
IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 76146

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

Appellants,

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Elizabeth A. Brown
Clerk of Supreme Court

vs.

**HALE LANE PEEK DENNISON AND HOWARD
PROFESSIONAL CORPORATION, a Nevada professional
Corporation
Respondent.**

Appeal from the Second Judicial District Court, Washoe County, Nevada
District Court Case No. CV07-00341
(Consolidated with CV07-01021)

RESPONDENT'S ANSWERING BRIEF

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DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1

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

Respondent Hale Lane Peek Dennison and Howard (now known as Holland and Hart) has no parent corporations and no publicly held company owns 10% or more of this party's stock.

Lemons, Grundy & Eisenberg is the only law firm which has appeared for Respondent Hale Lane Peek Dennison and Howard in the district court proceedings and in this appeal.

DATED this 16 day of January 2019.



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TABLE OF CONTENTS

	Page(s)
I. INTRODUCTION AND SUMMARY OF ARGUMENT	1
II. ISSUES PRESENTED	6
1. Whether the district court erred in granting Hale Lane's motion for summary judgment on the basis that the district court's judicial error was an intervening and superceding cause of Iliescu's claimed damages.....	6
2. Whether the district court abused its discretion in denying Iliescu's motions for leave to amend and for further discovery.....	7
III. STATEMENT OF FACTS	7
A. Hale Lane's involvement in Iliescu's sale of real property	7
B. Hale Lane's involvement in the lien litigation	9
C. Iliescu's litigation against Steppan and the subsequent appeal	11
D. Hale Lane's motion for summary judgment.....	12
E. The district court's ruling on Hale Lane's summary judgment motion	14
IV. ARGUMENT	16
A. Standards of Review	16
B. The distinction between transactional and litigation malpractice is immaterial in this case	17
C. The district court correctly concluded that its own judicial error constituted an intervening and superceding cause of Iliescu's claimed damages	20
D. Hale Lane's alleged errors were not a "substantial factor," along with the district court's judicial error, in causing Iliescu's claimed damages	35
E. The costs of mitigating Iliescu's damages are not damages caused by Hale Lane	42
F. Iliescu's motion to amend and for further discovery was appropriately denied as futile	43

TABLE OF CONTENTS
(Continued)

	<u>Page(s)</u>
V. CONCLUSION.....	45
CERTIFICATE OF COMPLIANCE.....	46
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Adamson v. Bowker</i> , 85 Nev. 115, 450 P.2d 796 (1969)	19
<i>Alexander v. Turtur & Associates, Inc.</i> , 146 S.W.3d 113 (Tex. 2004)	38
<i>Amfac Distribution Corp. v. Miller</i> , 138 Ariz. 155, 673 P.2d 795 (Ariz. App. 1983)	21
<i>Aviation Ventures v. Joan Morris, Inc.</i> , 121 Nev. 113, 110 P.3d 59 (2005)	17
<i>Charleson v. Hardesty</i> , 108 Nev. 878, 839 P.2d 1303 (1992)	19
<i>Clark County School District v. Payo</i> , 403 P.3d 1270 (Nev. 2017)	20
<i>Crestwood Cove Apartments Business Trust v. Turner</i> , 164 P.3d 1247 (Utah 2007)	23, 24, 25, 28, 29
<i>Dew v. Crown Derrick Erectors, Inc.</i> , 208 S.W.3d 448 (Tex. 2006)	38
<i>Fondren v. K/L Complex, Ltd.</i> , 106 Nev. 705, 800 P.2d 719 (1990)	4, 5, 10, 11, 12, 13, 14, 29, 30 34
<i>Halcrow, Inc. v. Eighth Judicial District Court</i> , 129 Nev. Adv. Op. 42, 302 P.3d 1148 (2013)	43
<i>Hewitt v. Allen</i> , 118 Nev. 216, 43 P.3d 345 (2002)	17, 18, 21, 22, 23, 37
<i>Holcomb v. Georgia Pacific, LLC</i> , 128 Nev. 614, 289 P.3d 188 (2012)	35, 36
<i>Iliescu v. Steppan</i> , 133 Nev. Adv. Op. 25, 394 P.3d 930 (2017)	2, 3, 4, 5, 12, 14, 30, 31

TABLE OF AUTHORITIES (Continued)

<u>Cases</u>	<u>Page(s)</u>
<i>Johnson v. Egtedar</i> , 112 Nev. 428, 915 P.2d 271 (1996).....	35
<i>Kiribati Seafood</i> , 2016 WL 1426297 (Mass. 2016) (quoting <i>Crestwood Cove</i> , 164 P.3d at 1256 (Utah 2007)).....	15
<i>Kopicko v. Young</i> , 114 Nev. 1333, 971 P.2d 789 (1998).....	19
<i>Mishler v. McNally</i> , 102 Nev. 625, 730 P.2d 432 (1986).....	21
<i>Nutton v. Sunset Station, Inc.</i> , 131 Nev. Adv. Op. 34, 357 P.3d 966 (2015)	43
<i>Price v. Blaine Kern Artista, Inc.</i> , 111 Nev. 515, 893 P.2d 367 (1995).....	36, 37
<i>Semenza v. Nev. Med. Liab. Ins. Co.</i> , 104 Nev. 666, 765 P.2d 884 (1988).....	17, 18, 21, 22
<i>Stanfield v. Neubaum</i> , 494 S.W.3d 90 (2016).....	15, 26, 27, 28, 34, 38
<i>Temple Hoyne Buell Found. v. Holland & Hart</i> , 851 P.2d 192 (Colo. App. 1992).....	38, 39, 40
<i>Wood v. Safeway, Inc.</i> , 121 Nev. 724, 121 P.3d 1026 (2005).....	16, 20, 21
<i>Yamaha Motor Co. v. Arnoult</i> , 114 Nev. 233, 955 P.2d 661 (1998).....	36, 37

TABLE OF AUTHORITIES
(Continued)

<u>Statutes and Rules</u>	<u>Page(s)</u>
NRCP 15	43
NRCP 56	17
Utah Rule of Civil Procedure 59.....	25
NRS 108.245	3, 4, 5, 11, 12, 29, 30
 <u>Other</u>	
1 Ronald E. Mallen, Legal Malpractice (2016 Ed.).....	41

I.

INTRODUCTION AND SUMMARY OF ARGUMENT¹

This is an appeal from an order granting summary judgment in a legal malpractice action. In granting summary judgment in favor of the law firm Hale Lane Peek Dennison and Howard (“Hale Lane”), the district court correctly determined that its own judicial error was the intervening and superceding cause of the damages claimed by Dr. and Mrs. Iliescu (“Iliescu”). It reached that determination because, at the very outset of the underlying case in 2007, Hale Lane had argued directly against an architect’s assertion of a lien on Iliescu’s property. In 2017, the Nevada Supreme Court invalidated the architect’s lien for reasons that were “nearly identical” to Hale Lane’s 2007 legal argument. Because Hale Lane had asserted the “appropriate” and “ultimately correct” legal arguments but the district court rejected those arguments in error, the district court’s judicial error was the intervening and superceding cause of Iliescu’s damages.

Hale Lane represented Iliescu with respect to an attempted sale of a parcel of Iliescu’s downtown Reno property, including an attempt to release or expunge an architect’s lien from the property. During litigation of the underlying lien dispute, Iliescu terminated Hale Lane and asserted claims against Hale Lane for legal

¹ For ease of reading, this Introduction does not include citations to the Appendix. Citations to the Appendix are included in the ensuing sections of this brief.

malpractice. Iliescu essentially alleged that, while the property transaction was in process, Hale Lane negligently allowed circumstances to arise in which the architect (“Steppan”) was able to record the lien on Iliescu’s property.

The very first filing in the underlying case, filed on February 14, 2007, was an *Application for Release of Mechanic’s Lien*, filed by Hale Lane on Iliescu’s behalf. Hale Lane’s briefing and oral argument on that application was correct and should have been granted. The district court erroneously declined to grant the application, however, and Iliescu was required to litigate the validity and enforceability of Steppan’s lien. The legal malpractice claims against Hale Lane remained stayed during the lien litigation. The lien dispute proceeded to a bench trial in which judgment was entered in favor of Steppan. Iliescu then appealed.

Over ten years after Hale Lane’s initial filing, the Nevada Supreme Court issued its opinion in *Iliescu v. Steppan*, 133 Nev. Adv. Op. 25, 394 P.3d 930 (2017). **According to that decision, Hale Lane’s initial filing in the underlying case should have been granted.** If Hale Lane’s 2007 *Application to Release Mechanic’s Lien* had been granted as it should have been, Iliescu would not have sustained any damages.

Upon remand from Iliescu’s first appeal, Hale Lane moved for summary judgment of Iliescu’s legal malpractice claims arguing, among other things, that the district court’s judicial error was an intervening and superceding cause of Iliescu’s

claimed damages. In short, Hale Lane had asserted the appropriate legal arguments in 2007, but the district court, albeit in error, rejected them.

In deciding Hale Lane's summary judgment motion, the district court agreed that its own judicial error was the intervening and superceding cause of Iliescu's claimed damages, and it therefore granted summary judgment. Iliescu now appeals the district court's order granting summary judgment in favor of Hale Lane.

The focal point of this appeal is whether Hale Lane asserted the appropriate legal arguments in 2007 when it filed and argued the *Application to Release Mechanic's Lien* on Iliescu's behalf. To determine that Hale Lane did, in fact, assert the appropriate legal arguments, it is useful to compare the arguments made by Hale Lane in 2007 with the Nevada Supreme Court's analysis and reasoning in its decision of Iliescu's previous appeal, *Iliescu v. Steppan*, 133 Nev. Adv. Op. 25, 394 P.3d 930 (2017). In making this comparison, it is easily seen that Hale Lane's 2007 argument was nearly identical to the Nevada Supreme Court's 2017 reasoning.

By way of illustration, Hale Lane argued in 2007 that Steppan's lien was invalid because Steppan had failed to serve Iliescu a notice of right to lien (a "pre-lien notice"), as required by NRS 108.245. At an oral argument hearing on Hale Lane's application to release Steppan's lien, the issue became whether Steppan's lien was valid despite the lack of a pre-lien notice because, as Steppan then alleged, Iliescu had actual notice of Steppan's architectural services. This is known as the

“actual notice” exception to the pre-lien notice requirement, as recognized in *Fondren v. K/L Complex, Ltd.*, 106 Nev. 705, 800 P.2d 719 (1990).

At the oral argument hearing on the application to release Steppan’s lien, Hale Lane attorney Jerry Snyder argued that Steppan’s lien was distinguishable from *Fondren* because, even if Iliescu had knowledge that somewhere an architect was creating plans or doing some form of design work, Iliescu did not have the information that would have been required in a pre-lien notice. For example, Snyder argued, Iliescu did not know the identity of the architect, he did not have a description of the architect’s work, and he did not know when the architect’s work began or what had been completed to date (i.e., all the information that Iliescu would have known if the work at issue had been onsite construction as opposed to offsite design work). Although Snyder did not frame his argument in the precise terms of “onsite” vs. “offsite” work, he made the same basic point. Snyder argued that applying the actual-notice exception under such circumstances would vitiate entirely the pre-lien notice requirement of NRS 108.245. In other words, the exception would swallow the rule.

The Nevada Supreme Court’s reasoning in *Iliescu v. Steppan*, 133 Nev. Adv. Op. 25, 394 P.3d 930 (2017) was nearly identical to Snyder’s argument in 2007. The Court held that the actual notice exception described in *Fondren* does not apply to offsite work when no onsite work has been performed on the property. *Id.* at 934-35.

It reasoned that the purpose of the pre-lien notice requirement of NRS 108.245 “would be frustrated if mere knowledge of construction is sufficient to invoke the actual notice exception against an owner by a contractor. Otherwise, the exception would swallow the rule.” *Id.* The Nevada Supreme Court further explained as follows:

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.

Id. The previous *Iliescu* decision therefore reversed the district court’s order foreclosing Steppan’s lien and remanded the matter to the district court for entry of judgment in Iliescu’s favor. *Id.* at 936.

After remand from that previous appeal, Iliescu continued to pursue his legal malpractice claims against Hale Lane, seeking as damages the fees and costs expended in successfully defending against Steppan’s lien. But, as the district court determined in its order granting summary judgment for Hale Lane, 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.” As the district court further explained:

The similarity further shows that Hale Lane did not contribute to or cooperate with the judicial error. Stated differently, Hale Lane did not invite the judicial error by advocating a legally erroneous principle that the Court accepted. To the contrary, the District Court made its erroneous ruling despite Hale Lane’s appropriate, and ultimately correct, legal argument.

Having recognized the similarities between Snyder’s 2007 argument and the Nevada Supreme Court’s 2017 reasoning, the district court properly concluded that its own judicial error in not granting Hale Lane’s *Application to Release Mechanic’s Lien* was the intervening and superceding cause of Iliescu’s claimed damages. The district court further recognized that the legal effect of the judicial error is to sever the causal connection between the alleged legal malpractice and Iliescu’s claimed damages. Because the element of causation was lacking as a matter of law, summary judgment was appropriately granted in favor of Hale Lane. The district court’s order granting summary judgment should be upheld in its entirety.

II.

ISSUES PRESENTED

1. Whether the district court erred in granting Hale Lane’s motion for summary judgment on the basis that the district court’s judicial error was an intervening and superceding cause of Iliescu’s claimed damages.

2. Whether the district court abused its discretion in denying Iliescu's motions for leave to amend and for further discovery.

III.

STATEMENT OF FACTS

A. Hale Lane's involvement in Iliescu's sale of real property

In August of 2005, Iliescu entered into an agreement to sell one of his pieces of real property in downtown Reno to a group of developers for a high-rise condominium project. (II JA 227, ¶15). Iliescu, through his broker, was first contacted about the project in July of 2005 by Consolidated Pacific Development Inc. (the "developer"). (II JA 227, ¶13). A deal was reached, and Iliescu's broker prepared a rudimentary Land Purchase Agreement. (II JA 227-228). The Land Purchase Agreement provided that the developer would buy the property from Iliescu for \$7.5 million with a \$500,000 non-refundable cash deposit and, upon completion, Iliescu was also to receive a 3,750 square-foot penthouse with four parking spaces. (X JA 1941 and 1955). The sale was contingent upon the developers obtaining the necessary entitlements for the development from the City of Reno. (X JA 1954).

Upon executing the Land Purchase Agreement, the parties realized that the form contract prepared by Iliescu's broker was perhaps inadequate for the magnitude of the transaction. (X JA 1993-1994). The parties agreed that legal counsel should

be hired to “fine tune” the agreement and better reflect the parties’ intentions. (X JA 1993-1994). For that reason, Iliescu’s broker brought the Land Purchase Agreement to attorney Karen Dennison at Hale Lane. (II JA 228, ¶¶ 18-19).

Ms. Dennison prepared Addendum No. 3 to the Agreement, which clarified the parties’ agreement in several respects. (X JA 1996-2011). It explained that obtaining the necessary entitlements from the City was a “condition precedent,” and it mandated that the developer “use its best efforts and reasonable diligence to satisfy all Conditions Precedent.” (X JA 1998). The Addendum also memorialized Iliescu’s ability to select the penthouse property of his choice with a value of \$2.2 million. (X JA 1998-2001).

Once the Purchase Agreement was finalized and executed, the developer sought out an architect to help obtain the necessary entitlements from the City of Reno. (II JA 228, ¶21). Stepan and his firm, Fisher Friedman, were retained by the developer to design the project, prepare the architectural drawings, and present the plans to the City Council. (VI JA 1219-1229). Iliescu signed a conflict waiver so that Hale Lane could assist the developer in obtaining the entitlements. (X JA 2013-2016). With Hale Lane’s assistance, approximately a year later the parties were ultimately successful in obtaining the entitlements and getting the project approved. (X JA 2018-2025).

B. Hale Lane's involvement in the lien litigation

On November 7, 2006, around the same time the entitlements were obtained, Steppan recorded a \$1.8 million mechanic's lien on Iliescu's property. (X JA 2027-2032). After the lien was recorded, both the developer and Iliescu approached attorney Craig Howard at Hale Lane and asked him to help resolve the lien issue. (II JA 230, ¶30). The parties then executed a second Conflict Waiver. (X JA 2034-2036).² Mr. Howard then brokered an Indemnity Agreement between the parties, whereby the developer and its principals, including co-third-party defendant, Schleining, would indemnify Iliescu for any harm resulting from the lien. (X JA 2038-2039). In addition to complete indemnification, the agreement also provided that the developer would attempt to discharge the lien on Iliescu's behalf at no expense to Iliescu. (X JA 2039).

Attorney Jerry Snyder at Hale Lane then filed an application on Iliescu's behalf for the release of Steppan's lien. (X JA 2041-2046). In that Application, Hale Lane argued that Steppan's lien was legally deficient and invalid and should be released or expunged because Steppan had failed to serve Iliescu with the required pre-lien notice. (X JA 2044-2045).

² Although the Conflict Waiver does not contain Iliescu's signature, Iliescu acknowledged in ¶32 of his Verified Complaint that he executed the Conflict Waiver. (IIJA230).

After Hale Lane filed the Application on Iliescu's behalf, Steppan filed a complaint against Iliescu to foreclose the lien, and the two actions were consolidated into the underlying case. (I JA 170-175).

On May 3, 2007, the district court held an oral argument on Hale Lane's application to release Steppan's lien. (I JA 107-108). At that oral argument, Hale Lane attorney Jerry Snyder argued, in pertinent part:

I believe what Ms. Kern³ 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 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

³ At the time of the May 3, 2007 hearing, Steppan was represented by attorney Gayle Kern.

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.

(I JA 153-155).

Despite Hale Lane's argument, the district court did not order the release of Steppan's lien. Instead, the court ordered that the parties were to conduct discovery on whether Iliescu had actual notice of Steppan's architectural work. (I JA 165).

Shortly after the May 2007 hearing, Iliescu replaced Hale Lane as his counsel and asserted a third-party complaint for, among other things, legal malpractice against Hale Lane. (I JA 209-210; II JA 233-234).

C. Iliescu's litigation against Steppan and the subsequent appeal

The validity and enforceability of Steppan's lien was litigated for approximately 8 years, and it was on appeal for an additional two years. During that time, Iliescu's third-party claims against Hale Lane were stayed by stipulation pending the resolution of Steppan's lien. (X JA 2048-2050). Ultimately, the district court entered judgment in favor of Steppan on February 26, 2015, and Iliescu appealed. (VII JA 1394-1398).

Before his appeal was decided, Iliescu sought to amend his third-party claims against Hale Lane. (VII JA 1485-1503). That motion was denied because the stipulated stay remained in place at the time the motion was filed. (VIII JA 1706-

1711). In Iliescu's motion, he sought to expand upon the third-party claims already set forth in his existing Third-Party Complaint. Specifically, Iliescu argued that in drafting Addendum No. 3 to the agreement between Iliescu and the developer, Hale Lane had "the perfect opportunity" to protect Iliescu against mechanic's liens, such as Steppan's. (VII JA 1487-1488). Iliescu contended that Hale Lane "could have" included certain provisions in Addendum No. 3 that may have prevented or limited contractors' prospective assertion of mechanic's liens. (VII JA 1487-1488).

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 Steppan's lien was invalid because Steppan had not substantially complied with the mechanic's lien statutes. *Id.* at 934-35. Specifically, Steppan had failed to provide Iliescu with a pre-lien notice, as required by NRS 108.245. *Id.* The Court further clarified that *Fondren's* actual notice exception to the pre-lien notice requirement, upon which Steppan had relied, does not apply to offsite (i.e., architectural) work when no onsite work had been conducted on the property. *Id.*

D. Hale Lane's motion for summary judgment

After remand from the successful appeal, Iliescu continue to pursue his legal malpractice claims against Hale Lane, seeking as damages the attorney's fees and costs expended in invalidating the lien, as well as some component of lost value of the subject property. (XIII JA 2441:13-18). Hale Lane moved for summary

judgment of those claims on the basis that it had appropriately sought the release of Steppan's lien immediately after it was recorded, but the district court's judicial error (in declining to release the lien) was a judicial error that broke the chain of causation. (X JA 1933-1936). Stated differently, the judicial error constituted an intervening and superceding cause of Iliescu's claimed damages. (X JA 1933-1936).

In opposition, Iliescu argued that although the lien litigation was defended successfully, Hale Lane still had a duty to warn Iliescu of how to avoid the unfounded lien claim in the first place. (X JA 2078:14-22). Iliescu listed various methods by which Hale Lane might have been able to protect Iliescu from the lien before it was asserted. (X JA 2068-2070). In short, Iliescu confused the element of causation with the element of breach. In addition to his opposition, Iliescu moved for leave to amend his pleading and to conduct additional discovery. (X JA 2082-2084).

In its reply, Hale Lane pointed out Iliescu's confusion of the breach and causation elements of a malpractice claim, and demonstrated that any alleged breach by Hale Lane (i.e., an alleged failure to warn of or protect Iliescu from a potential lien) was entirely irrelevant. (XI JA 2241-2243). Once Hale Lane filed its application to release Steppan's lien, and followed that application with the appropriate legal argument distinguishing this case from *Fondren*, the causal chain

between any alleged professional negligence and Iliescu's claimed damages was broken by the district court's judicial error. (XI JA 2241-2247).

E. The district court's ruling on Hale Lane's summary judgment motion

On June 12, 2018, the district court entered its order granting Hale Lane's summary judgment motion. (XIII JA 2497-2511). In that order, the district court first set forth the legal framework underlying the doctrine of judicial-error-as-superseding-cause. (XIII JA 2502-2507). It recognized the Nevada Supreme Court case law in which the doctrine is acknowledged, and then discussed case law from other jurisdictions in which the doctrine is fleshed out in greater depth. (XIII JA 2502-2507). Against that legal backdrop, the district court explained how the undisputed facts led to only one reasonable conclusion. (XIII JA 2507-2509). Comparing Jerry Snyder's May 3, 2007 oral argument to the Nevada Supreme Court's reasoning in the May 2017 *Iliescu* decision, the district court stated as follows:

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 not provide a property owner with the same information as does actual notice of onsite work.

...

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.

(XIII JA 2507-2508).

Furthering its comparison of Hale Lane's argument and the Nevada Supreme Court's reasoning, the district court then quoted the Nevada Supreme Court's 2017 opinion and stated as follows:

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.

(XIII JA 2509).

Accordingly, the district court appropriately concluded that its own judicial error was the intervening and superceding cause of Iliescu's claimed damages. (XIII

JA 2509). As the element of causation was lacking as a matter of law, the district court properly granted summary judgment in favor of Hale Lane. (XIII JA 2509).

With regard to Iliescu's motion for leave to amend, the district determined that any such amendment would have been futile. (XIII JA 2509-2510). It explained as follows:

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.

(XIII JA 2510:6-13).

IV.

ARGUMENT

A. Standards of Review

A district court's order granting summary judgment is reviewed *de novo*. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.*

A district court's denial of a motion for leave to amend, as well as a denial of a motion for further time to conduct discovery under Rule 56(f), are reviewed for an abuse of discretion. *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. The distinction between transactional and litigation malpractice is immaterial in this case.

In the Opening Brief, Iliescu first argues that the doctrine of judicial-error-as-intervening-cause applies only to claims of litigation malpractice, as opposed to transactional malpractice. (AOB 29-31). Iliescu advances this argument by pointing out that the Nevada cases cited by Hale Lane in its summary judgment briefing (*Semenza v. Nev. Med. Liab. Ins. Co.*, 104 Nev. 666, 765 P.2d 884 (1988); *Hewitt v. Allen*, 118 Nev. 216, 43 P.3d 345 (2002)) both involved allegations of litigation malpractice, as opposed to transactional malpractice. (AOB 29-30). Iliescu concludes this argument by stating that “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.” (AOB 30).

While Iliescu is correct that the accrual and tolling principles set forth in *Semenza* and *Hewitt* do not apply to transactional malpractice cases, Iliescu neglects to point out that Hale Lane did not cite those cases as authority on accrual or tolling principles. (X JA 1933-1935). Rather, those cases were cited only as examples in

which the Nevada Supreme Court has recognized that judicial error, rather than attorney malpractice, is, in certain cases, more appropriately characterized as the cause of a client's claimed damages.⁴ (X JA 1933-1935).

In the context of this case, the distinction between litigation malpractice and transactional malpractice is a distinction without a difference. This is because any alleged transactional errors took place before Hale Lane filed and argued its application to release Stepan's lien. If that application had been successful, as it should have been were it not for the district court's judicial error, Iliescu would not have sustained any damages from any alleged transactional malpractice that preceded the judicial error.

The distinction between litigation malpractice and transactional malpractice is only important in determining when a legal malpractice claim can be said to have accrued for the purpose of determining whether the claim has been asserted within the applicable statute of limitations period. Specifically, the statutory limitations period for a claim of legal malpractice involving the representation of a client during *litigation* does not commence until the underlying litigation is concluded. *Hewitt*, 118 Nev. at 221, 43 P.3d at 348. It is not the same, however, for

⁴ Use of *Semenza* and *Hewitt* as examples of the Nevada Supreme Court's recognition of the judicial-error-as-superceding-cause doctrine is reiterated in the following section of this brief.

a claim of *transactional* legal malpractice. *Kopicko v. Young*, 114 Nev. 1333, 1337 n.3, 971 P.2d 789, 791 n.3 (1998). In the context of alleged transactional legal malpractice, the limitations period does not necessarily wait until underlying litigation is concluded before commencing. *Id.* Rather, the limitations period begins to run when “the client discovers, or should discover, facts establishing the elements of his or her cause of action.” *Charleson v. Hardesty*, 108 Nev. 878, 883, 839 P.2d 1303, 1307 (1992).

This appeal does not present an issue of accrual or a determination of whether malpractice claims were asserted within the applicable statute of limitations. It is therefore irrelevant whether Iliescu’s legal malpractice claims were based on alleged transactional or litigation errors. The alleged transactional errors, if any, occurred before Hale Lane filed its application to release Steppan’s lien. Thus, had the district court granted the very first filing in the underlying case—Hale Lane’s application to release Steppan’s lien—Iliescu would not have sustained any damages from either litigation or transactional malpractice. Accordingly, the judicial error at issue in this case was the intervening and superceding cause of Iliescu’s claimed damages, regardless of whether those damages allegedly stemmed from transactional or litigation errors. The distinction between alleged transactional and litigation malpractice is therefore irrelevant in this case.

C. **The district court correctly concluded that its own judicial error constituted an intervening and superceding cause of Iliescu's claimed damages.**

The causation element of a negligence action has two components: actual cause and proximate cause. *Clark County School District v. Payo*, 403 P.3d 1270, 1279 (Nev. 2017). Proximate cause is defined as “any cause which in natural [foreseeable] and continuous sequence unbroken by any efficient intervening cause, produces the injury complained of and without which the result would not have occurred.” *Id.* In a negligence action, including professional negligence, an intervening or superceding cause breaks the chain of causation and relieves the alleged tortfeasor of liability. *Wood v. Safeway, Inc.*, 121 Nev. 724, 740-41, 121 P.3d 1026, 1037 (2005). An intervening act is a superceding cause only if it is unforeseeable. *Id.* at 741, 121 P.3d at 1037.

The Nevada Supreme Court has recognized that alleged legal malpractice damages in the form of litigation expenses 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*, 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 in *Semenza* 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 666, 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*, 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. 118 Nev. at 222, 43 P.3d at 348-49. 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 (emphasis added).

Having conceptually recognized that a judicial error can constitute an intervening and superceding cause in a legal malpractice case, it does not appear that a Nevada appellate court has examined the issue in depth. Courts in other jurisdictions have taken the opportunity to examine the issue and have concluded that, if an attorney asserts the appropriate legal argument but the court rejects it, the district court's judicial error is the superceding cause of the client's damages.

One such case is *Crestwood Cove Apartments Business Trust v. Turner*, 164 P.3d 1247, 1255 (Utah 2007). *Crestwood Cove* involved an underlying foreclosure, quiet title, and redemption of property action between the former owner of an apartment complex and the subsequent owner who had purchased the complex at a foreclosure sale. *Id.* at 1249. The trial court applied an unlawful detainer statute, which trebled the amount of the judgment against the former owner of the complex. *Id.* The former owner's attorney had argued that the unlawful detainer statute was not applicable, but the trial court rejected that argument. *Id.* at 1249-50. The former

owner later appealed the trial court's ruling but ended up settling the matter and dismissing the appeal. *Id.* at 1250. The former owner then sued the attorney who had represented it in the foreclosure and quiet title action, arguing that the attorney failed to assert the arguments necessary to protect it. *Id.* at 1250. The district court granted summary judgment for the attorney because he had asserted the appropriate legal arguments, but the district court in the quiet title case had erroneously rejected those arguments.⁵ *Crestwood Cove*, 164 P.3d at 1250.

In its discussion of the lower court's judicial error, the Supreme Court of Utah held that "[w]here 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." *Id.* at 1255. "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." *Id.* at 1255-56. The Court explained that "[w]ere it otherwise, an attorney would be subject to liability every time a judge erroneously ruled against the attorney's client." *Id.* at 1256. "In effect, an attorney

⁵ *Crestwood Cove* also involved an issue, which is not pertinent here, of whether the client had abandoned its right to pursue a malpractice action by settling the underlying matter. 164 P.3d at 1250-54.

would become a guarantor of correct judicial decisionmaking—a result we cannot accept.” *Id.* 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.*

The plaintiff in *Crestwood Cove* argued that when answering certain questions during oral argument, the attorney implied that the unlawful detainer statute might be applicable. 164 P.3d at 1256. The plaintiff argued that the attorney’s missteps “allowed the trial court to proceed too far down the wrong road.” *Id.* But, the Court explained, the attorney “cured any possible mistake when he specifically argued against” application of the unlawful detainer statute. *Id.*

The plaintiff also argued that the attorney did not raise the applicable procedural rule governing the appropriate measure of damages in a property redemption matter until the attorney moved for a new trial or to have the judgment amended under Utah Rule of Civil Procedure 59. *Id.* at 1257. The Court held, however, that the Rule 59 motion was an appropriate procedural mechanism under which the district court should have corrected its previous error. *Id.* Because the undisputed facts established that the proximate cause of the plaintiff’s injury was judicial error, summary judgment in favor of the attorney was affirmed. *Id.* at 1258.

Crestwood Cove did not address whether the district court’s judicial error may have been foreseeable or what impact such considerations may have on the notion

of judicial error as superceding cause. The Supreme Court of Texas discussed the foreseeability of the district court's judicial error in *Stanfield v. Neubaum*, 494 S.W.3d 90 (2016). Importantly, *Stanfield* held, a judicial error is only regarded as foreseeable under very limited circumstances.

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 superceding cause of the Neubaums' damages. *Stanfield*, 494 S.W.3d at 95-96. The Supreme Court of Texas agreed. It 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.

In this case, the district court’s judicial error was the intervening and superceding cause of Iliescu’s claimed damages. Just as in *Crestwood Cove* and *Stanfield*, Hale Lane asserted the appropriate legal argument which, although rejected by the district court at the time, was ultimately deemed correct by the Nevada Supreme Court. Moreover, Hale Lane cannot be said to have contributed to or cooperated with the district court’s error. Instead, Hale Lane argued directly against the district court’s ruling that was determined to have been in error.

Just as in *Crestwood Cove*, Iliescu argues that in portions of Snyder’s 2007 oral argument he “undermined the idea” that Steppan was not entitled to rely on the

actual notice exception to the pre-lien notice requirement. (AOB 33). Just like the lawyer in *Crestwood Cove*, however, Snyder argued directly against Steppan's reliance on the actual notice exception.

In its application to release Steppan's lien, Hale Lane first 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.⁶ (X JA 2041-2046). Indeed, Hale Lane attorney Jerry Snyder went much further than that.

At the May 3, 2007 oral argument hearing, Snyder pointed out the precise reason Steppan should not have been afforded the benefit of the actual-notice exception set forth in *Fondren v. K/L Complex, Ltd.*, 106 Nev. 705, 800 P.2d 719 (1990). (I JA 153-155). Snyder first pointed out that a formal, written pre-lien notice, pursuant to NRS 108.245, is required to include certain specific information about the lien claimant and the work that is the subject of the prospective lien. (I JA 153-155). He then argued that Iliescu was not provided with any such information about Steppan or his architectural firm or the work Steppan had performed. (I JA 153-155). Although Iliescu may have known that some architect somewhere was creating plans for a work of improvement on his property, Snyder argued, Iliescu

⁶ Incidentally, Iliescu refers to Snyder's *Application to Release Mechanic's Lien* as "extremely short," as though a brief must be lengthy in order to drive a point home. (AOB 32).

was never provided the information that would have been required in a formal, written pre-lien notice. (I JA 153-155). The obvious conclusion of Snyder's illustration is that, to appropriately satisfy the actual-notice exception to the statutory pre-lien notice requirement, the alleged actual notice must, at the very least, include the information that would otherwise be required in a statutory pre-lien notice. Indeed, Snyder's exact words were, "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." (I JA 154:8-11). Otherwise, Snyder argued, "[t]hat's reading *Fondren* so broadly as to vitiate the specific requirements of NRS 108.245." (I JA 154:24 – 155:2). In other words, Snyder contended that the exception would swallow the rule.

Over ten years after Snyder spoke those words, his argument was adopted and mirrored in the Nevada Supreme Court's decision in *Iliescu v. Steppan*, 133 Nev. Adv. Op. 25, 394 P.3d 930 (2017). As the district court found in granting summary judgment for Hale Lane, "juxtaposing Snyder's 2007 argument with the Nevada Supreme Court's 2017 reasoning reveals that the two are nearly identical." (XIII JA 2508:18-19). In its 2017 *Iliescu* opinion, 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, 394 P.3d at 934-35 (internal citations omitted).

Although Snyder did not frame his argument strictly in terms of “on-site vs. off-site” work, he made the same basic point. In Snyder’s words, “[s]o this notion that, because he [Iliescu] 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 [the information that would otherwise be included in a pre-lien notice] is simply untrue.” (I JA 154:20-24). The architect is referred to as “somewhere” precisely because he was not “on-site”—his whereabouts were unknown. Snyder then refers to a hypothetical obligation that would have been imposed on Iliescu to “go dig out” the information, characterized as such precisely because the required information is not immediately available “on-site.”

Snyder was making the point that the mere knowledge that a design professional somewhere is creating a set of plans for a developer who intends to buy the owner's property is not equivalent to the information that would be readily available if construction work was being performed on-site. It does not provide the property owner with the information that would otherwise need to be included in a statutory pre-lien notice. The on-site vs. off-site distinction makes sense only because a property owner with actual notice of on-site work has immediate access to the information that would otherwise be required to be included in a formal, written pre-lien notice.

In discussing the portion of Snyder's oral argument in which he expressly and appropriately distinguished this case from *Fondren*, Iliescu mischaracterizes the argument.⁷ After quoting Snyder's argument, Iliescu argues that "the concept of any

⁷ Iliescu states that, in granting summary judgment to Hale Lane, "the district court requested Hale Lane's counsel to prepare an Order which he would be able 'to defend before a court of appeals,'" and "[i]n an attempt to fulfill this task, Hale Lane's counsel clearly searched through the record and tried to find some argument that Hale Lane made at the Application hearing which could satisfy the 'judicial error' defense standards...." (AOB 39). To this, three things must be stated: (1) there is nothing inappropriate or improper about the Judge ordering the prevailing party to prepare the order reflecting the Judge's ruling, especially where, as here, the order is first circulated amongst both counsel and agreed upon; (2) the district court's reference to "an order that you are going to want to defend before a court of appeals" (XIIIJA 2489) was merely an admonition against providing the court an order that was less than thorough and thoughtful; and (3) Hale Lane's counsel did not "search through the record" in an effort to "fulfill this task." To the contrary, the subject

distinction between offsite and onsite work does not come up, *at all*, in this passage.” (AOB 40). Iliescu essentially contends that certain key words must have been written or spoken and, if not, a given issue has not been properly argued. As the district court recognized at the oral argument on Hale Lane’s summary judgment motion, Iliescu’s counsel “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.” (XIII JA 2485).

The question thus becomes: do we want to hold attorneys to a standard in which they are required to have written or spoken certain key words to be considered to have asserted a particular argument in a given case? In other words, can an attorney be said to have “caused” a client damages by arguing an issue using words or phrases other than those specific words eventually used by an appellate court that arrives at the same conclusion the attorney argued from the outset? The question is rhetorical and the answer is obvious.

As shown above, Snyder may not have used the specific terms “offsite” or “onsite,” but he argued the same issue without using those terms. He argued that Steppan’s lien was distinguishable from *Fondren* because all Iliescu knew was that

passage from Snyder’s oral argument was recited, verbatim, at the summary judgment hearing, *before* summary judgment was granted and *before* counsel was tasked with drafting the order. (XIIIJA 2459-2461).

“an architect somewhere would be creating some plans.” (I JA 154:21-22). Stated differently, Iliescu’s knowledge was limited because, unlike in *Fondren*, this case did not involve on-site construction work. Snyder then argued that to read *Fondren* so broadly as to characterize such limited knowledge as “actual notice” would be to allow the exception to swallow the rule. This is precisely the same rationale used by the Nevada Supreme Court in 2017 in overturning the order enforcing Steppan’s lien. The argument should have prevailed in 2007.

Analogizing this case with *Stanfield*, the district court properly concluded that the similarity between Snyder’s 2007 argument and the Nevada Supreme Court’s 2017 analysis renders this case a clear example of judicial error acting as intervening and superceding cause:

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.

(XIII JA 2509:9-13).

Because Hale Lane presented the correct legal argument, but the district court rejected it in error, the district court appropriately concluded that its judicial error was the intervening and superceding cause of Iliescu’s claimed damages, relieving

Hale Lane of liability for Iliescu's legal malpractice allegations. The district court's order granting summary judgment should be affirmed.

D. Hale Lane's alleged errors were not a "substantial factor," along with the district court's judicial error, in causing Iliescu's claimed damages.

Iliescu next argues that Hale Lane's alleged errors may not have been the sole cause of Iliescu's claimed damages, but should be regarded as a "substantial factor" in causing such damages. (AOB 41-45). Iliescu's substantial factor argument is misplaced, and it flies in the face of the very notion of judicial error acting as an intervening and *superceding* cause in a legal malpractice case. As demonstrated below, a court's determination that there has been a *superceding* cause necessarily carries with it the determination that other alleged causes have been overridden, or *superceded*, by the intervening cause.

First, this argument is misplaced because it disregards the proper application of the substantial factor test for determining proximate causation. Iliescu cites to *Holcomb v. Georgia Pacific, LLC*, 128 Nev. 614, 289 P.3d 188 (2012), for the proposition that Nevada applies the substantial factor test to determine proximate causation, but Iliescu neglects to point out that *Holcomb* also explained that "substantial-factor causation [] is appropriate when 'an injury may have had two causes, either of which, operating alone, would have been sufficient to cause the injury.'" 128 Nev. at 627, 289 P.3d at 196 (quoting *Johnson v. Egtegar*, 112 Nev. 428, 435, 915 P.2d 271, 276 (1996) (emphasis added)). Such a discussion was

appropriate in *Holcomb*, which dealt with asbestos-induced mesothelioma involving asbestos exposure from multiple possible sources. *Id.* at 622, 289 P.3d at 193. The substantial factor analysis is not appropriate in this case.

The only two potential causes in this case that, operating alone, would have been sufficient to cause Iliescu's injury were (1) Steppan's legally erroneous assertion of a lien without having first served a pre-lien notice, and (2) the district court's judicial error in the face of Hale Lane's appropriate and ultimately correct legal argument.

None of Hale Lane's alleged errors, whether transactional or during litigation, operating alone, could be said to have caused any injury to Iliescu. Hale Lane worked to facilitate the underlying property transaction on Iliescu's behalf. When Steppan asserted a lien on the property, Hale Lane worked, at no expense to Iliescu, to have the lien released or expunged. As determined by the Nevada Supreme Court in 2017, Hale Lane's efforts should have been successful.

Iliescu next cites to *Yamaha Motor Co. v. Arnoult*, 114 Nev. 233, 955 P.2d 661 (1998) and *Price v. Blaine Kern Artista, Inc.*, 111 Nev. 515, 893 P.2d 367 (1995), for the propositions that a district court may not grant summary judgment based on a lack of causation "where there is any question of fact as to whether an alleged intervening cause would be foreseeable," and "[p]roximate causation is generally an issue of fact for the jury to resolve." (AOB 41). While such principles

may be applicable in cases like *Yamaha* and *Price*, involving several possible causes of a claimant's physical injuries, they are not applicable here. An application of these principles in this case would mean that a jury should be called upon to decide whether the district court's judicial error was foreseeable in the face of Hale Lane's legal arguments.

Even if the foreseeability of judicial error was a factor to be considered, such foreseeability should not be a question for a jury. In *Hewitt, supra*, the Nevada Supreme Court recognized that such predictions are not appropriate for a jury. When a legal malpractice defendant contends that a client's damages were caused by judicial error that could have been corrected on appeal, "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. In much the same manner, whether a district court's judicial error should be regarded as foreseeable, assuming that is a determination that should ever be undertaken, should be decided by the trial court.

In the ensuing paragraphs of the Opening Brief, Iliescu returns to his argument that Hale Lane should have foreseen and acted to prevent Steppan's assertion of a lien in the first place. (AOB 42-43). This is, once again, a confusion of the breach and causation elements of a professional negligence claim. "Breach of the standard of care and causation are separate inquiries, however, and an abundance of evidence

as to one cannot substitute for a deficiency of evidence as to the other.” *Alexander v. Turtur & Associates, Inc.*, 146 S.W.3d 113, 119 (Tex. 2004).

For the sake of argument, even if it is assumed that Hale Lane’s transactional work for Iliescu breached the standard of care and permitted Steppan to record a lien when he otherwise would not have been able to do so, once the district court *erroneously* rejected a properly-argued application to release Steppan’s lien (the lien would have vanished were it not for the district court’s error), the chain of causation between the breach and any ensuing damages was broken. The district court’s erroneous decision not to grant the application to release Steppan’s lien *superceded* any previous alleged error and became the intervening and superceding cause of Iliescu’s claimed damages. Thus, Iliescu misses the mark when he repeatedly argues that Hale Lane should have foreseen and acted to prevent Steppan’s lien before it was asserted. As explained in *Stanfield, supra*, “[a]lthough there can be more than one proximate cause of an injury, a new and independent, or superceding, cause may ‘intervene between the original wrong and the final injury such that the injury is attributed to the new cause rather than the first and more remote cause.’” *Stanfield*, 494 S.W.3d at 97 (internal citations omitted) (quoting *Dew v. Crown Derrick Erectors, Inc.*, 208 S.W.3d 448, 450 (Tex. 2006)).

Concluding the “substantial factor” argument, Iliescu relies heavily on *Temple Hoyne Buell Found. v. Holland & Hart*, 851 P.2d 192 (Colo. App. 1992). In that

case, an attorney drafted an option contract that was later challenged under the Rule against Perpetuities. *Temple Hoyne*, 851 P.2d at 194. The trial court determined that the contract violated the Rule, but the appellate court reached the opposite conclusion. *Id.* at 197-98. Although it concluded that the contract did not violate the Rule and was therefore valid and enforceable as written, the appellate court held that such validation did not necessarily relieve the drafting attorney of liability for malpractice. *Id.* at 198-99. Instead, it concluded, the question remained whether the attorney should have foreseen that the option contract was likely to result in litigation. *Id.*

Temple Hoyne is inapposite here because it did not analyze its facts under the judicial-error-as-superceding-cause analysis. Moreover, *Temple Hoyne* is a poorly decided case that should not be followed in Nevada. Although the contract at issue in *Temple Hoyne* did not violate the Rule against Perpetuities, the appellate court held that the attorney failed “to recognize the likelihood that a good faith dispute could occur over the enforceability of the option because of the Rule....” *Id.* at 198. The glaring and alarming problem with this holding is that attorneys’ clients can and will be sued in “good faith disputes” no matter how perfectly an attorney drafts his or her client’s transactional documents. Under *Temple Hoyne*, even if the client is successful in such litigation, the client can maintain a malpractice action seeking from his or her former attorney the costs of the litigation. In such actions, with the

benefit of hindsight, an expert can and inevitably will offer an opinion as to how the contract could have been drafted differently and the litigation could have been avoided.

This imposes an untenable standard and an unbearable burden on the legal profession to draft ironclad, litigation-proof transactional documents. Even carefully-worded documents often devolve into litigation over the parties' interpretation of them. Under *Temple Hoyne*, not only does an attorney become the guarantor of correct judicial decision-making, she becomes a guarantor or insurer against litigation.

On this issue, a passage from Mallen's treatise on legal malpractice is instructive:

The common, frequent litigation about the meaning or validity of documents or legal products is because of the willingness of persons to litigate interpretation issues. Invariably one party's legal position will be found to be incorrect. Hindsight frequently will show, however, that the other party's lawyer could have drafted, advised or acted differently to reduce the risk of an unfounded claim. On a causation analysis approach, each successful litigant could sue his or her lawyer for the cost of litigation. With the benefit of hindsight, an expert witness might be willing to opine that the lawyer was negligent. With the benefit of hindsight, the expert can testify to how the risk of litigation could have been avoided or minimized. Thus, in every underlying lawsuit there exists the potential that one party's lawyer will be liable for an unfounded prosecution or for failing to avoid an unfounded prosecution.

The burden of such liability on the profession would be immense. Complex documents and complicated transactions often carry a risk of litigation. Lawyers would seek to use disclaimers or decline representation if there was a serious risk of litigation. A response to that concern is that only negligent lawyers would be liable. That argument is unpersuasive for two reasons. First, the danger is the threat of liability and the reality of legal malpractice litigation that must be defended at substantial cost. Second, the lawyer's liability will be measured by another lawyer, opining with the benefit of hindsight about the particular paragraph, clause or word that could have been clarified, rewritten or eliminated to make a correct document more litigation-proof. Even the most careful lawyers would have difficulty defending the wisdom of hindsight.

1 RONALD E. MALLIN, LEGAL MALPRACTICE § 8:23, pp. 1037-38 (2016 Ed.).

Hale Lane's alleged transactional errors should not be considered a substantial factor in causing Iliescu's claimed damages. Indeed, this case is not appropriate for a substantial factor analysis because Hale Lane's alleged errors, operating alone, would not have been sufficient to cause Iliescu's injury. Further, contrary to Iliescu's argument, a jury should not be called upon to decide whether the district court's judicial error was foreseeable. That question was appropriately addressed and answered when the district found that, because Hale Lane made the appropriate legal arguments against Steppan's lien, the district court's judicial error was the *superceding* cause of Iliescu's damages. Finally, this Court should not impose the unbearable burden on Nevada attorneys of potential liability for failing to foresee the seemingly infinite transactional issues that can give rise to litigation, regardless

of whether the attorney's legal arguments are correct or whether his or her transactional documents are valid and enforceable. For each of these reasons, the order granting summary judgment in favor of Hale Lane should be affirmed.

E. The costs of mitigating Iliescu's damages are not damages caused by Hale Lane.

Iliescu next argues that he had a legal duty to mitigate his damages by litigating Steppan's lien and filing and arguing the previous appeal. (AOB 48-52). Because of that legal duty to mitigate, Iliescu argues that the order granting summary judgment for Hale Lane violated a principle requiring mitigation costs to be recoverable as damages. This argument is unpersuasive because it asks this Court to assume the conclusion Iliescu ultimately wants the Court to reach. This argument is a perfect example of circular reasoning.

To illustrate, Iliescu starts with the premise that "[a]ll 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." (AOB 48) (emphasis added). The district court properly concluded that Iliescu's losses were *not* caused by Hale Lane but, rather, by the district court's judicial error. Proximate causation of Iliescu's damages is the very issue at the heart of this appeal. Whether or not Iliescu had a duty to mitigate his claimed damages has no bearing whatsoever on who or what

caused those damages. Because of its clearly circular reasoning, this argument should be given no weight at all.

F. Iliescu's motion to amend and for further discovery was appropriately denied as futile.

In response to Hale Lane's motion for summary judgment, Iliescu filed a countermotion for leave to amend and for time to conduct further discovery. (X JA 2082-2084). The district court denied that countermotion as futile. (XIII JA 2509-2510). In conjunction with its determination that its own judicial error was the superceding cause of Iliescu's losses, the district court found that Iliescu could not establish the element of causation regardless of whether or how Iliescu's pleading was amended. (XIII JA 2509-2510). This was a sound exercise of the district court's discretion.

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).

As the district court correctly observed, Iliescu's proposed amended third-party complaint was essentially a list of steps Hale Lane allegedly could have or should have taken to protect Iliescu from the possibility that Stepan would later assert a lien against Iliescu's property. (XIII JA 2509:21-24). Due to the lack of a causal link between Hale Lane's work and Iliescu's damages, Iliescu's proposed amendment could not correct the causal deficiency. As the district court concluded, "even if Iliescu's amended allegations are accepted as true, the fact remains that Hale Lane's 2007 application to release Stepan's lien should have been granted." (XIII JA 2510:7-9).

Iliescu spends considerable time arguing that the motion for leave to amend was not dilatory, but that was not the basis upon which the motion was denied. Iliescu's only argument that speaks to the futility of the proposed amendment is that Hale Lane's "theory of intervening proximate cause should not have been accepted. Hence, the amendment would not have been futile." (AOB 53). Conceptually, Hale Lane agrees that if summary judgment was not granted on the issue of proximate causation, Iliescu's proposed amendment might not have been futile. Thus, the futility of Iliescu's proposed amended pleading is either a moot issue, or it should be upheld along with the rest of the district court's order granting summary judgment.

V.

CONCLUSION

In the district court, 10 years ago, Hale Lane asserted the same argument that formed the basis of the Nevada Supreme Court's 2017 decision in Iliescu's favor. Hale Lane's application for release of Steppan's lien should have been granted. Accordingly, the proximate cause of Iliescu's claimed damages is not any alleged negligence on Hale Lane's part, but judicial error that has now been corrected on appeal. Because the proximate cause element of Iliescu's legal malpractice claim was lacking as a matter of law, the district court properly granted summary judgment in Hale Lane's favor. The order granting summary judgment should be affirmed.

DATED this 16 day of January, 2019.



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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 Times New Roman. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7)(ii) 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 10,887 words.

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

DATED this 16 day of January 2019.



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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that I am an employee of the law office of Lemons, Grundy & Eisenberg and that on January 16, 2019, I e-filed a true and correct copy of the foregoing **Respondent's Answering Brief**, with the Clerk of the Nevada Supreme Court through the Court's electronic filing system and notice will be sent electronically by the Court to the following:

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