollar land sale transaction. The potential for malpractice to occur when a law firm represents both the purchaser and the seller on such a transaction is so great, that at least one state Supreme Court has adopted a bright-line rule expressly forbidding it, regardless of consent. *See, Baldasarre v. Butler*, 132 N.J. 278, 295-296 625 A.2d 458, 467 (N.J. 1992).

The would-be Property buyer, BSC/Consolidated, sought out an architect to help obtain the entitlements, namely, the California architectural firm of Fisher Friedman Associates ("FFA"), which had its Nevada licensed employee, Steppan, execute an initial hourly fee contract for the work, while concurrently beginning the process of negotiating a flat-fee AIA Agreement which would eventually allow the work to be re-invoiced on a flat-fee basis, tied to a percentage of the anticipated cost of construction (which would never commence). Hale Lane lawyer Sarah Class would have learned of Steppan's/FFA's retention in her review of the proposed architectural agreements, but no one from Hale Lane informed the Iliescus of the architect's retention, identity, or payment terms. X JA2059-2061; X JA2132-2145.

At some point in time prior to December 14, 2005, Hale Lane lawyers, R. Craig Howard and Doug Flowers, learned that the firm had different lawyers working for both the buyer and the seller, respectively, on the same deal. X JA2060; JA2132-2145. Howard and Flowers discussed these troubling facts with Class and Dennison in December of 2005. *Id*. But Hale Lane still did not inform or warn the Iliescus of any of the information then known to Hale Lane, at that time, let alone advise the Iliescus how to deal with the lien dangers arising from these facts. *Id*.

Based on the four lawyers' discussion, Hale Lane communicated with the Iliescus about these matters via a conflict waiver letter dated December 14, 2005, signed by Hale Lane lawyer Dennison (XI JA2153-2154) and faxed by Hale Lane lawyer Class. XI JA2155-2156. The preparation and delivery of this letter presented Hale Lane with an opportune time and medium to inform the Iliescus of information then known to it about potential architectural liens arising during escrow, to warn the Iliescus about risks arising from that information, and to advise the Iliescus of any methods or strategies for dealing with those risks. But this was not to be. X JA2063.

Instead, the December 14, 2005 conflict waiver letter contained only four brief paragraphs of explanatory text, which acknowledged its "existing" attorney-client relationship with the Iliescus, but failed to disclose the law firm's also

already existing relationship with the buyer, instead inaccurately indicating that Hale Lane "will" now start to represent the buyer. XI JA2153. The letter omitted to inform the Iliescus of any information which Hale Lane had already learned from this representation. XI JA2152-2156. The letter asked for consent to this future representation of the buyer, and for a waiver of any conflict arising from the same. *Id*.

The Iliescus contend that this letter was inadequate, such that the drafting and sending of the letter was itself an act of transactional malpractice. For example, the letter did not provide the legal advice to the Iliescus which should naturally have arisen from the information then in Hale Lane's possession: namely that Nevada allows architects to assert lien claims under its mechanic's lien statutes and that the Iliescus should employ certain protective strategies to avoid this result, or that the Iliescus should at least keep this in mind at the time of any future amendments to its arrangements with the purchaser, such as any closing extensions. *Id*. Nor did the letter advise the Iliescus that they should contact the buyer and request that no binding architectural contracts be entered into, before financing was obtained and closing of the sale had been accomplished, on any onerous flat fee terms, which could be the basis for a similarly onerous lien amount. *Id*. Nor did the Hale Lane lawyers engage in any other separate

communications with the Iliescus, at that time, to provide them with any such information or warnings. X JA2060-2064.

In violation of Nevada Rule of Professional Conduct 1.8(h)(1) the letter did not advise the Iliescus to obtain separate counsel before agreeing to its terms, even though such separate counsel might have asked the questions which would have prompted Hale Lane to more fully disclose the information then in its possession. *Id*. Ultimately, this first conflict waiver letter did not provide sufficient information to Dr. and Mrs. Iliescu to provide for informed consent to the conflict, as required by Nevada Rule of Professional Conduct 1.7(b)(4).

The letter did not, for example, provide any of the information contemplated by the ABA in its comment to Model Rules of Professional Conduct (upon which Nevada's Rules of Professional Conduct are based) Model Rule 1.0(E), in which comment the requirements of "informed consent" are set forth. XI JA2152-2156. The letter was therefore a missed opportunity for the Iliescus to be informed, warned, and advised of matters which it was vital for them to be apprised of at that time.

(iv) <u>Addendum No. 4.</u>

Several months after the delivery of this conflict waiver letter, the Iliescus were asked to and agreed to grant an extension to the close of escrow date in favor

of the buyer. X JA2064-2065. The Iliescus asked Hale Lane to prepare the paperwork for this extension. *Id*.

Thus, at some point prior to September 18, 2006, Hale Lane prepared Addendum No. 4 on behalf of the Iliescus, which allowed for this extension, and told the Iliescus to sign it. XI JA2157-2159. By the time this Addendum No. 4 was prepared, Hale Lane's other work (for the purchaser) on the matter had been sufficiently substantial for Hale Lane to be even more aware of the facts of the project, and the manner in which those facts potentially impacted the Iliescus, for even further and stronger duties to have arisen on the part of Hale Lane, to inform, warn, and advise the Iliescus, than had existed when Addendum No. 3 was drafted. X JA2065. However, in the course of working on this Addendum No. 4, Hale Lane, once again, failed to *inform* the Iliescus of what Hale Lane knew, or to *warn* the Iliescus about a potential lien threat arising from that information, or to *advise* them of any strategies for how to deal with that threat. *Id*. Hale Lane could have used the opportunity afforded by the buyer's request for this extension, to protect the Iliescus, by advising them to condition this escrow extension on a lien release from the architect, or similar protective measures. But, as shown by the contents of this fourth addendum, Hale Lane did not do so, thereby throwing away the opportunity this extension request afforded, to meet and address this lien danger head-on. XI JA2157-2160.

The buyer ultimately defaulted, as its investors were unable to obtain the necessary financing to close on the purchase (X JA2065) such that the Iliescus received their Property out of escrow subject to the major architectural Mechanic's Lien claimed by Steppan. X JA2101-2102; XI JA2160-2164.

Hale Lane then asked for a second conflict letter to be signed by the buyer and the seller (X JA2103; XI JA2182-2184), promising that Hale Lane would act to resolve the Mechanic's Lien.

B. Hale Lane's Litigation Services Provided to the Iliescus.

In an unsuccessful attempt to make good on this promise, Hale Lane then filed its above-described NRS 108.2275 Application on behalf of the Iliescus, on February 14, 2007, for the Release of Steppan's lien, initiating the first of these two consolidated suits. I JA0001-0006. This Application relied primarily on the theory that Steppan's lien was not valid because Steppan had failed to provide the statutorily required 31-day right-to-lien notice that work was being provided by an architectural firm for the project, mandated by NRS 108.245. *Id*. This was the first 1/2 of the two-part argument that would eventually succeed before this Court. VIII JA1721-1732. Hale Lane failed, however, to make the second 1/2 of that successful two-part argument, namely, to contend that the *Fondren* actual notice cases which created an exception to this mandate, were inapplicable to excuse lien

claimants providing off-site work, from their violation of NRS 108.245. I JA0001-0006; VIII JA1721-1732.

Hale Lane instead conceded at the hearing on this Application that the *Fondren* case could be relied on by Steppan if the Iliescus had sufficient actual notice of Steppan's work or identity, and argued that the Iliescus did not have the necessary degree of knowledge (without arguing, in the alternative, that whether or not the Iliescus had this degree of knowledge was irrelevant). I JA0349-0351; X JA2066. Based thereon, the case was sent into discovery by the district court's order after hearing (I JA0167-0169), was ultimately consolidated with Steppan's lien foreclosure suit (I JA0216-0219), and the Iliescus then hired new counsel without any conflicts, to represent them. I JA0209-0215.

C. <u>The Litigation and Appeal History After Hale Lane's Replacement.</u>

That new counsel then filed an Answer to Steppan's mechanic's lien foreclosure suit, which included the Third-Party Complaint against Hale Lane. II JA0220-0253.

Countervailing motions for partial summary judgment were subsequently filed by the Iliescus and Steppan on the issue of whether the *Fondren* actual notice exception applied. II JA0257-IV JA0846. The district court granted Steppan's Motion, issuing partial summary judgment in his favor, on his claim that he was excused from his violation of NRS 108.245, because of the alleged extent of the

Iliescus' knowledge. IV JA0847-0850. This was a highly ironic ruling, given that Hale Lane had never in fact shared any of its knowledge with the Iliescus, to bring them out of the dark. VII JA1459-1460; XIII 2540-2542.[4] Nevertheless, a trial would later take place, after which the reasoning of this prior summary judgment order would continue to be upheld. VII JA1347-1349.

The Iliescus subsequently obtained an appellate reversal of that post-trial Judgment, via a decision from this Court, which determined that Steppan should not have been able to rely on the exception to NRS 108.245 created by the *Fondren* actual notice cases, as those cases applied to lien claimants providing on-site work, not offsite work, such that the question of what knowledge the Iliescus did or did not have was legally irrelevant. *See, Iliescu v. Steppan*, 133 Nev. Adv. Op. 25, 394 P.3d 930 (2017), VIII JA1721-1732.

However, before that appellate victory was obtained, this case had gone through years of litigation, an initial appeal and remand, a subsequent bench trial and final Judgment, post-trial motions, and a subsequent appeal; with the Iliescus having incurred hundreds of thousands of dollars in fees and costs seeking to defend against the Steppan lien, and then successfully appealing a trial court Judgment upholding the Steppan lien. IX JA1756-1922; X JA2051-2054. Those fees and costs (which Steppan was not required to pay -- XIII JA2406-2417, on

[4] These appendix pages are not in chronological order as they were attached shortly before filing this brief.

grounds which would have been futile to attempt to appeal -- XIII JA2436-2444) could have been avoided had Hale Lane better protected the Iliescus' interests in the first place.

Accordingly, Hale Lane's malpractice committed in its representation of the Iliescus may be established on the basis of several distinct negligent and inadequate acts by Hale Lane in its transactional representation and then in its brief litigation representation. These include, without limitation, the acts and omissions set forth at X JA2105-2108, containing certain paragraphs from the Iliescus' Proposed Amended Third-Party Complaint, which the district court did not allow them to file, before instead granting summary judgment to the Respondent.

ARGUMENT

A. Applicable Standards of Review.

This Court reviews the district court's summary judgment ruling *de novo*. *MB America Inc. v. Alaska Pacific Leasing Co.*, 132 Nev. Adv. Op. 8, 367 P.3d 1286, 1287 (Nev. 2016).

This court reviews the district court's denial of the Iliescus' request for leave to amend, as well as its denial of their NRCP 56(f) request for further time to complete discovery, under an abuse of discretion standard. *Adamson v. Bowker,* 85 Nev. 115, 121, 450 P.2d 796, 800-01 (1969); *Aviation Ventures v. Joan Morris, Inc.,* 121 Nev. 113, 118, 110 P.3d 59, 62 (2005).

B. Hale Lane's "No Duty" Arguments Were Never Valid; Based thereon, the Transactional Malpractice Claims Asserted by the Iliescus Should Not Have Been Dismissed.

The elements of a malpractice claim are set forth at *Mainor v. Nault*, 120 Nev. 750, 101 P.3d 308 (2004).[5] They include: (i) the existence of an attorney-client relationship creating a duty of care; (ii) a breach of that duty; (iii) that this breach proximately caused damages to the client; and, finally, (iv) the existence of actual loss or damage, resulting from the negligence.

Hale Lane's Motion initially argued that the second element was lacking in this case, because attorneys should not, as a matter of law, be held to a duty of care requiring them to protect their clients against *unfounded* legal claims; such that Hale Lane had no breachable duty to protect the Iliescus against Steppan's filing of what *ultimately* turned out to be an *invalid* mechanic's lien. X JA1929, ll. 21-26; and JA1930-1932.

This argument might have been persuasive in a different case, with a completely different set of facts, where, for example, Nevada was a state that did not allow architects to pursue mechanic's liens *at all*, or where Steppan was providing other non-lienable services, such that Steppan's lien was substantively unfounded and non-foreseeable. But that was simply not the case, and the damages

[5] Abrogated in part on other grounds by *Delgado v. American Family Insurance Group*, 125 Nev. 564, 217 P.3d 563 (2009).

which the Iliescus have suffered were imminently foreseeable by Hale Lane, who should have warned the Iliescus against them.

Nevada *does* expressly allow architectural liens under NRS 108.2214(1). Steppan's lien was not invalidated as substantively unpermissable, but due to *his own procedural* failures to properly preserve and perfect his statutory mechanic's lien rights, by failing to ever serve the written notice mandated by NRS 108.245, within 31 days of any work being performed which was later claimed as part of his lien. NRS 108.245(3); VIII JA1726.

Nevertheless, the possibility that such a lien might be asserted by a party providing architectural services, was or should have been known to Hale Lane at the time it was providing transactional representation to the Iliescus. The fact that such an asserted lien claim, even if ultimately not upheld, would in the meantime cause litigation costs and losses to the Iliescus, and a multi-year deprivation of their right to own their property free and clear, was also foreseeable.

As noted in 1 Ronald E Mallen, Legal Malpractice §8:23 pp. 1037-38 (2016 Ed.) (hereinafter the "Mallen Malpractice Treatise") written by "perhaps this country's preeminent authority on legal malpractice" (X JA1930, ll. 8-9):

> **A negligently drafted provision or erroneous advice** can involve the client in litigation or **prolonged litigation**. **Those expenses . . . can be recoverable as direct damages.**
>
> . . . .

> A 1997 California decision **allowed the client's heirs to sue** a law firm for [the cost of litigation] **for failing to advise its client** to obtain his wife's consent to an estate plan or an acknowledgment that only his separate property was involved.[6]
>
> A 1993 Colorado decision concerned the inclusion of an offset provision in a loan, which resulted in litigation with the borrower. . . . [T]he bank subsequently **sued its lawyers** for allowing the provision to be in the contract, **as an allegedly negligent cause of litigation**. The **appellate court agreed that such an action could be pursued**.
>
> . . . .
>
> A Georgia court held that **legal fees incurred in defending a fraud claim**, based on a transfer of assets, could be recovered from the attorney, **even if the plaintiffs prevailed in the fraud case.**[7]

Mallen Malpractice Treatise at § 8:23 Causation; Cost of Litigation (emphasis added).

Similarly, in *Lucero v. Sutten*, 341 P.3d 32 (N.M. Ct. App. 2014), a lawyer was sued for malpractice for his failure to warn the client of the dangers of entering into an unsecured Nevada loan. The district court entered judgment for the lawyer, on the theory that the client's damages were caused by an intervening and superceding cause (namely, the collapse of the Nevada real estate market). But the appellate court reversed, ruling that the lawyer *had negligently increased the risk of loss* to the client, via his *failure to warn* the client of the inherent dangers in the transaction. Hale Lane, in this case, also failed to inform or warn the Iliescus of

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[6] *Sindell v. Gibson, Dunn & Crutcher*, 54 Cal. App. 4th 1457, 63 Cal. Rptr. 2d 594 (2d Dist. 1997)

[7] *Rogers v. Hurt, Richardson, Garner, Todd & Cadenhead*, 203 Ga. App. 412, 417 S.E.2d 29 (1992).

the lien dangers arising out of this transaction, or of any strategies to deal with those risks.

See also, In re Seare, 493 B.R. 158, 188-89 (Bankr. D. Nev. 2013), as corrected (Apr. 10, 2013), aff'd, 515 B.R. 599 (B.A.P. 9th Cir. 2014) (the "[c]ompetent handling of a legal matter includes inquiry into and **analysis of the factual and legal elements** of the problem" with the lawyer obligated to "provide **the bundle of services that are reasonably necessary** to achieve the client's **reasonably anticipated result**" such that, as a "baseline" obligation, "a lawyer must . . . **independently investigate any 'red flag' areas**.") [emphasis added]; Nevada Rule of Professional Conduct 1.4 (requiring lawyers to adequately communicate with their clients, to keep them informed, to consult with their clients, and to explain matters as necessary).

Based on these issues with this initial Hale Lane argument, which was the primary focus of its original Motion brief, Hale Lane's counsel deemphasized and largely omitted this argument from its Reply brief (XI JA2241) and declined to advance this point during oral argument on its motion, instead withdrawing any claim that summary judgment would be appropriate on the theory that Hale Lane had not breached any duty of care. XIII JA2451; XIII JA2457, ll. 18-23; XIII JA2466, ll. 2-9; XIII JA2487, ll. 10-11. The district court agreed that withdrawing this argument was appropriate. XIII JA2491, ll. 5-9.

Hale Lane's counsel and the district court were correct in their apparent assessment that this Hale Lane argument would not withstand summary judgment scrutiny and should appropriately be withdrawn. (The undersigned recognizes and acknowledges that Hale Lane's counsel did not withdraw or abandon this issue for trial.) This assessment, and this withdrawal, should, however, have prevented entry of Summary Judgment with respect to the transactional malpractice claims against Hale Lane, as the "lack of breached duty" argument was the only argument raised in Hale Lane's Motion for Summary Judgment which was potentially applicable to the Iliescus' transactional malpractice claims, had it been a valid argument (which was not the case).

The other major argument raised by Hale Lane, its "judicial error as intervening proximate cause argument" discussed below, comes from a series of cases which all examine *litigation malpractice* claims, and which are therefore NOT applicable to defend against claims arising out of transactional malpractice. Based thereon, the district court erred in rejecting the entirety of the Iliescus' claims notwithstanding the withdrawal and weakness of the only potentially applicable argument which the motion even raised against the transactional malpractice claims.

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C. Failure of Proximate Cause Was an Illegitimate Basis for Summary Judgment Dismissal of the Third-Party Legal Malpractice Claims.

(i) The judicial-error as proximate cause cases relied on by Hale Lane do not apply to the transactional malpractice claims against Hale Lane.

Hale Lane also argued below (and emphasized solely this argument in its Reply brief and at oral argument, as noted above) that it was "judicial error" for the Honorable Brent Adams to rule "that Steppan's lien may be upheld, despite the lack of a pre-lien notice, if it was shown that Iliescu had 'actual notice' of Steppan's architectural services" leading to a discovery order (rather than an order granting the Hale Lane submitted Application), after the hearing thereon. XI JA2243; JA2251-53. Furthermore, argued Hale Lane, this judicial error must be treated as the true proximate cause of the Iliescus' losses, either *per se* (XI JA2244) or if regarded as unforeseeable (XI JA2245), depending on which judicial-error case cited by Hale Lane's counsel applies. This was the sole basis for the district court's summary judgment ruling appealed herein.

The first problem with this argument is that it only applied, if at all, to litigation malpractice claims, and should not properly have been accepted as a defense to the Iliescus' transactional malpractice claims. Rather, all of the cases relied on by Hale Lane to support this judicial error as intervening proximate cause defense, were litigation malpractice cases, not transactional malpractice cases. For example, Hale Lane's original motion cited to *Semenza v. Nevada Medical*

Liability Insurance Co., 104 Nev. 666, 765 P.2d 884 (1988) (X JA1933), which was a litigation malpractice case, based on claimed failure to prevent improperly prejudicial evidence from being submitted at trial; and *Hewitt v. Allen*, 118 Nev. 216, 43 P.3d 345 (2002) (X JA1934), which was also a litigation malpractice case, involving failure to notify an administrative agency of the filing of a lawsuit, leading to dismissal of the lawsuit. These were the only Nevada cases ever cited on behalf of Hale Lane, to support the claim that Nevada recognizes the theory of judicial error as a superceding/intervening cause (even though said cases did not actually focus on that theory, but dealt primarily with statute of limitation tolling or delayed accrual issues). Significantly, Nevada case law treats litigation malpractice differently than it treats transactional malpractice. Indeed, the delayed claim accrual/tolling rules described in cases such as *Semenza* and *Hewitt* have expressly been held to *not* apply to cases involving transactional malpractice claims. *See, e.g.*, *Kopicko v. Young*, 114 Nev. 1333, 1337, 971 P.2d 789, 791 (1998) at n.3.

The other cases cited on behalf of Hale Lane's position, from other states outside Nevada, are likewise all litigation malpractice cases. X JA1935; XI JA2242-2247. However, the claims raised against Hale Lane herein are primarily transactional malpractice claims, rather than solely litigation malpractice claims. As such, the judicial-error as intervening proximate cause cases, relied on by Hale Lane, which all involve litigation malpractice, do not even apply to the

central allegations raised in the proposed amended pleading in the first instance. Rather, the cases cited in the *Mallen Malpractice Treatise*, demonstrating numerous instances of transactional lawyers being held liable for the litigation costs resulting from their inadequate transactional counsel, are the applicable cases herein.

(ii) <u>The prerequisites for a judicial error defense are not met in this case: Hale Lane did not raise the winning argument; but instead invited the error.</u>

The next equally serious problem with this argument is that, as Hale Lane's own briefs below admitted, judicial error can be treated as an intervening and superceding proximate cause, under the *per se* approach to this defense, *only* "where the attorney has presented the necessary legal arguments and the judge, albeit in error, rejects them." XI JA2243; citing *Kiribati Seafood Co. v. Dechert LLP*, 2016 WL 1426297, *12 (Mass. Super. 2016),[8] which was itself citing to *Crestwood Cove Apts. Business Trust v. Turner*, 164 P.3d 1247, 1256 (Utah 2007).

Likewise, under what Hale Lane's counsel calls the foreseeability approach of *Stanfield v. Neubaum*, 494 S.W.3d 90 (Tex. 2016) another case cited by Respondent below (XI JA2245), judicial error can be an intervening proximate cause only if it was not "directly contributed to" by the attorney accused of

[8] The *Kiribati* decision cited in Respondent's briefs below was reversed on appeal, the Massachusetts' Supreme Court ruling the attorney in that case was liable for the judicial error the attorney failed to prevent. *Kiribati Seafood Co. v. Dechert LLP*, 83 N.E.3d 798 (Mass. 2017).

malpractice:

> To break the causal connection between an attorney's negligence and the plaintiff's harm, the judicial error must not be reasonably foreseeable. . . . But **if the judicial error alleged to have been a new and independent cause is reasonably foreseeable at the time of the defendant's alleged negligence, the error is a concurring cause as opposed to a new and independent, or superseding, cause**.
>
> . . . . A judicial error *is* a reasonably foreseeable result of an attorney's negligence 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. 494 S.W.3d at 99-100 [citations omitted] [emphasis added]. Thus, as Hale Lane's own briefing pointed out and admitted: "judicial error is foreseeable" under *Stanfield*, "where a legal malpractice defendant has, in effect, **invited the judicial error** by advocating a legally erroneous principle that the court accepts." XI JA2246 [emphasis added].

In the present case, Hale Lane fails both tests: (i) Hale Lane did not raise the offsite work argument; and (ii) Hale Lane did make arguments and concessions which invited the judicial error.

The extremely short Application for Release of Lien (I JA0001-0006) filed by Hale Lane on behalf of the Iliescus, asserted the first of the two arguments on which the Iliescus' ultimately prevailed on appeal: that the Steppan lien was invalid due to his violation of NRS 108.245. But this Application did not raise the

second argument on which the Iliescus ultimately prevailed on appeal, namely the *legal* argument that any claimed actual notice to the Iliescus, to excuse Steppan's noncompliance with that statute, would be irrelevant, as the *Fondren* actual notice rule, which would be the basis for any such relevance, dealt only with lien claimants providing on-site work, and would excuse only those lien claimants providing such on-site work, from an NRS 108.245 violation. *Id*.

The oral arguments on the Application made by Hale Lane lawyer Snyder likewise did not include this argument. Instead, the Hale Lane oral arguments affirmatively undermined that idea, and contested, *factually*, whether the Iliescus had received sufficient actual notice of Steppan or of his work (I JA0110-0113; JA0151; JA0153-0158; XII JA2307) inaccurately conceding that this factual question actually mattered, and was indeed "the whole question" (I JA0110) and "the ultimate question" at issue (I JA0113).

Hale Lane lawyer Snyder did not explain (or at least argue in the alternative), either in his brief or in his oral argument, that this factual question should be treated as legally unimportant and irrelevant in any event, given that Steppan's work was performed off-site, and the case law creating an actual notice exception to the mandates of NRS 108.245, involved on-site work, and therefore said cases simply did not apply at all as a matter of law. The text of *Fondren* itself supports this argument. VII JA1457-1458. Nevertheless, it was not made.

Instead, Hale Lane made repeated oral argument contentions, that various factual questions (such as whether the Iliescus had actual notice, and if so, what they knew when, were relevant factual issues that mattered in this case) (I JA0110-0113; I JA0151-0158). These contentions were legally inaccurate, and thereby invited the judicial error Hale Lane now avers was the cause of the Iliescus' losses. As the Iliescus eventually successfully argued to this Court, the *Fondren* actual notice exception only applies to cases, like *Fondren*, where the lien claimant has actually performed on-site work, and not just off-site plans or renderings. VIII JA1722; JA1731. There is no mystery, however, as to how Judge Adams came to erroneously believe that "Steppan's lien may be upheld, despite the lack of a pre-lien notice, if it was shown that Iliescu had 'actual notice' of Steppan's architectural services." XI JA2243. That belief, which Hale Lane's counsel later called out as the relevant judicial error (*id.*), came from Hale Lane itself, who told the Judge that this was so.

For example, Hale Lane argued to Judge Adams as follows: "Now, **the whole question here is whether Dr. Iliescu had knowledge** . . . **of the lien claimant's work** that was sufficient to enable him to file a notice of non-responsibility" such as Steppan's identity, and the name of the customer who had retained Steppan, whereas "Here, . . . there is no way on earth Dr. Iliescu could have recorded a valid notice of non-responsibility because **he did not know the**

identity of . . . the architects . . . or the entity that was contracting with the architects." I JA0110-0112.

Hale Lane simply did not argue that the *Fondren* actual-notice exception to the mandates of NRS 108.245 did not even apply to off-site work, the argument which ultimately carried the day before this Nevada Supreme Court. Nor did Hale Lane argue that *Fondren might* not apply to off-site work, as an alternative argument. Rather, Hale Lane's arguments assumed, conceded, and, indeed, were premised on the concept that the *Fondren* actual notice exception did apply, *legally*, to the situation before the Court, but that the case was only *factually* distinguishable (not because Steppan's architectural services were performed off-site, but) because the Iliescus did not have sufficient knowledge or information to be subject to the actual notice exception set forth in *Fondren.*

This factual question theme, that Dr. Iliescu did not know what he needed to know about Steppan's identity, or the identity of the entity for whom Steppan was employed, in order for him to be treated as having obtained *Fondren* actual notice, was repeated by the Hale Lane lawyer representing the Iliescus at the hearing, again and again, throughout this hearing, as he repeatedly mis-instructed the Judge on what the relevant law was (or would ultimately be determined by this Court to be) and that *Fondren* should indeed be read to potentially apply to this matter, if certain allegedly material factual questions went the wrong way for the Iliescus,

under *Fondren*. *See, e.g.*, I JA0155.

Thus, everyone in the courtroom came to falsely and erroneously understand that the Iliescus' argument for expunging the Steppan lien necessarily rested on a factual question, the legal significance of which was repeatedly conceded, and indeed argued, by the Iliescus' counsel, Respondent herein, with even Mr. Iliescu indicating he was "ready to testify under oath today" to address that factual question, since he, too, was misled by his lawyer's inaccurate arguments, to believe that factual question, of the extent of his notice of Steppan's work and identity, if any, was legally relevant. But it was not. VIII JA1722; JA1731. And if, as Hale Lane's counsel now argues, it was judicial error for the district court to hold otherwise (XI JA2243), that judicial error cannot be treated as an intervening and superceding proximate cause of the Iliescus' losses, where Hale Lane (i) did not argue otherwise; but (ii) instead invited and induced the judicial ruling in question.

Given that record, it should surprise no one that, after Hale Lane's brief involvement in this suit, this litigation proceeded on the assumption that a factual question mattered, which did not really matter at all, with Judge Adams, after that hearing, issuing an Order for discovery as to this supposedly important factual question, I JA0167-0169, which Order was attached as Exhibit 1 to Hale Lane's Reply brief as the smoking gun to support their judicial error as intervening cause

argument. XI JA2251-2253. It is true, as this Hale Lane Reply brief argues, that said Order was based on the erroneous proposition "that Steppan's lien" might have been "upheld if it was shown that Iliescu had actual notice of Steppan's services." XI JA2243. However, since this erroneous belief was induced by Hale Lane's own arguments, and since, as Hale Lane's counsel admitted below, "a lawyer cannot invite judicial error and then escape responsibility for the financial consequences thereof" (XI JA2246), said erroneous belief cannot now be used by Hale Lane to claim that the Iliescus' losses have some other proximate cause.

This initial erroneous belief continued to play out in Judge Adams and his replacements' views and rulings, and thereby set this case onto a particular track, which involved years of beating what turned out to be a legally irrelevant factual horse, about what the Iliescus knew and when they knew it. By contrast, the attorney accused of malpractice in *Stanfield* did not contribute to the judicial error by wrongfully advising the court as to the nature of the law. Similarly, the *Crestwood Cove* rule, also quoted in the (subsequently reversed) *Kirabati* case, that "a client may believe that an attorney has not litigated a case in the most effective manner possible, [but] such beliefs are irrelevant **where the attorney has presented the necessary arguments** and the judge, albeit in error, rejects them" does not apply herein, where a presentation of the necessary arguments by Hale Lane did not ever occur.

While it is true that certain of the Iliescus' subsequent attorneys raised the on-site/offsite distinction (*see, e.g.*, IV JA0811 at ll. 12-13; 16; 21-22), which was thereby preserved for appeal, by the time they did so, Judge Adams had already been convinced by Hale Lane that the *Fondren* exception was potentially applicable herein, and ruled accordingly. IV JA0847-0850. This remained true of the later Judges to subsequently preside over the litigation. As one of the later Judges to inherit this case explained, Judge Adams' early rulings came to be "baked into the cake" upon which the case was decided, and which the later district court judges inherited. XIII JA2454. The ingredients for that cake were, however, provided by Hale Lane at the outset. This chronology of events at the very least raises a question of fact under Nevada's substantial factor test for determining proximate cause.

Based on the path upon which Hale Lane placed this case, and the legal rules which Hale Lane erroneously asserted applied to this case, no legal ruling ever issued (until many years later by this Nevada Supreme Court) that any alleged actual notice by the Iliescus, if any, was simply legally irrelevant, with respect to off-site work, and could not be relied on by Steppan to excuse his violation of NRS 108.245.

As one of the cases cited by Hale Lane in support of a claimed "per se" judicial-error-as intervening-proximate-cause approach indicated:

> In articulating this rule, **we are not holding that judicial error always forecloses a plaintiff from bringing a malpractice suit**. Where there are factual disputes surrounding causation, **determining "whether the attorney's conduct was a substantial factor** in the result or whether there should have been a better result had the attorney done otherwise" will remain **a question for the trier of fact**.

Crestwood Cove, 164 P.3d at 1256 [emphasis added]. This hardly sounds like a "per se" rule. But more importantly, there are many such factual questions in this case. Thus, proximate cause, and whether Hale Lane's conduct was a "substantial factor" in the losses, should have been left for the jury's determination as a question of fact. As noted below, Nevada also follows a "substantial factor" test for determining proximate cause.

In its oral ruling granting Summary Judgment to Hale Lane, the district court orally requested Hale Lane's counsel to prepare an Order which he would be able "to defend before a court of appeals." XIII JA2489. In an attempt to fulfill this task, Hale Lane's counsel clearly searched through the record and tried to find some argument that Hale Lane had made at the Application hearing which could satisfy the "judicial error" defense standards, by showing that Snyder had made the argument on which the Iliescus had ultimately prevailed on appeal, but that the Court had rejected it. The result of that quest is found in the quotation from Snyder's argument found in the Order of Summary Judgment at pages 3-4, XIII JA2499-2450, 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 this 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.

It is respectfully submitted that this argument does *not* contend that *Fondren* is inapplicable to a lien claimant who provides offsite work. Indeed, the concept of any distinction between offsite and onsite work does not come up, *at all*, in this passage. Nor is that concept even approached. Rather, this passage contains one more example of Snyder conceding that *Fondren* notice is potentially applicable to this case (thereby inviting the judicial error), but that Dr. Iliescu did not have sufficient knowledge for the exception to apply.

Based thereon, Summary Judgment should *not* have been granted on this theory.

(iii) Typically, it is inappropriate to grant summary judgment on a failed proximate cause defense, given the factual questions which arise under Nevada's "substantial factor" test for proximate causation, and it was definitely inappropriate to do so in this action.

Nevada law does not require that a defendant's conduct be the sole cause of injury for proximate causation to be demonstrated, but follows the substantial factor test, under which, a defendant's conduct may be the legal or proximate cause of an injury if it substantially contributed to the injury, and intervening causes were reasonably foreseeable. *Holcomb v. Georgia Pacific, LLC*, 1218 Nev. 614, 289 P.3d 188 (2012) . Nevada also recognizes that, where there is any question of fact as to whether or not an alleged intervening cause would be foreseeable, this prevents a court from granting summary judgment on the basis of a lack-of-proximate-cause defense. *See e.g., Yamaha Motor Co. v. Arnoult*, 124 Nev. 233, 238, 955 P.2d 661, 664-65 (1998) (in order to establish proximate cause, the injury must be shown to be "the natural and probable consequence of the negligence . . . [which] . . . ought to have been foreseen in the light of the attending circumstances. . . . **Proximate causation is generally an issue of fact for the jury to resolve.**") [Emphasis added.] *See also, Price v. Blaine Kern Artista, Inc.*, 111 Nev. 515, 520-21, 893 P.2d 367, 370-71 (1995) (reversing summary judgment issued for failure to

establish proximate causation, on grounds that issue of fact existed as to whether a third-party's intervening intentional act was foreseeable and thus failed to "sever[] the chain between a plaintiff and a defendant," as the "risk of such an occurrence . . . may be found to be within the realm of risks that should have been considered and addressed" by the defendant).

In the present case, it was certainly foreseeable that Hale Lane's neglect, as sought to be described in the amended pleading the Iliescus have moved for leave to file, would lead to a mechanic's lien being claimed against their Property, and that subsequent expensive and protracted litigation would then occur. At the very least, there is certainly at least a *question of fact* as to whether this was foreseeable! This should have prevented entry of Summary Judgment on the basis of lack-of proximate cause, which this Court has stated is not typically an appropriate basis for NRCP 56 relief.

Indeed: "A negligently drafted provision or erroneous advice **can involve the client in litigation or prolonged litigation**. Those expenses may be the only damages sustained **and can be recoverable as direct damages . . .** even if the [future malpractice Plaintiffs] prevailed in [such resulting litigation]." 1 Ronald E Mallen, Legal Malpractice §8:23 pp. 1037-38 (2016 ed.) Hale Lane had every reason to know and realize and foresee that factual and legal information in its possession (about the architect's services and about Nevada's mechanic's lien

statute allowing architectural liens) would be vitally important to their clients, and to foresee that if it did not share that information with their clients, and provide them with legal assistance and advice, the Iliescus would likely incur the expenses of prolonged mechanic's lien litigation.

For example, in *Temple Hoyne Buell Foundation v. Holland & Hart*, 851 P.2d 192 (Colo. Ct. App. 1992) the court overturned a legal malpractice judgment against attorneys who had inartfully drafted a real property option contract which was later challenged as invalid under the Rule against Perpetuities. The appellate court ruled that the option had not in fact violated the Rule against Perpetuities. Nevertheless, the appellate court declined to require the lower court to dismiss the legal malpractice claims against the attorneys altogether, instead merely granting those lawyers the right to a new trial under the proper law of the case. The Court reasoned that those lawyers could potentially have foreseen that a legal dispute would occur on this question, and could have protected their clients from the losses which such a dispute ultimately engendered. In so ruling, the *Temple Hoyne* court explained as follows:

> An attorney owes a duty to his client to employ that degree of knowledge, skill, and judgment ordinarily possessed by members of the legal profession in carrying out the services for his client. *Myers v. Beem,* 712 P.2d 1092 (Colo.App.1985). One of these obligations is anticipating *reasonably foreseeable risks. Pacelli v. Kloppenberg,* 65 Ill.App.3d 150, 22 Ill.Dec. 250, 382 N.E.2d 570 (1978).

> Thus, although we hold here that the option [drafted by the malpractice defendants] did not violate the Rule against Perpetuities**, the question remains whether defendants, as reasonably prudent attorneys, should have foreseen that the option, as drafted, was likely to result in litigation and whether other attorneys, in similar circumstances, would have taken steps to prevent such a result**.
>
> Plaintiffs argued at trial, and presented expert testimony in support of their assertion, that the principal negligence of defendants was **their not protecting plaintiffs from loss by failing to research and analyze the Rule's applicability . . . to recognize the likelihood that a good faith dispute could occur over the enforceability of the option because of the Rule, and to take the simple step of either adding a time limitation or "savings clause" or recommending the deletion of the provision that made the option binding on heirs, successors, and assigns**.
>
> [Defendant attorney] Bruce Buell . . . **did not advise his clients of the real likelihood that a good faith dispute could arise** over the enforceability of the option under the Rule.

Id. at 198-99 [bracketed language and emphasis added].

Just as the attorneys in the *Temple Hoyne* case should have recognized the likelihood of a challenge to their Option, in this case, likewise, the Hale Lane attorneys should have anticipated the attempted architectural lien. There was ample information within Hale Lane's possession, during the time it was drafting the Third Addendum, to be aware of the risk to the Iliescus that architectural services being provided for the property could result in a such mechanic's lien for design services being claimed against their Property, which, even if ultimately unsuccessful, would cause litigation expenses to the Iliescus. Hale Lane's awareness of that possibility had become even more acute by the time Hale Lane

provided its inadequate first conflict waiver letter to the Iliescus, and by the time the Addendum No. 4 was drafted by Hale Lane. However, just like Holland & Hart in the *Temple Hoyne* case, Hale Lane, in this case, failed to advise their clients of the real likelihood of a potential lien claim arising, or how to deal with the same. They should have informed, warned, and advised the Iliescus of some strategies for dealing with that "real likelihood that" a lien claim "could arise" under Nevada's mechanic's lien statutes. Instead, Hale Lane blithely prepared the 4th Addendum, without even discussing the opportunity created by the purchaser's request for an extended closing date, which could have been leveraged to deal with the potential lien risks, by conditioning such an extension on lien releases, and other conditions on the buyer contracting to certain terms with the architect, until *after* closing. But, like the *Temple Hoyne* lawyers, they did not advise their clients about this lien issue or how to deal with it.

(iv) Attorneys' fees and litigation costs incurred in Mechanic's Lien litigation are awardable as damages against a party whose breached duty caused such litigation.

Nevada law recognizes that attorneys' fees incurred in order to defend against a third-party's claim, including a mechanic's lien claim, may be pursued as special damages in suits against those whose failures or breaches led to such a claim. *See, e.g.*, *Liu v. Christopher Homes, LLC*, 321 P.3d 875, 130 Nev. Adv. Op. 17 (2014) (claimant whose property had been clouded by a mechanic's lien claim,

allowed to recover the attorneys' fees she had incurred in defending against that mechanic's lien claim as part of her damages in her own suit against the developer, for breach of the developer's warranty of good title). Similarly, in the present case, the Iliescus are likewise entitled to recover the expenses of defending against the Steppan lien from those whose breaches allowed it to be recorded.

That the Iliescus would incur litigation expenses was or should have been entirely foreseeable to Hale Lane, once it realized that the Iliescus faced a mechanic's lien risk, and failed to lift a finger to prevent it, and made exactly the wrong legal and factual arguments at the beginning of the litigation, placing the case onto an improper conceptual track, from which it was only finally dislodged on appeal.

Hale Lane knew and could have reasonably foreseen that one of four outcomes would result from an architectural lien (*i.e.*, that the Iliescus would incur costs and fees to successfully defend against any architect lien claim Steppan or FFA might bring, and then prevail on appeal in maintaining that victory; or would incur costs and attorneys' fees to unsuccessfully defend against any architectural lien claim and then incur costs and fees to prevail on appeal in reversing that loss; or that the Iliescus would incur costs and attorneys' fees to unsuccessfully defend against any Steppan lien claim and then incur costs and fees to lose on appeal; or that they would suffer losses in order to settle any Steppan lien claim). While the

specific sequence and outcome may not have been known to Hale Lane beforehand, it certainly had enough information in its possession to act to forestall *any* of those four scenarios, as Hale Lane knew or should have known of the likelihood of an architectural mechanic's lien, which it was foreseeable would cost money to the Iliescus to defend against, were it not strategically dealt with during Hale Lane's transactional services, or properly argued against in Hale Lane's half-hearted initial litigation appearance, which instead invited the judicial error now claimed by Hale Lane as a defense.

See e.g., Rogers v. Hurt, Richardson, Garner, Todd & Cadenhead, 417 S.E.2d 29 (Ga. Ct. App. 1992) (claimants whose reliance on bad advice from attorneys resulted in their being sued for fraud, had a valid legal malpractice action against attorneys, for the costs and attorneys' fees incurred in that suit); *Hill v. Okay Const. Co., Inc.*, 252 N.W.2d 107 (Minn. 1977)(attorney who negligently represented both parties to a transaction held liable for the attorneys' fees and expenses incurred in litigation between them); *Preble v. Schwabe, Williamson & Wyatt,* 875 P.2d 526 (Or. Ct. App. 1994)(client would be entitled to seek litigation expenses from legal malpractice defendant if not reimbursed from opposing party).[9]

[9] The Iliescus were not reimbursed by Steppan in this action. XII JA2406-2417.

D. The Summary Judgment Dismissal Violated Longstanding Common Law Principles Requiring Mitigation Costs to Be Treated as an Element of Recoverable Damages, Especially Where Such Mitigation Efforts Are Legally Required.

One of the reasons why the litigation expense losses incurred by the Iliescus were foreseeable, is that the Iliescus had a legal duty to attempt to mitigate their losses, by defending against the Steppan lien claim, as part of maintaining their legal malpractice claims. Indeed, under Nevada law, this duty required the Iliescus to appeal any adverse ruling, rather than rely on the adverse outcome at the trial court level, as part of establishing their case against Hale Lane, unless they could demonstrate that such an appeal would be a "futile gesture" (which was obviously not so herein). *Hewitt v. Allen*, 118 Nev. 216, 222, 43 P.3d 345, 348 (2002). All the costs and fees incurred by the Iliescus after they retained new counsel to replace Hale Lane and represent them, were required to be undertaken to mitigate the losses caused by Hale Lane, in order to comply with this rule of law.

Where there is a legal duty to mitigate, there is a correlative right to recover the costs of that mitigation effort. *See, e.g.*, *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 . . . and that it is held as a natural corollary to this rule of duty . . . that the injured party . . . will be allowed to

recover the expenses necessarily incurred in so doing."); *Davis v. Beling*, 128 Nev. 301, 278 P.3d 501, 514 (2012)(vendors could recover carrying costs of home purchased as a result of agent's alleged failure to disclose material information, it having been "preeminently reasonable for the Doughertys to obtain property insurance for the . . . Property, pay the taxes and mortgage . . . and maintain the property . . . [as] if they had not done so, they would likely be deemed to have failed to mitigate their damages. The . . . carrying costs are thus . . . a recoverable component of their compensatory damages."); *Tulsa Municipal Airport Trust v. National Gypsum Co.*, 551 P.2d 304, 310 (Ok. Ct. App. 1976) (allowing suit to proceed for attorneys' fees and expert expenses incurred in order to mitigate losses from negligently constructed aircraft hangar roof because the duty to mitigate losses "carries with it an equally well-established correlative right . . . to recover from the wrongdoer the expenses incurred in fulfilling the duty.") *Morgan v. Morgan*, 81 Misc. 2d 616, 619 (N.Y. Dist. Ct. 1975) ("it is a corollary to the rule of mitigation that the injured party may also recover for the expenses reasonably incurred in an effort to avoid or reduce the damage"); *Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896, 907 (Utah 1989) (since we have imposed on the landlord an affirmative obligation to seek a new tenant, it is appropriate that costs reasonably incurred [in doing so] be added to the amount recoverable from the breaching tenant); *McCormick Int'l USA, Inc. v. Shore*, 277 P.2d 367, 371 (Idaho 2012).

Likewise, in the present case, since Nevada imposes, under *Hewitt*, a duty to attempt to mitigate the losses from attorney malpractice, by pursuing any viable, non-futile, defense, through an appeal, the cost of the litigation through that appeal must necessarily be recoverable against the malpractice defendant. It would be wholly unjust to mandate that a client with malpractice claims against the client's lawyer, must mitigate the client's losses, without allowing recovery of the costs for that mitigation.

Indeed, in the subsequent reversal of the *Kirabati* decision which Respondent cited below, the Massachusetts' Supreme Court noted that, had the client successfully appealed the judicial error to mitigate its losses, and thereby reduce those losses to the costs of that mitigation effort, those expenses would have been recoverable, instead of the larger loss imposed upon the defendant lawyer who advised the client against seeking an appeal. *Kiribati*, 83 N.E.3d 798, 810 (Mass 2017). In the present case, where further mitigation efforts *did* occur, to prevent Hale Lane from suffering a higher loss, the cost of those efforts should be awardable.

Hale Lane committed transactional malpractice long before this litigation commenced, on the basis of the facts described above. This malpractice proximately resulted in substantial costs and attorneys' fees and related losses to the Iliescus, whose property was burdened by an invalid mechanic's lien for ten

years, which it took the Iliescus' substantial fees and costs to finally successfully oppose. The Iliescus did what they were required to do under *Hewitt*, and mitigated their damages and losses, arising from Hale Lane's malpractice, by successfully contesting the Steppan lien claim through the end of bitterly contested litigation and on appeal. If the Iliescus' mitigation efforts had failed, they would now be suing Hale Lane for the entire value of the $4.5 million+ judgment on the lien, a much higher figure than is now at issue. Hale Lane has thus directly benefitted from the Iliescus' mitigation efforts. But that is the sole extent of the benefit which should be provided.

The expenses incurred by the Iliescus to so mitigate must be recoverable. This is in keeping with this Court's ruling in the *Davis v. Beling* case cited above. Likewise, in *Sadler v. Pacificare of Nevada, Inc*., 130 Nev. Adv. Op. 98, 340 P.3d 1264, 1271 (2014) this Court reasoned: "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." *See also, Illinois Structural Steel Corp. v. Pathman Const. Co.* 318 N.E.2d 232, 236 (Ill. Ct. App. 1974)("Furthermore, it is a general rule of law that a party may recoup all expenses reasonably incurred in mitigating damages.").

The district court's summary judgment dismissal created an unjust, illogical,

Catch 22, in which the Iliescus, if they had failed to mitigate their losses by declining to contest the Steppan lien through appeal, would have been subjected to the defense of failure to mitigate (for failing to pursue a non-futile appeal, as required by *Hewitt*); but by complying with *Hewitt*, and successfully mitigating, and obtaining a ruling which reduced the amount of their malpractice claim, are now treated as subject to a new defense, *still* rendering them unable to recover the costs of that effort from the very Defendant who caused and benefitted from that effort! For reasons of logic, justice, equity, and rational public policy, this heads the lawyer wins, tails the client loses, approach, should not be upheld by this Court. Nor, as the Mallen Malpractice Treatise shows, should this approach be upheld, consistent with the common law of other states.

E. The Iliescus' Countermotion Requests for Leave to Amend and for Further Time to Complete Discovery Should Have Been Granted.

In *Adamson v. Bowker,* 85 Nev. 115, 121, 450 P.2d 796, 800-01 (1969), this Court adhered to the doctrine set forth by the United States Supreme Court in *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 230 (1962), that, "if the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits" such that leave to amend should be freely given "[i]n the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant."

In the present case, no such concerns about dilatory delay exist, as the Iliescus had attempted, twice before, to amend their third party complaint (V JA0858-0910; VII JA1485 *et seq.*), and been denied this normally "freely given" relief on both occasions (V JA0967-0969; VIII JA1706-1711), and given that the third party claims against Hale Lane were stayed during the pendency of the main Steppan lien litigation dispute, as the district court itself noted (XIII JA2500, ll. 10-12), with the Hale Lane Motion, leading to the Iliescus' responsive request, then filed very shortly after issuance of this Court's remittitur of the Steppan lien litigation appeal.

The district court's third denial of this relief was provided on the basis that the amended pleading would have been futile, based on that court's acceptance of the Hale Lane argument that the losses claimed by the Iliescus were due to an intervening judicial error. XIII JA2509-2510. However, as argued above, this theory of intervening proximate cause should not have been accepted. Hence, the amendment would not have been futile.

Based on the intervening discovery and trial and final outcome on appeal, in the years since the Iliescus' original Third-Party Complaint was initially filed, the Third-Party Plaintiffs are now in a much better position to clarify and enunciate the entire and ultimate premises and bases for their Third-Party Claims. Refusing to grant them leave to do so, in order to grant summary judgment against them on

their currently existing pleading, violated what justice required.

For example, the prior third-party pleading focused on the Hale Lane firm's failure to advise the Iliescus to file a Notice of Non-responsibility to protect against a Steppan or FFA architectural lien. We now know, however, based on certain *dicta* in this Supreme Court's *Iliescu* decision, that such a theory would not be availing to the Iliescus. Justice therefore required that the Iliescus, with the benefit of the knowledge now available to all parties, should have been allowed to amend their pleading. This would, at the very least, have allowed the properly pled pleading to be the one contested in any future dispositive motion filed by Hale Lane.

As a further example, the Iliescus' damages are no longer based on the existence of a lien against their Property, but consist of litigation and mitigation costs and expenses to remove that lien, similar to the damages recoverable by the Nevada plaintiffs in cases such as *Liu, Davis,* and *Sadler*. Thus, the nature of those damages and their right to pursue the same, can now be better articulated, via an amendment. Based thereon, the district court should have granted the Iliescus' Countermotion for Leave to Amend, rather than foreclosing the same via a summary judgment order dismissing a prior version of that pleading, which had been rendered somewhat obsolete and incomplete by virtue of intervening events.

The Iliescus' also countermoved for additional time to complete discovery. That countermotion should also have been granted. A party seeking an NRCP 56(f) continuance for further discovery must demonstrate how further discovery will lead to the creation of a genuine issue of material fact. *Id.*

In the present case, the Iliescus' NRCP 56(f) request noted that, as the case had been stayed for several years prior thereto, the Iliescus now needed additional time to complete their selection and retention of an expert witness, as required in legal malpractice cases, to opine on the issue of Hale Lane's breach of its duties of care (X JA2083-2084). As demonstrated by the *Temple Hoyne* decision, such an expert could be vitally important to opposing a summary judgment motion, such that this request should have been granted prior to issuing summary judgment. And the Iliescus also argued that they needed to retain a financial expert to opine on the economic losses (similar to the lost time-value of inaccessible money) attributable to having their valuable property tied up for ten years by litigation and encumbrances which prevented its sale or use as collateral, etc. XIII JA2477-2478. The Iliescus thus satisfied the NRCP 56(f) standard.

In that regard it must be noted that the third-party legal malpractice claims, including any discovery thereon, had been stayed for several years, pending the outcome of the Steppan-lien litigation. Indeed, the district court's summary judgment ruling itself recognized that this stay had been in effect. XIII JA2500, at

ll. 10-12. Hale Lane filed its Motion for Summary Judgment only 30 days after Remittitur had issued in the case, lifting that stay, basing its arguments on procedural facts and ultimate dispositions which were not known to be the ultimate outcome until that Remittitur and resultant lift-of-stay had only recently occurred.

Thus, this countermotion should have been granted to allow discovery to be completed and experts to be retained, before any summary judgment or other dispositive rulings, issued.

CONCLUSION

Based on the foregoing, the district court's Summary Judgment dismissing the Third-Party legal malpractice claims against Hale Lane, should be reversed, and this matter should be remanded, to allow final discovery followed by trial on the merits of the Appellants' claims.

DATED this 21st day of November, 2018.

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ATTORNEYS' RULE 28.2 CERTIFICATE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 13,644 words, including all text, headings, and footnotes.

3. Finally, I certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event the

accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 21st day of November, 2018.

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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, service was made by the following mode/method a true and correct copy of the foregoing **APPELLANTS' OPENING BRIEF**, to the following person(s):

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