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.

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

APPELLANTS' REPLY BRIEF

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I. OVERVIEW AND INTRODUCTION

Based on the arguments in the Respondent's Answering Brief ("RAB"), in order for this Court to newly grant *de novo* Summary Judgment to Hale Lane herein, it would need to reach all of the following conclusions:

First, this Court would need to reject the applicability of its own proximate cause case law to this appeal, in order to then also ignore the many questions of fact which exist herein as to the foreseeability of the claimed intervening judicial error, and as to whether Hale Lane substantially contributed to the Iliescus' losses. *See*, Section IIA, below.

Secondly, this Court would need to apply Hale Lane's "it's not my fault you lost" defense, not only to the Iliescus' litigation malpractice claims (a relatively minor element of their suit), but also to their transactional malpractice claims, despite the logical inapplicability of such a defense to such claims, in which the harm to the client *is* the resultant litigation, in and of itself, regardless of the course or even the outcome thereof. *See,* Section IIB, below.

Third, this Court would have to accept the "judicial error" defense invoked by Respondent Hale Lane, even though Hale Lane's arguments to the erring court did not avoid, but instead invited, that error. *See,* Section IIC, below.

The RAB does not provide a valid basis for any of these leaps to be taken. Accordingly, the lower court's rulings should be reversed.

II. LEGAL ANALYSIS

A. Nevada's Tests for Proximate Causation Apply to Respondent's Defense, Notwithstanding Its Assertions to the Contrary.

Alleged judicial error, like any other allegedly intervening cause, does not necessarily act as an absolute bar to a malpractice defendant's liability, given that, under Nevada law, a defendant's conduct may be a proximate cause of an injury, even if it is not the sole cause, if it substantially contributed to that injury, and if allegedly intervening causes were reasonably foreseeable. *Holcomb v. Georgia Pacific, LLC*, 1218 Nev. 614, 289 P.3d 188 (2012); *Williams v. State*, 118 Nev. 536, 550, 50 P.3d 1116, 1125 (2002)("The contributory negligence of another does not exonerate the defendant unless the other's negligence was the **sole cause** of injury")[emphasis added].

The RAB contends that *Holcomb* and the other Nevada proximate cause cases cited in the AOB, simply do not apply herein, because of Respondent's invocation of judicial error as an alleged *superseding* proximate cause. RAB at 35-37. But this reasoning is seriously amiss. Assertion of the "judicial error" defense by a legal malpractice defendant does *not* somehow magically bestow any factual presumptions in favor of the movant, or render the substantial factor and foreseeability of alleged intervening cause tests, as set forth in this Court's prior cases, suddenly inapplicable, or require that foreseeability be treated as a legal, not a factual, question.

For example, even *Stanfield v. Neubaum*, 494 S.W.3d 90, 99-100 (Tex. 2016), one of the only two cases cited in the RAB upholding summary judgment on the basis of a judicial error defense, explained that, for such judicial error to be a superseding proximate cause, and "break the causal connection between an attorney's negligence and the plaintiff's harm" the judicial error "must not be **reasonably foreseeable**." Otherwise, "the error is a concurring cause as opposed to a new and independent, or superseding, cause." *Id.* [Emphasis added.] Likewise, *Crestwood Cove Apts. Business Trust v. Turner*, 164 P.3d 1247, 1256 (Utah 2007), the other case cited in the RAB which illustrates the type of decision Respondent hopes to replicate herein, cautioned:

> [W]e 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. [Emphasis added.]

Clearly, Hale Lane's assertion that the *Holcomb* analysis, which similarly raised substantial factor and foreseeability tests, somehow does not apply to this matter, is wholly unsupported. Hale Lane's own cited cases reference these same foreseeability and substantial factor questions as equally applicable to a judicial error defense.

Based on the questions of fact which inevitably arise when an intervening proximate cause defense is raised, the results of *Stanfield* and *Crestwood Cove* are

unusual outliers. A far longer list of malpractice cases could be cited, in which summary judgment on an intervening judicial error, or similar, defense, was rejected. For example, in *Skinner v. Stone, Raskin & Israel*, 724 F.2d 264, 265-66 (2d Cir. 1983), the Circuit Court reversed a district court's acceptance of a judicial error defense to grant summary judgment dismissal of legal malpractice claims, where the judicial error involved a district court's entry of default judgment, later set aside on appeal: "We think the matter cannot be disposed of so simply. Whether appellant wins or loses in the [underlying] action, he still will be out of pocket for his expenses in opposing enforcement of the defective default judgment . . . . If these expenses resulted from appellees' negligence and were reasonably incurred, they should be recoverable." *Id*. Moreover, the Circuit ruled, whether "appellees contributed to the fiasco" which led to the default judgment, was a factual question for the jury, as was the question of whether "the trial court's mistake was" or was not, truly "a superseding rather than a contributing cause of the defective default judgment" such that the lawyer defendants could be "held liable if their negligence was a proximate contributing cause" of the client's loss, such as the legal expenditures incurred to vacate the default judgment. *Id*.

See also, *Kiribati Seafood Co. v. Dechert LLP*, 83 N.E.3d 798, 806 (Mass. 2017)(reversing summary judgment in favor of defendant law firm, and noting that "where the judicial error is foreseeable . . . an attorney has an obligation to take

reasonable and prudent steps to prevent or mitigate that error"); *Edleman v. Russell*, 167 Wash. Ct. App. 1050 *11 (2012) (unpublished disposition) ("Whether the [lawyer's breach] caused the damages suffered by the Edlemans presented a factual question. It is true that damages caused *solely* by judicial error . . . would not be recoverable. . . . But there may be more than one proximate cause, and a third party's concurring negligence does not necessarily break the causal chain from the original negligence to the final damages").

Clearly, the mere invocation of a "judicial error" defense does not render the substantial factor test inert, nor erase the need to determine whether an intervening cause was foreseeable, as one test for determining if it were a superseding cause.

Nor does *Holcomb* cease to apply for the reasons argued at pp. 35-36 of the RAB. Instead, under the *Holcomb* language cited at p. 35 of the RAB, if both Hale Lane's transactional malpractice, and/or its litigation malpractice [inviting the judicial error], and the judicial error itself, may each, standing alone, have been sufficient to cause the injury (the possibility of which is seemingly conceded in the first full paragraph of page 36 of the RAB) then the *Holcomb* substantial factor test *does* apply. These RAB claims as to the inapplicability of the normal proximate cause tests to its judicial error defense, put the cart before the horse, and assumed without prior proof that the alleged judicial error herein was not foreseeable, and was the sole rather than a contributing cause of the injury. But this reasoning has

been repeatedly rejected by the courts. *See e.g., John B. Gunn Law Corp. v. Maynard*, 235 Cal. Rptr. 180, 182-83 (Ct. App. 1987)("an attorney's negligence need not be the sole proximate cause of a client's loss to establish a case of malpractice" such that, in the face of an attorney's assertion of an intervening cause defense, the jury should have been instructed that legal (i.e. proximate) causation is defined as "a substantial factor in bringing about the injury" and should also have been instructed that "where two causes combine to bring about an injury and either of them operating alone would have been sufficient to cause the injury, either cause is considered to be a [proximate] [legal] cause of the injury if it is a material element and a substantial factor in bringing it about, even though the result would have occurred without it."); *A.R.K. Patent International LLC v. Levy*, 50 Misc.3d 1204(A) *7 (N.Y. Cnty Ct. 2014) (unpublished disposition) ("A [legal malpractice] plaintiff must establish that the defendant law firm was a proximate cause of damages, but need not establish that it was the lone proximate cause."); *Laird v. Blacker*, 828 P.2d 691, 696 (Cal. Ct. App. 1992) (a successful "appeal does not necessarily exonerate the attorney, nor . . . extinguish the client's action against him for negligence"); *Lombardo v. Huysentruyt,* 110 Cal. Rptr. 2d 691, 701 (Ct. App. 2001) (attorneys could escape liability for malpractice "only if probate court's mistake could be viewed as a superseding cause . . . [which would not be the case where] there was evidence that the probate court's order was foreseeable"

and, "[a]s an abstract principle, it is always foreseeable that a trial court will err, as evidenced by the existence of appellate courts.").

Hale Lane's arguments that its "judicial error" defense, somehow requires this Court to ignore its own prior case law on how to analyze proximate causation, should be rejected. There is nothing so extraordinary in this defense, that its invocation relieved Hale Lane from a summary judgment movant's normal obligations to demonstrate the absence of any questions of fact (in this case, as to whether the alleged intervening cause was or should have been foreseeable, and as to whether or not its own neglect was a substantial factor in the Iliescus' losses).

Summary Judgment is not normally appropriate on these questions. *See e.g., Jenifer v. Fleming, Ingram & Floyd, P.C.*, 552 F. Supp. 1370, 1378-79 (Ga. U.S. Dist. Ct. 2008) (declining to grant summary judgment to defendant in legal malpractice case, as "issues of proximate cause are reserved for the jury except in plain and unequivocal cases"); *Yamaha Motor Co. v. Arnoult*, 124 Nev. 233, 238, 955 P.2d 661, 664-65 (1998) ("Proximate causation is generally an issue of fact for the jury to resolve."); *Price v. Blaine Kern Artista, Inc.*, 111 Nev. 515, 520-21, 893 P.2d 367, 370-71 (1995)(reversing summary judgment due to issue of fact as to a third-party's intervening act potentially having been foreseeable and thus failing to "sever[] the chain between a plaintiff and a defendant").

In the present case, as discussed further below, the subject district court

order invoked as a defense was not so extraordinary as to have been beyond the realm of risks foreseeable to Hale Lane. Moreover, it was obviously foreseeable that Hale Lane's transactional failures, as described in the Appellants' Opening Brief ("AOB"), could lead to a mechanic's lien being claimed against the Iliescus' Property, and that subsequent expensive and protracted litigation could then occur thereon, which would in and of itself comprise the clients' loss, and which might be exacerbated by any number of factors, including initial rulings which were contested and disputed and might need to be appealed. Thus, summary judgment should have been denied. *See, e.g., First Interstate Bank of Denver v. Berenbaum,* 872 P.2d 1297, 1300 (Colo. Ct. App. 1993) (a transactional attorney has a duty to anticipate reasonably foreseeable risks, such as resultant litigation, and "the question remains whether reasonably prudent attorneys should have foreseen that the likely result of [their work product] would be litigation"); *Nettleton v. Stogsdill, Jr.*, 899 N.E.2d 1252 (Ill. Ct. App. 2009) (reversing district court's summary judgment dismissal of legal malpractice claims, to recover fees incurred in second divorce proceeding, after first proceeding was dismissed due to attorney error: "reasonable persons could reach different conclusions as to whether defendants' alleged malpractice proximately caused plaintiff's injuries . . . . [H]ow much of plaintiff's attorney fees was attributable to defendants' alleged malpractice versus . . . other factors presented a genuine issue of material fact warranting a denial of

the motion for summary judgment.").

Moreover, an intervening cause does not "supersede" a transactional lawyer's faults, if the transactional lawyer failed to warn the client about the same. *Lucero v. Sutten*, 341 P.3d 32 (N.M. Ct. App. 2014). This is exactly what the Iliescus claim occurred in this case, when Hale Lane failed to warn them of the risks of their purchase contract, or to discuss various strategies, which were viable at certain points in time, to overcome those risks. AOB 11-20.

Judicial error was not the sole nor an unforeseeable cause of injury herein, including for the reasons discussed below, upon which there are, at the very least, questions of fact which should have prevented entry of Summary Judgment.

B. "It's Not My Fault You Lost Defenses," Including under a Judicial Error Theory, Do Not Apply to Transactional Malpractice Claims.

Even if Hale Lane's judicial error defense were valid as a basis to summarily adjudicate and dismiss the Iliescus' litigation malpractice claims (which is not the case), it should not have been relied upon to also dismiss the Iliescus' transactional malpractice claims. Judicial error is, ultimately, just one more variation of a lawyer defending a malpractice case on the grounds that "it's not my fault you lost." Such defenses, however, apply to litigation malpractice cases, in which a loss or a win occurs, but not to transactional malpractice cases, in which the client's subsequent entanglement in litigation is, in and of itself, the damage to the client, regardless of the outcome thereof, let alone the course leading to that outcome.

(i) <u>Transactional Lawyers who Increase the Risk of their Clients Incurring Litigation Fees Are Liable for those Losses</u>.

"Fees paid to a second attorney to correct errors committed by a negligent prior attorney represent damages recoverable in a legal malpractice action." *Callahan v. Gibson, Dunn & Crutcher*, 125 Cal. Rptr. 3d 120, 140 (Ct. App. 2011); *see also, Collier v. Manring*, 309 S.W.3d 848 (Mo. Ct. App. 2010). This is especially true in cases involving transactional malpractice. 1 Ronald E Mallen, Legal Malpractice §8:23 pp. 1037-38 (2016 Ed.):

> 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 [client ultimately] prevailed in [such resulting litigation].

See, e.g., Gram v. Davis, 495 S.E.2d 384, 387-88 (N.C. Ct. App. 1998) ("costs, including attorney's fees, incurred by a plaintiff to remedy the injury caused by the malpractice" are recoverable, **including "damages" in the "amount required to free . . . land from [an] encumbrance"**)[emphasis added]; *Sindell v. Gibson, Dunn & Crutcher*, 63 Cal. Rptr. 2d 594 (Ct. App. 1997) (estate beneficiaries, forced to defend claims arising from possible property interests of decedent's former wife, due to transactional attorney's failures to take action which would have obviated this risk, entitled to sue attorney for their resulting defense costs and attorney's fees, said litigation itself being the damage caused by the transactional malpractice); *First Interstate Bank of Denver, N.A. v. Berenbaum*,

872 P.2d 1297, 1300 (Colo. Ct. App. 1993) (even if litigation arising out of attorneys' transactional services is resolved "in favor of the client," summary judgment dismissal of resultant malpractice action against attorney is improper, where questions of fact remain as to whether lawyer should have foreseen litigation); *Schwarz v. Bloch*, 88 So. 3d 1068 (Fla. Ct. App. 2012) (reinstituting damages award in favor of legal malpractice plaintiff, arising because "the wrongful act of the defendant . . . involved the claimant in litigation with others . . . [or made] it necessary to incur expenses to protect its interests").

Not only are such expenses recoverable when the client prevails in the resultant litigation, they are also recoverable when the client does *not* succeed: Where fees are incurred by a client "in attempting to avoid, minimize or reduce the damage caused by attorneys' wrongful conduct" such "mitigation expenses may" also "be charged to the attorney even if the efforts were not productive" although the reasonableness of the client's efforts may in such a case be disputed. 3, Mallen, Legal Malpractice §21.18 (2019 Ed.). *See also*, *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, 8 N.Y. 3d 438 (Ct. App. 2007); *Rafferty v. Scurry*, 690 N.E.2d 104, 109 (Ohio Ct. App. 1997).

In cases where transactional malpractice leads to litigation expenses, the necessity of initiating or defending a lawsuit, and the expenses incurred therein, *are* the damage, regardless of the specifics of how that litigation plays out. As

Sindell v. Gibson, Dunn & Crutcher, supra, 63 Cal. Rptr. 2d at 602, explained: "Where, as here, . . . the [transactional] lawyer negligently fails to [take action which would] preclude costly litigation, **the mere fact of such litigation is the unwanted consequence**. The litigation represents the loss of the bargained-for benefit; **the litigation itself is the event which constitutes damage**." [Emphasis added.]

The lien litigation which the Iliescus found themselves defending for several years, was the very type of danger they had hired Hale Lane's transactional attorneys to assist them in obviating. Hale Lane failed to inform or warn the Iliescus of the facts causing potential lien dangers to arise from this transaction, or to timely advise them of any strategies to deal with those risks, at the times when such strategies could have been successfully implemented. *See*, AOB at pp. 11-20. This then required the Iliescus to prosecute their lien expungement action, and defend the lien foreclosure suit consolidated therewith, ultimately resulting in their successfully setting aside the lien as well as a multi-million dollar judgment thereon. Given that these litigation expenses are typically recoverable, ***whether or not*** *the client ultimately succeeds*, it is difficult to fathom how the Iliescus' initial litigation failure, but subsequent success, could logically deprive them of this transactional malpractice claim. *See, e.g., Paul Hastings LLP v. Superior Court*, 2013 WL 4093501 (Cal. Ct. App. 2013) (unpublished disposition) (malpractice suit

against transactional attorney on sale of Nevada property allowed to go forward even though client ultimately prevailed in litigation arising out of that malpractice).

Hale Lane had every reason to know and realize and foresee that if it did not provide its clients with legal assistance and advice on how to overcome the risks of the transaction at issue herein, the Iliescus would likely incur the expenses of prolonged mechanic's lien litigation. Nevertheless, Hale Lane did not do so. AOB 11-20. Thus, Hale Lane is liable for the costs of the clearly foreseeable subsequently arising litigation, to defend against and expunge the lien.

This principle is well illustrated in *Temple Hoyne Buell Foundation v. Holland & Hart*, 851 P.2d 192, 198-99 (Colo. Ct. App. 1992), described at pp. 43-45 of the AOB, in which the appellate court ruled that, although an option agreement drawn up by transactional attorneys did not violate the rule against perpetuities, the clients could continue to sue the lawyers to recover their litigation fees incurred to establish that fact: "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." *Id.*

The RAB contends, at p. 39, that *Temple Hoyne* is bad law, which should be rejected in Nevada. However, (i) Hale Lane already conceded below, which was a proper concession for the reasons discussed in the AOB, that it was not entitled to

summary judgment on the issue of whether it breached any duties to the Iliescus; and (ii) Nevada also and already follows the rule that an intervening cause does not break the chain of proximate causation if it is foreseeable, as within the realm of possible risks the defendant should have considered (*Price*, 111 Nev. at 520-21). (iii) Furthermore, the *Temple Hoyne* Court did not rule that the attorneys *were* responsible for the litigation costs, merely that this raised a question of fact, to be resolved by the trier-of-fact, which is the only ruling the Iliescus seek in this appeal. (iv) Finally, *Temple Hoyne* is but one of several other similar cases, many of which are cited above, demonstrating that transactional lawyers are routinely held liable for the costs of foreseeable litigation, arising from the transactional lawyer's failure to protect the client from the risk of such litigation, even if the client prevails. Rejecting the Iliescus' arguments would not be so simple as rejecting *Temple Hoyne*, but would also require this Court to reject principles repeatedly articulated throughout the entire body of law in this area.

(ii) <u>The Judicial Error Defense Does Not Apply to Transactional Malpractice Claims</u>.

Based on the foregoing, even if Hale Lane's judicial error defense were valid (which it was not, as discussed below), the district court should only have applied it to the Iliescus' litigation malpractice claims, and should not have relied thereon to dismiss the Iliescus' transactional malpractice claims. For example, the court in *Callahan v. Gibson, Dunn & Crutcher*, 125 Cal. Rptr. 3d 120, 140 (Cal. Ct. App.

2011), reversed summary judgment in favor of a law firm sued for transactional malpractice, arising out of its inadequate drafting of a partnership agreement, which led the client to become embroiled in litigation stemming therefrom. The law firm unsuccessfully argued on appeal, *inter alia*, that the appellate court should uphold summary judgment on the grounds that the client had ultimately prevailed in those portions of the litigation which arose from the lawyer's alleged errors in drafting the agreement. The Court rejected this argument, however, given that the mere need to defend the litigation, constituted the basis of the client-plaintiff's malpractice claims, such that a causation defense based on events during the litigation was not appropriate. *Id*.

Both of the Nevada cases relied on by Hale Lane to support its assertion that a judicial error defense would be recognized in this State, involve litigation, *not* transactional, malpractice claims: *Semenza v. Nevada Medical Liability Insurance* Co., 104 Nev. 666, 765 P.2d 884 (1988) involved a claimed failure to prevent prejudicial evidence from being admitted at trial, and *Hewitt v. Allen*, 118 Nev. 216, 43 P.3d 345 (2002) involved a failure to send required notices to a governmental agency, as a statutory prerequisite to filing suit. These cases recognized the possibility that a judicial error defense could be asserted in Nevada, such that a claim for *litigation* malpractice would not accrue until the underlying litigation and any non-futile appeals therein, had been completed: "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. . . . Thus, **when the malpractice is alleged to have caused an adverse ruling *in an underlying action*,**[1] the malpractice action does not accrue while an appeal from the adverse ruling is pending." *Hewitt,* 43 P.3d at 348-349 [emphasis added]. However, the principles discussed in these cases apply only "[i]n the context of **litigation malpractice**, that is, **legal malpractice committed in the representation of a party to a lawsuit**." *Hewitt*, 118 Nev. at 221, 43 P.3d at 348 [emphasis added]. *See also, Moon v. McDonald, Carano, Wilson LLP*, 129 Nev. 547, 552, 306 P.3d 406, 410 (2013) (declining to apply Nevada's litigation tolling rule, as established in cases such as *Semenza* and *Hewitt*, to malpractice claim involving attorneys' representation of client in *non-adversarial* bankruptcy proceedings). Thus, the two cases which establish that Nevada would recognize a judicial error defense, *apply only to litigation malpractice.*

Respondent argues that this distinction is only applicable to the question of whether the delayed claim accrual / statute of limitations tolling rule described in *Semenza* and *Hewitt* will apply to a transactional malpractice case, and is irrelevant

[1](whereas the Iliescus' transactional malpractice claims in this case involve a different assertion altogether, that the malpractice led to consolidated lien foreclosure litigation which had to be prosecuted and defended)

in this case. RAB at 17-19. But that is simply inaccurate: it is impossible to separate out the *rationale* of *Semenza* and *Hewitt* (that an initial litigation loss may be shown to have resulted from judicial error), from the *result* reached in those cases (that, *therefore*, a *litigation malpractice* claim does not accrue while that litigation is still pending or on appeal). And it is solely and only that rationale which supports Respondent's assertion that Nevada would recognize the judicial error defense, which those cases demonstrate that Nevada would do, *in a litigation malpractice case*.

The rationale of *Semenza* and *Hewitt* (that damages must have become certain in order for a client's litigation malpractice claim to accrue, which certainty does not yet exist while the case in which the malpractice occurred is still pending, or on an appeal which may reveal earlier judicial error), by its nature, only makes sense in the context of litigation malpractice, where the client loss is a permanent or temporary loss *during* litigation, caused by the attorney. By contrast, where *transactional* malpractice is alleged to have led to avoidable litigation, which litigation is, *in and of itself*, the consequence of the transactional malpractice, the judicial error defense is logically inapplicable. Respondent's claim, that the distinction between transactional and litigation malpractice is irrelevant in this case, is therefore inaccurate.

See, e.g., Union Planters Bank N.A. v. Thompson Coburn, LLP, 935 N.E. 2d

998, 1022-23 (Ill. Ct. App. 2010)(in a litigation malpractice case, a client plaintiff must prove "a case-within-a-case to establish proximate cause" by demonstrating that it would have won the underlying litigation lost by the attorney's error, such that a lawyer may defend such a claim on the grounds that the case within a case would not have been successful anyway. "We hold however that proving a case-within-a-case is not always required in transaction based legal malpractice cases where damage can otherwise be established. . . . Here, [the client] alleged and the jury found[2] that because of [the law firm's] faulty advice, it was sued . . . and forced to pay legal expenses to defend itself . . . . Thus, [the client] could have recovered the legal expenses it paid in defending the cases . . . even if [it] had not settled and had ultimately succeeded on the merits [i.*e.*, just like the Iliescus did here]." *Id*. at 1022-23 [footnote and bracketed language added].

Union Planter's demonstrates why this Court's repeated refusal to apply *Semenza* and *Hewitt* to non-litigation malpractice claims makes sense. "It's not my fault you lost" defenses (you would have or did lose anyway, on the merits/due to judicial error/due to another lawyer's subsequent bad representation/etc.), are defenses which only logically apply to claims of litigation (not transactional) malpractice, where there is a *case* (within a case) to be lost or won. Thus, the rationale of *Hewitt* and *Semenza* (including the recognition that a judicial error

[2] (this being a question properly left to the jury)

defense can be raised against litigation malpractice claims) makes no sense outside that context, of litigation malpractice. *See e.g.*, the Arizona cases which, like Nevada, have ruled that Arizona's litigation tolling rule, which is based on the rationale that "the element of injury or damage remains speculative or remote" until the "final adjudication of *the client's case in which the malpractice allegedly occurred*" [emphasis added] cannot be rationally or logically applied to a non-litigation malpractice suit, where the malpractice did not occur *in a case*. *Commercial Union Ins. Co. v. Lewis & Roca*, 902 P.2d 1354, 1360 (Ariz. Ct. App. 1995); *Environmental Liners, Inc. v. Ryley, Carlock & Applewhite*, 930 P.2d 456, 461 (Ariz. Ct. App. 1997).

The other two cases cited on behalf of Hale Lane's judicial error defense, *Crestwood Cove* and *Stanfield*, from states outside Nevada, are likewise *both* litigation malpractice cases. RAB at 23-29.[3] Thus, the Iliescus' transactional malpractice claims should have survived summary judgment (even if the litigation malpractice claims did not). This is further demonstrated by the multiple cases cited above herein, which provide numerous examples and illustrations of transactional lawyers being held liable for the litigation costs resulting from their inadequate transactional counsel, regardless of the outcome in that resultant

[3] The judicial error defense has also been applied to a lawyer's representation during a criminal trial, which is also a *case*, which a lawyer's malpractice can cause to be *lost*. *Simko v. Blake*, 506 N.W. 2d 258 (Mich. Ct. App. 1993).

litigation (be it a settlement, a loss, a win, a loss followed by a win, or some other variation), let alone the course of the litigation to reach that outcome.

C. <u>The Prerequisites for a Judicial Error Defense Are Not Met in this Case.</u>

Additionally, even with respect to the Iliescus' litigation malpractice claims (and even were this Court to hold that a judicial error defense could somehow be applied to transactional malpractice claims), the defense should have failed in this case in any event, based on the facts.

First of all, as explained in *Stanfield*, 494 S.W.3d at 99-100, for alleged judicial error to be a *superseding* proximate cause, it "must not be reasonably foreseeable." In the present case, Judge Adams ruling was not so utterly surprising or extraordinary as to have been unforeseeable. *See, e.g., Rosen v. Davis & Drum*, 2002 WL 1753189, *9 (Cal. Ct. App. 2002)(unpublished disposition)(an alleged intervening cause must be "unusual or extraordinary and hence not reasonably foreseeable" in order to break the chain of causation ordinarily flowing from a prior lawyer's negligence.).

Here, it was well within the realm of foreseeable possibility, that the district court might erroneously accept a *Fondren* actual notice argument from lien claimant Steppan, to erroneously excuse Steppan from his violation of NRS 108.245, which result would need to be challenged on appeal. This is especially true given the state of the law in Nevada at the time, before this Court's decision in

Fondren v. KL Complex, Ltd., 106 Nev. 705, 800 P.2d 719 (1990) had been clarified by *Hardy Companies, Inc. v. SNMARK, LLC*, 126 Nev. 528, 245 P.3d 1149 (2010) and *Iliescu v. Steppan*, 394 P.3d 930 (Nev. 2017) (which resolved a question this Court noted "we have not previously addressed").

Judge Adams' ruling cannot therefore be treated as unforeseeable judicial error. Or, at the very least, there are genuine issues of fact on that foreseeability question, such that summary judgment should not have been granted on this defense, which is only appropriate "where there is **no doubt** that judicial error, rather than attorney malpractice, caused [the] client's losses." *Crestwood Cove,* 164 P.3d 1247 at 1255 [emphasis added].

Moreover, to apply the *Crestwood Cove* template, and rule that judicial error was the true superseding proximate cause, the claimed judicial error must occur after "the attorney has presented the necessary legal arguments and the judge, albeit in error, rejects them." *Crestwood Cove Apts. Business Trust v. Turner*, 164 P.3d 1247, 1256 (Utah 2007). This simply did not occur in this case. Hale Lane's Application for Release of Lien (I JA0001-0006) filed on behalf of the Iliescus, appropriately raised Steppan's violation of NRS 108.245 as a defense to the Steppan lien. But it did not present the second component of the succeeding NRS 108.245 legal argument which was later accepted by this Court. It did not argue that the *Fondren* "actual notice" exception to the mandatory written notice

provisions of NRS 108.245, could only be relied upon by a lien claimant providing onsite work, such that any factual question about the extent of the Iliescus' alleged actual notice or knowledge of Steppan's work, if any, was simply legally irrelevant. This was the argument ultimately accepted by this Court in its *Iliescu v. Steppan*, 394 P.3d 930, 935-36 (Nev. 2017) decision, at pp. 935-36 thereof.

Nor did the *oral arguments* on the Hale Lane Application, made by Hale Lane lawyer Mr. Snyder, present this necessary and ultimately successful argument, even as an alternative to the arguments Mr. Snyder did raise. *See, e.g.*, *Kiribati*, 83 N.E.3d at 807 (Mass. 2017)(attorney can be negligent in failing "to argue in the alternative" other assertions which would mitigate against judicial error). Thus, it cannot be said, as it could in the *Crestwood Cove* case, that the Judge was presented with the necessary arguments and in error rejected them.

Instead, Mr. Snyder argued about the extent of the owner's knowledge needed for the *Fondren* "actual notice" exception to apply, thereby erroneously conceding that this question of fact was relevant (contrary to what this Court would later hold). More particularly, Mr. Snyder contended that the extent of knowledge needed was equivalent to that which would have been sufficient to allow the Iliescus to record a notice of nonresponsibility, as though the Iliescus' failure to record such a notice (which Hale Lane's transactional attorneys had never advised them to do) was what needed to be defended, instead of Steppan's failure to

comply with NRS 108.245 (whereas this Court ultimately ruled in its *Iliescu* decision, that the Iliescus would not have been eligible to record a notice of nonresponsibility in any event-but still ruled in their favor). Snyder then asserted that the Iliescus *did not have the degree of knowledge or notice* needed for Steppan to establish that the *Fondren* actual notice exception excused his violation of NRS 108.245 ("none of that information was provided to Dr. Iliescu" -- RAB 10), thereby again conceding the relevance of a question of fact which was ultimately determined to be irrelevant. *See e.g.,* the explanation of Snyder's argument set forth at page 30 of the RAB; together with I JA0110-0113; JA0151; JA0153-0158; XII JA2307.

It appears likely that the above-described Snyder reasoning was developed primarily to protect Hale Lane (which had never advised the Iliescus to record a notice of nonresponsibility) rather than to protect solely the Iliescus, such that Snyder might have approached the argument differently, or at least thought of other alternative arguments, such as the one that later succeeded in front of this Court, were it not for that competing and conflicting interest. But more importantly for present purposes, Snyder did not present the necessary legal argument which ultimately prevailed before this Court, for the Judge to either accept or erroneously reject, so as to allow Hale Lane to now rely on *Crestwood Cove*.

Instead, Snyder asserted and conceded just the opposite position, that the

degree of knowledge held by the Iliescus was not only a relevant factual question (I JA0110), but "the ultimate question" before the court (I JA0113). Thus, in addition to failing the *Crestwood Cove* test, Hale Lane's arguments also failed the *Stanfield* test, which Hale Lane itself describes as meaning that the judicial error defense cannot be successfully raised "where a legal malpractice defendant has, in effect, **invited the judicial error** by advocating a legally erroneous principle [in this case, that the degree of the Iliescus' knowledge was a legally relevant question] that the court accepts." RAB 28 [emphasis and bracketed language added].

Hale Lane's current contention, that the firm's arguments before Judge Adams were substantially equivalent to the reasoning ultimately adopted by this Court in its *Iliescu* decision, such that the correct arguments were presented, and the judicial error was not invited, are wholly and completely untenable: Not only did this Court rule that a notice of non-responsibility would not have availed the Iliescus in any event (thereby undercutting the logical theorem at the heart of the Snyder argument), but Snyder repeatedly conceded the relevance of a question of fact which this Court's ruling concluded was irrelevant. These Hale Lane arguments thereby invited the judicial error. This was not a mere failure to utilize the correct buzz words or key phrases, as Hale Lane now avers. This was a fundamental failure to even raise the question which this Court ultimately

answered in favor of the Iliescus on appeal; while concurrently presenting arguments which instead invited an error as to the answer to that very question.

Mr. Snyder simply did not argue, even in the alternative, that Steppan could not rely on *Fondren*, based on the offsite nature of his work. Arguing about the *extent* of the knowledge required for *Fondren* to apply and whether or not the Iliescus had it, is, simply, *not* the same thing, *at all*, as arguing that *Fondren* cannot be relied upon in the first instance, by an architect providing offsite services, such that the extent of the owner's knowledge, if any, is irrelevant and does not matter (as ultimately ruled by this Court).

If summary judgment were to ever issue on this question, it should be in favor of the Iliescus, as it could not be more clear, from the undisputed record, that Hale Lane's arguments simply did not raise the issue on which they ultimately prevailed. If that is *not* clear, then there is at the very least, a question of fact on this issue which should have been left to the jury.

D. Attorneys' Fees and Litigation Costs Incurred by a Client to Mitigate Losses Caused by the Client's Transactional Attorney, Are Awardable as Damages Against the Transactional Lawyer Whose Breached Duty Caused Such Litigation Expenses.

The Iliescus had a legal duty to contest the Steppan lien claim, including through any non-futile appeal, in order to avoid a failure to mitigate defense. *Hewitt*, 118 Nev. at 222. They fulfilled that duty, to their own and Hale Lane's benefit. As such, the expenses they incurred to do so are recoverable. *See*, AOB at

pp. 48-49. This principle has been routinely and regularly applied to legal malpractice suits (3, Mallen, Legal Malpractice §21.18 (2019 Ed)) which further supports the foregoing analysis in this brief.

Hale Lane contends that this argument should be disregarded, as based on "circular reasoning," which assumes causation. RAB 42. However, as the movant, it was Hale Lane's job to establish no question of fact existed as to causation. Moreover, this misreads the argument: As demonstrated above, Hale Lane's intervening proximate cause defense will not stand if the intervening cause and related losses were foreseeable. As the AOB pointed out, at p. 48, one of the reasons why the litigation expense losses incurred by the Iliescus (due to Hale Lane's failures to properly advise them during Hale Lane's transactional work), were foreseeable, is that the Iliescus had a legal duty to attempt to incur these costs, in order to mitigate their losses. Thus, the Iliescus' mitigation recovery arguments are not circular but are a component of the foreseeability analysis required for adjudicating proximate causation. Furthermore, the "circularity" assertion is especially disingenuous as applied to Hale Lane's transactional litigation claims, with respect to which the need to mitigate by defending against the Steppan lien *is* the damage caused by the transactional malpractice, in the first place.

That the likely outcome of an Iliescu appeal, in the Steppan lien dispute

litigation, had it not been pursued, would have been a question of law, under *Hewitt*, does *not* mean, as the RAB now erroneously asserts, that the foreseeability of the judicial error, which *did* lead to pursuit of an appeal, is also somehow a question of law. These are distinct, and not equivalent, queries.

E. The Iliescus' Countermotion Requests Should Have Been Granted.

The lower court rejected the Iliescus' countermotions for leave to amend and for more discovery as "futile" based on the Summary Judgment ruling, which mooted those arguments. However, that Summary Judgment should be reversed, after which no such futility would exist, and the countermotions should be granted.

III. CONCLUSION

The district court's Summary Judgment dismissal of the legal malpractice claims against Hale Lane should be reversed, and this matter remanded, to allow amendment of the pleadings, final discovery, and trial on the merits.

DATED this 15th day of February, 2019.

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DATED this 15th day of February, 2019.

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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 15th day of February, 2019, service was made by the following mode/method a true and correct copy of the foregoing **APPELLANTS' REPLY BRIEF**, to the following person(s):

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