

IN THE SUPREME COURT OF THE STATE OF NEVADA

**FILED**

DEC 17 2014

TIMOTHY TOM, an individual,

Appellant,

v.

INNOVATIVE HOME SYSTEMS,  
LLC., a Nevada limited liability  
company,

Respondent.

Case No.: 65419  
66006

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *S. Young*  
DEPUTY CLERK

District Court Case No. A680766

**APPELLANT'S OPENING BRIEF**

Jennifer R. Lloyd, Esq.  
Nevada Bar No. 9617  
Marisa L. Maskas, Esq.  
Nevada Bar No. 10928  
PEZZILLO LLOYD  
6725 Via Austi Pkwy., Suite 290  
Las Vegas, Nevada 89119  
Tel: 702 233-4225  
Fax: 702 233-4252  
*Attorneys for Appellant,  
Timothy Tom*

*Detached from Motion filed  
on 12-16-14 and filed separately  
per order filed on 12-17-14.*

## **I. NRAP 26.1 DISCLOSURE**

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

Appellant, TIMOTHY TOM ("Tom"), is an individual.

The law firm of Pezzillo Lloyd is the only firm which represented Tom in the District Court action.

PEZZILLO LLOYD

By: /s/ Jennifer R. Lloyd  
Jennifer R. Lloyd, Esq.  
Nevada Bar No. 9617  
Marisa L. Maskas, Esq.  
Nevada Bar No. 10928  
PEZZILLO LLOYD  
6725 Via Austi Pkwy., Suite 290  
Las Vegas, Nevada 89119  
Tel. 702 233-4225  
Fax: 702 233-4252  
*Attorneys for Appellant,*  
*Timothy Tom*

**II. TABLE OF CONTENTS**

<b>I. NRAP 26.1 DISCLOSURE .....</b>	<b>i</b>
<b>II. TABLE OF CONTENTS .....</b>	<b>ii</b>
<b>III. TABLE OF AUTHORITIES .....</b>	<b>v</b>
<b>IV. JURISDICTIONAL STATEMENT .....</b>	<b>viii</b>
<b>V. STATEMENT OF THE ISSUES .....</b>	<b>viii</b>
<b>VI. STATEMENT OF THE CASE.....</b>	<b>1</b>
<b>VII. STATEMENT OF FACTS.....</b>	<b>1</b>
<b>VIII. SUMMARY OF THE ARGUMENT.....</b>	<b>5</b>
<b>IX. ARGUMENT.....</b>	<b>6</b>
<b>A. Standards of Review.....</b>	<b>6</b>
<b>B. The Trial Court Erred In Granting IHS' Renewed Motion For         Summary Judgment And Motion To Dismiss Tom's         Counterclaims, As IHS Was Required to Be Licensed as a         Contractor to Perform the Work in Question.         .....</b>	<b>6</b>
<b>C. The District Court Erred in Giving Preclusive Effect to the         Nevada State Contractors Board's Inaction         .....</b>	<b>12</b>
<b>1. The Doctrine of Claim Preclusion Does not Apply to             Prevent Tom from Litigating that IHS was not             Properly Licensed .....</b>	<b>12</b>

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

a. Tom's Claims Are Not Precluded Because a  
Final Judgment Was Not Rendered by  
The NSC.....13

b. Tom Was Not a Party to an NSCB Adjudication  
and Therefore is Not Precluded From Litigating  
the Issue of Licensure  
.....15

c. The Ruling of the District Court Does Not  
Pertain to Claims that Were or Which Could  
Have Been Brought Before the  
NSCB.....17

2. The Doctrine of Issue Preclusion Does Not Bar  
the Requested Relief of Tom.....18

a. The Issue Presented Has Not Been Litigated  
and Therefore Issue Preclusion Cannot  
Apply.....19

b. No Ruling Was Ever Made Upon the Merits of  
Tom's Claim Before the NSCB and Therefore  
Issue Preclusion Cannot Apply.....19

c. Tom Was Not a Party, or in Privity With a  
Party, to the NSCB in any Prior  
Proceedings.....20

d. The Issues On Appeal Were not Actually and  
Necessarily Litigated by the NSCB and  
Therefore Issue Preclusion Does Not Bar the  
Claims of Tom .....20

D. The Trial Court Erred in Granting Summary Judgment as  
Genuine Issues of Material Fact Were Raised Regarding  
Whether IHS Fulfilled its Contractual Obligations.....21

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1. The Trial Court Erred in Granting IHS' Motion For Summary Judgment And Motion To Dismiss Because Tom Provided A Sworn Statement Stating That The Work At His Residence Was Not Complete And Had Poor Workmanship .....21

2. The Trial Court Erred In Granting IHS' Motion For Summary Judgment And Motion To Dismiss Because Discovery Should Have Been Allowed Pursuant To NRCF 56(f) .....23

E. The District Court Erred in Awarding Attorneys' Fees to IHS as No Legal Basis Exists for Such an Award.....25

1. The Trial Court Erred in Awarding IHS Attorneys' Fees pursuant to NRS 18.010(2)(b).....25

2. The Award For Attorney's Fees Included Fees Incurred Outside Of The Proceedings And Relating To The Nevada State Contractor's Board Action.....26

3. The Trial Court Did Not Analyze the *Brunzell* Factors in Making its Award for Attorneys' Fees.....28

a. The Billing Rate Is Not Appropriate For The Character Of The Work .....29

b. An Award of \$35,350.00 In Fees Is Unreasonable in Light of the Work Performed.....30

X. CONCLUSION.....31

XI. ATTORNEY'S CERTIFICATE.....32

XII. CERTIFICATE OF SERVICE.....33

### III. TABLE OF AUTHORITIES

#### Cases

<i>Accord Price v. Dunn</i> , 106 Nev. 100, 787 P.2d 785 (1990).....	23
<i>Ameritrade Inc. v. First Interstate Bank of Nevada</i> , 105 Nev. 696, 782 P.2d 1318 (1989).....	24
<i>Aviation Ventures, Inc. v. Joan Morris, Inc.</i> , 121 Nev. 113 (2005) .....	24
<i>Barney v. Mt. Rose Heating &amp; Air Conditioning</i> , 124 Nev. 821, 192 P.3d 730 (2008) .....	27-29
<i>Barozzi v. Benna</i> , 918 P.2d 301, 112 Nev. 635 (1996) .....	26
<i>Bivins v. State Contractors Board</i> , 107 Nev. 281, 809 P.2d 1268 (1991).....	14, 17
<i>Bower v. Harrah's Laughlin, Inc.</i> , 215 P.3d 709, 125 Nev. 470 (2009).....	25
<i>Brunzell v. Golden Gate National Bank</i> , 85 Nev. 345, 455 P.2d 31 (1969) ...	28-30
<i>City Council of Reno v. Reno Newspapers</i> , 105 Nev. 886, 784 P.2d 974 (1989)...	8
<i>City of N. Las Vegas v. Warburton</i> , 262 P.3d 715 (Nev. 2011) .....	9
<i>Five Star Capital Corp. v. Ruby</i> , 124 Nev. 1048 (2008).....	13, 15, 18, 20
<i>Haftor v. Clark</i> , 992 F.Supp.2d 1063 (D. Nev. 2014).....	13, 21
<i>Halimi v. Blacketor</i> , 105 Nev. 105, 770 P.2d 531 (1989).....	23, 24
<i>Interstate Commercial Bldg. Servs., Inc. v. Bank of Am. Nat. Trust &amp; Sav. Ass'n</i> , 23 F. Supp. 2d 1166, 1173 (D. Nev. 1998).....	10
<i>Kahn v. Morse &amp; Mowbray</i> , 117 P.3d 227, 121 Nev. 464 (2005).....	25

1	<i>Mangarella v. State</i> , 117 Nev. 130, 17 P.3d 989 (2001).....	11
2	<i>MGM Grand Hotel v. Imperial Glass Co.</i> , 533 F.2d 486, 489 (9th Cir.1976).....	10
3	<i>Munda v. Summerlin Life and Health Ins. Co.</i> , 267 P.3d 771 (Nev. 2011).....	6
4	<i>Parodi v. Budetti</i> , 115 Nev. 236, 984 P.2d 172 (Nev. 1999).....	28
5	<i>Plaine v. McCabe</i> , 797 F.2d 713, 718 (9 <sup>th</sup> Cir. 1986).....	13, 21
6	<i>Shuette v. Beazer Homes Holdings Com.</i> , 121 Nev. 837, 124 P.3d 530 (2005)....	29
7	<i>Silver State Elec. v. State, Dep't of Tax</i> , 123 Nev. 80, 157 P.3d 710 (2007).....	9
8	<i>Star Ins. Co. v. Neighbors</i> , 122 Nev. 773, 138 P.3d 507 (2006).....	8
9	<i>Summerfield v. Coca Cola Bottling Co.</i> , 113 Nev. 1291, 948 P.2d 704 (1997)...	24
10	<i>Wood v. Safeway, Inc.</i> , 121 Nev. 724, 121 P.3d 1026 (2005).....	6
11	<b>Statutes</b>	
12	NRS 18.010(2)(b).....	26
13	NRS 108.222(2).....	7, 10
14	NRS 108.237.....	26
15	NRS 108.237(1).....	27
16	NRS 108.239.....	27
17	NRS 108.2453.....	10
18	NRS 233B.032.....	15
19	NRS 233B.035.....	16
20	NRS 233B.121(2).....	16

1	NRS 233B.1219(4).....	16
2	NRS 624.160(3).....	11, 12
3	NRS 624.320.....	6, 7, 29
4	NRS 624.323.....	13, 14
5	NRS 624.335.....	13, 14
6		
7		
8	<b>Rules</b>	
9	NAC 624.200.....	6, 8
10	NAC 624.6975.....	15
11	NAC 624.6978.....	15, 20
12	NAC 624.6981.....	15
13	NAC 624.700.....	3, 9
14	NRCP 56(c).....	6
15	NRCP 56(f).....	5, 23, 24
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		



#### IV. JURISDICTIONAL STATEMENT

The Court has jurisdiction pursuant to NRAP 4(e)(1) as the appeal arises from a final judgment entered on March 20, 2014 after the District Court entered its Order Granting Summary Judgment and Motion to Dismiss in favor of INNOVATIVE HOME SYSTEMS, LLC ("IHS"). TOM appealed this Order by filing a Notice of Appeal on April 8, 2014. The District entered its Order on Plaintiff's Motion for Award of Interest Cost and Attorneys' Fees on June 30, 2014, and TOM appealed this Order on July 1, 2014.

#### V. STATEMENT OF THE ISSUES

1. Whether the trial court erred in granting IHS' Motion for Summary Judgment because IHS' claims were barred as it was not a licensed contractor when it bid and performed the majority of the work on the Project at Issue.
2. Whether the Court erred in applying preclusive effect, and relying upon the actions of the Nevada State Contractor's Board investigator in granting IHS' Motion for Summary Judgment/Motion to Dismiss.
3. Whether the trial court erred in granting IHS' Motion for Summary Judgment when Tom submitted a NRCP 56(f) affidavit to the Court, giving rise to whether questions of fact existed regarding the work IHS agreed to be perform was actually performed and whether the work was performed in conformance with the contract.
4. Whether the trial court erred in granting IHS' Motion for Attorney's Fees for matters outside the pending litigation and without considering the *Brunzell* factors.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**V. STATEMENT OF THE CASE**

Tom appeals the summary judgment entered on behalf of Respondent IHS as the Court erred in finding that IHS was not required to possess a Nevada state contractor's license to perform the work contracted for and in reliance on an informal investigation of a Nevada State Contractors Board ("NSCB") employee where no administrative adjudication had taken place, based upon informal advisory opinions of the NSCB and prior to discovery commencing. The Court erroneously found that IHS' work was complete at a time that no discovery had taken place and when questions of fact existed as to whether IHS had fully and adequately performed the work it contracted to perform. The District Court likewise erred in dismissing the counterclaim asserted by Tom based upon IHS' failure to be properly licensed and arising from the incomplete and inadequate work of IHS.

**VI. STATEMENT OF FACTS**

**A. The Contract**

In April 2012, Tom and IHS entered into a contract (the "Contract") wherein IHS agreed to provide, install and program home automation, audio, visual and security equipment at Tom's residence, located at 1840 Claudine Drive, Las Vegas, NV 89156 (the "Project"). See JA<sup>1</sup> 00002, ¶4; JA 00064 (design and

---

<sup>1</sup> References cited as "JA" refer to the Stipulated Joint Appendix.

1 installation services); JA 00072 – 82, 00084 – 0087. The Contract contains line  
2 items for the purchase, installation and programing of equipment, including  
3 thermostats [JA 00072, 73], audio speakers [JA 73, 74], irrigation controls [JA  
4 00074], landscape lighting [JA 00074], an automated pool controller [JA 00074],  
5 surveillance equipment [JA 00074], and a home theater [JA 00074 – 75]. The  
6 original contract price was \$60,688.94. JA 00075.<sup>2</sup> According to the mechanic's  
7 lien recorded by IHS, IHS acknowledges that Tom paid a total of \$60,999.30. JA  
8 00588. At the time the contract was bid and entered into, IHS did not possess a  
9 Nevada State Contractor's license. JA 00045, 55. IHS misrepresented to Tom that  
10 it was properly licensed. JA00033. Tom believed IHS and relied upon its  
11 representation concerning licensure. *Id.* After bidding, contracting and completing  
12 much of the work on the Project, IHS subsequently obtained a Nevada contractor's  
13 license. JA 00045, fn. 2. After much of the work on the Project was complete and  
14 the majority of the contract was paid for, Tom discovered that some of the  
15 equipment installed by IHS was not functioning properly, and the programming  
16 was not complete. JA00620. IHS demanded payment in full even though the final  
17 payment was due only at completion. JA00119 - 133. After Tom refused to make  
18 the payment because the work was not complete, IHS refused to complete the work  
19 and recorded a lien.

20  
21  
22  
23  
24  
25  
26  
27  
28 <sup>2</sup> The contract price was subsequently altered due to changes in the scope of work;  
however, such fact is not relevant to the analysis herein.

1 **B. The Contractor's Board**

2 Due to the issues with IHS' incomplete work on the Project, its  
3 abandonment of the work and the discovery that IHS had not been properly  
4 licensed, Tom filed a Consumer Complaint with the NSCB on March 25, 2013.  
5 See JA 000140 - 000175. An investigative officer of the Board investigated the  
6 situation, and found that Tom's concerns had merit. JA 000731 - 000732. The  
7 Investigator found that there was work that had not been completed or was not  
8 completed in a workmanlike manner and issued a Notice to Correct the deficient  
9 work pursuant to NAC 624.700, that contained nine items. *Id.*

10  
11  
12  
13 Some of the issues were corrected by IHS, but issues with the work still  
14 remained and the dispute over IHS' scope of work, including programing. The  
15 equipment rack ventilation system was not functioning, and there was a constant  
16 beeping sound because of an "overheat" warning most of the time in the theater.  
17 JA 00312. The sprinkler system never functioned properly. *Id.* IHS failed to install  
18 the sidelite window switchable smart tint. *Id.* IHS failed to honor warranty  
19 coverage for the entire system and failed to fulfill dealer-required duties such as  
20 authorizing additional control devices. *Id.* Also, IHS never provided a wiring  
21 diagram for upstairs window pre-wiring. *Id.* The NSCB closed Tom's complaint,  
22 without making an express determination regarding whether or not IHS complied  
23 with all contractual obligations or ultimately whether or not IHS was required to be  
24  
25  
26  
27  
28

1 licensed. The Board took no formal action on the issue of whether IHS needed a  
2 license to perform the work.

3 **C. District Court Proceedings**  
4

5 On April 25, 2013, IHS filed a Complaint against Tom for breach of contract  
6 and lien foreclosure, amongst other claims. JA 00004 - 00011. On June 20, 2013,  
7 Tom filed a Motion to Dismiss the Complaint or in the Alternative Motion for  
8 Summary Judgment against IHS [JA 00012 - 00041], which was opposed by IHS.  
9 JA 00042 - 00284. The trial court denied both Tom's Motion to Dismiss the  
10 Complaint and IHS' Countermotion for Summary Judgment on July 25, 2013. The  
11 Order denying the Motion and Countermotion was entered on September 10, 2013.  
12 JA00324 - 00328. Tom filed an Answer and Counterclaim to the Complaint of IHS  
13 on September 27, 2013. JA 00329 - 00337. IHS did not file a Reply to the  
14 Counterclaim asserted by Tom.  
15  
16  
17  
18

19 On October 22, 2013, IHS resubmitted its Motion for Summary Judgment,  
20 which included slight additions, along with a Motion to Dismiss Tom's  
21 Counterclaims. JA 00338 - 00662. Tom opposed these Motions. JA 00603 - 00628.  
22 IHS' Renewed Motion for Summary Judgment was granted. The Court's Findings  
23 of Fact and Conclusions of Law were entered on March 20, 2014. JA 00647 -  
24 00659. A Notice of Appeal was filed on April 8, 2014. JA 00754 - 00756.  
25  
26  
27  
28

1 Subsequently, IHS filed a Motion for Attorney's Fees on March 19, 2014.  
2 JA 00660 - 00710. Tom opposed the Motion and submitted a Countermotion for  
3 Fees. JA 00711 - 00756. IHS' request for attorney's fees was granted on June 10,  
4 2014. Tom's request for a stay was also granted. The trial court signed IHS'  
5 proposed order, and the order was entered on June 30, 2014. JA 00776 - 00781. A  
6 Notice of Appeal of the attorneys' fees award was filed on July 1, 2014. JA 00782  
7 - 00784.  
8

## 10 VII. SUMMARY OF THE ARGUMENT

11 The trial court erred in granting IHS' summary judgment on its affirmative  
12 claims as IHS was required to be licensed as a contractor at the time it bid and  
13 performed the work contracted for with Tom as a matter of law. Likewise, the  
14 work contracted for was not completed, the work that was completed was not done  
15 properly, genuine issues of material fact were raised by Tom and discovery should  
16 have been allowed to be conducted, as requested by Tom pursuant to NRCP 56(f)  
17 on the renewed motion for summary judgment. JA00628. Further, the Court's  
18 reliance on the inaction of the NSCB for preclusive effects on the license to work  
19 issues has no basis in law. The Court erred in granting IHS' Motion to Dismiss for  
20 these same reasons. The trial court also erred in awarding attorneys' fees and costs  
21 to IHS as the Court failed to analyze the *Brunzell* factors and also included fees in  
22 the award for matters outside the pending litigation.  
23  
24  
25  
26  
27  
28

## VIII. ARGUMENT

### A. Standards Of Review

The district court's grant of summary judgment is reviewed de novo, without deference to the findings of the lower court. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate when "the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.'" *Id.* (citing NRCP 56(c)). When reviewing a motion for summary judgment all evidence must be considered in the "light most favorable to the nonmoving party." *Id.* Motions to Dismiss are subject to rigorous appellate review and the court will accept all of Plaintiff's factual allegations as true. *Munda v. Summerlin Life and Health Ins. Co.*, 267 P.3d 771, 774 (Nev. 2011). The trial court's decision will be reviewed *de novo* and will not be upheld unless it appears beyond a doubt that the plaintiff could prove no set of facts that would entitle him/her to relief. *Id.*

### B. The Trial Court Erred In Granting IHS' Renewed Motion For Summary Judgment And Motion To Dismiss Tom's Counterclaims, As IHS Was Required to Be Licensed as a Contractor to Perform the Work in Question.

IHS was required to hold an applicable contractor's license pursuant to NRS 624.320 and NAC 624.200 to perform the contracted for work at the Tom residence; therefore, because IHS was not licensed at the time it bid, contracted for

1 and completed much of the work, IHS cannot pursue legal action against Tom for  
2 Breach of Contract or seek enforcement of its mechanic's lien. NRS 624.320  
3 states no contractor shall be able to maintain an action for compensation:  
4

5 ...without alleging and proving that such person, firm,  
6 copartnership, corporation, association or other  
7 organization, or any combination of any thereof, **was a**  
8 **duly licensed contractor at all times during the**  
9 **performance of such act or contract and when the job**  
10 **was bid.**

11 (Emphasis added). Further, NRS 108.222(2) states:

12 If a contractor or professional is required to be licensed  
13 pursuant to the provisions of NRS to perform the work, the  
14 contractor or professional will only have a lien pursuant to  
15 subsection 1 if the contractor or professional is licensed to  
16 perform the work.

17 IHS was not licensed when it bid the Project or when it performed the majority of  
18 its scope of work. IHS did not become a licensed contractor until September,  
19 2012. JA 000182. IHS submitted its bid to perform the work to Tom in April,  
20 2012. JA 00002, ¶4; JA 000064 – 00075. IHS then commenced and completed  
21 much of the work prior to obtaining a license. As such, IHS was not a duly  
22 licensed contractor at all times as required by NRS 624.320. The Court failed to  
23 engage in any fact finding regarding the issue of licensure as it granted judgment  
24 prior to discovery commencing and relied upon the lack of action by the NSCB  
25 and a hearsay statement of an NSCB investigator made outside of an adjudicatory  
26 process on the licensing issue. JA 000578; 000652, ¶13. As discussed below, the  
27  
28



1 Court erroneously treated this statement as a quasi-judicial action of the NSCB and  
2 applied preclusive effect to the investigator's correspondence closing Tom's  
3 consumer complaint and inferred that IHS was not required to be licensed by virtue  
4 of the fact that the NSCB did not expressly address the issue.  
5

6 The Nevada Administrative Code makes clear that the work performed by  
7  
8 IHS required a contractor's license. NAC 624.200 states:

9 The Board will grant to qualified applicants a license in the  
10 specialty of electrical contracting. The Board designates  
11 such a license as "classification C-2." A person who has a  
12 license designated classification C-2 may perform any  
13 work authorized for the subclassification of a license  
14 designated classification C-2.

15 The subclassifications of a license designated classification  
16 C-2 and the work authorized for persons licensed in the  
17 respective subclassifications are:

18 . . .

19 (d) LOW VOLTAGE SYSTEMS (subclassification C-2d):  
20 The installation, alteration and repair of systems that use  
21 fiber optics or do not exceed 91 volts, including telephone  
22 systems, sound systems, cable television systems, closed  
23 circuit video systems, satellite dish antennas,  
instrumentation and temperature controls, computer  
networking systems and landscape lighting.

24 This Court has stated that "[w]hen the text of a statute is plain and unambiguous,  
25 [we] should . . . not go beyond that meaning." *Star Ins. Co.*, 122 Nev. 773, 776,  
26 138 P.3d 507, 510 (2006). When interpreting multiple provisions, we must read the  
27 provisions in harmony, unless it is clear the Legislature intended otherwise. *City*  
28

1 *Council of Reno v. Reno Newspapers*, 105 Nev. 886, 892, 784 P.2d 974, 978  
2 (1989). These rules of statutory construction also apply to administrative  
3 regulations. *Silver State Elec. v. State, Dep't of Tax.*, 123 Nev. 80, 85, 157 P.3d  
4 710, 713 (2007).” *City of N. Las Vegas v. Warburton*, 262 P.3d 715, 718 (Nev.  
5 2011). As stated above, the contract was for the installation of thermostats, audio  
6 speakers, irrigation controls, landscape lighting, an automated pool controller,  
7 surveillance equipment, and a home theater. See JA 00072 - 00075. This is  
8 precisely the type of work that NAC 624.700 states that a contractor must be  
9 licensed to perform.  
10  
11

12  
13 IHS argued to the district court that the nature of its work did not require it  
14 to hold a contractor’s license; however, IHS’ own arguments were contradictory on  
15 this issue. First, IHS argued that “the components of the automation systems that  
16 IHS sold and installed into the Project are standalone electronics products that plug  
17 into existing electrical outlets and existing wiring.” See JA00341, Ins. 10 - 12.  
18 IHS’ Motion immediately contradicts itself by then stating, “On occasion,  
19 however, some incidental patching and painting of drywall, stucco or other  
20 penetrations are usually necessary. Incidental patching and painting have never  
21 required a contractor’s license to perform...” *Id.* at Ins. 20 – 22. IHS thus admitted  
22 that it did more than simply plug components into outlets and program them. IHS  
23 performed wiring, which is why patching was needed to cover the holes made by  
24  
25  
26  
27  
28

1 IHS as part of its scope of work. In a letter to the NSCB, IHS' attorney  
2 acknowledged that a license might be required but that IHS' subsequent licensure  
3 should rectify any problems. JA 000182. It was likewise argued that any such  
4 violation merely violated the letter of the law, but not its spirit. *Id.* Such an  
5 argument is unpersuasive when no opportunity to present the facts and  
6 circumstances of what work was performed was ever afforded to Tom. This  
7 argument is not in accordance with Nevada law. *See* NRS 108.222(2) (unlicensed  
8 contractor not permitted to record mechanic's lien); *see also* NRS 108.2453 (party  
9 may not waive a right *or* obligation required pursuant to NRS 108.221 – 108.246).

13 “The primary purpose of Nevada’s licensing statutes is to protect the public  
14 against both faulty construction and financial irresponsibility.” *Interstate*  
15 *Commercial Bldg. Servs., Inc. v. Bank of Am. Nat. Trust & Sav. Ass'n*, 23 F. Supp.  
16 2d 1166, 1173 (D. Nev. 1998) (citing *MGM Grand Hotel v. Imperial Glass Co.*,  
17 533 F.2d 486, 489 (9th Cir.1976). Here, it is undisputed that at the time IHS  
18 submitted a bid to Tom, IHS was not licensed. IHS performed much of the work  
19 before it became licensed. The Project was to be completed before IHS obtained  
20 its license. IHS was not complying with the spirit or the letter of the law. IHS’  
21 actions bar it from seeking to collect compensation for the performance on any  
22 contract for which a license is required.

1 If a contractor, like IHS, that allegedly complies with the spirit of the law  
2 but not the actual requirements of the law is allowed to pursue claims for payment  
3 against an a homeowner that believes it is properly licensed, the purpose of the  
4 law, which is to protect the members of the public, like Tom, would be vitiated.  
5 The requirement for licensing would be without real meaning and of no effect and  
6 would nullify Nevada statutory provisions requiring licensure. *See Mangarella v.*  
7 *State*, 117 Nev. 130, 133, 17 P.3d 989, 991 (2001) (Statutes must not be read in  
8 way to render words, or phrases superfluous or make a provision nugatory).  
9

10  
11  
12 After having its initial motion for summary judgment denied, IHS  
13 subsequently submitted a second motion for summary judgment prior to discovery  
14 commencing and based upon the same facts but which added administrative  
15 advisory opinions issued by the NSCB from other, unrelated matters in an attempt  
16 to demonstrate that its scope of work did not require a proper license. JA 000596 -  
17 000598. As stated on the face of the advisory opinions, such opinions are limited  
18 to the specific facts and circumstances of the question for which the opinion is  
19 sought. The District Court nevertheless improperly relied upon these advisory  
20 opinions in determining that IHS was not required to be licensed. JA 000654, ¶5.  
21 Unlike the policy of judicial courts, administrative bodies can give advisory  
22 opinions. *See NRS 624.160(3)*. Again, however, the NSCB limits the applicability  
23 of any given opinion through an express disclaimer: ***"Please Note: Advisory***  
24  
25  
26  
27  
28

1 *Opinions apply only to the specific facts and circumstances of a particular*  
2 *project.”* JA 000596 - 98. It was therefore clear error for the District Court to rely  
3 on an opinion issued in an unrelated matter for purposes of granting IHS' Motion  
4 for Summary Judgment and Motion to Dismiss. If IHS had wished to receive an  
5 advisory opinion it could have sought one pursuant to NRS 624.160(3); however, it  
6 did not do so.  
7

9 **C. The District Court Erred in Giving Preclusive Effect to the Nevada**  
10 **State Contractors Board's Inaction.**

11 The District Court erred in finding that the NSCB had determined that IHS  
12 was not required to hold a valid Nevada State Contractor's license at the time it  
13 entered into its agreement with Tom and throughout the duration of the Project. JA  
14 00654. First, the NSCB did not make any "findings" as no adjudicatory or quasi-  
15 judicial process took place before the NSCB. Second, even in the event that the  
16 informal investigation efforts of an NSCB investigator could be considered an  
17 adjudicative or quasi-judicial proceeding, the stringent requirements of claim  
18 preclusion and/or issue preclusion were not met and therefore cannot serve to  
19 preclude Tom's right to be heard on the merits of his claim.  
20  
21  
22  
23

24 **1. The Doctrine of Claim Preclusion Does not Apply to Prevent Tom**  
25 **from Litigating that IHS was not Properly Licensed.**

26 This Court has established a three-part test for determining whether a prior  
27 proceeding may result in claim preclusion being applied to bar a subsequent action,  
28

1 to wit: 1) the parties or their privies are the same, 2) the final judgment is valid  
2 and 3) the subsequent action is based on the same claims or any part of them that  
3 were or could have been brought in the first case. *See Five Star Capital Corp. v.*  
4 *Ruby*, 124 Nev. 1048, 1054 (2008). Even the most cursory review of these factors  
5 leads to the inevitable conclusion that the doctrine of claim preclusion is  
6 inapplicable under the facts and circumstances of this case. This is in line with the  
7 well-recognized fact that in order to be entitled to preclusive effect an  
8 administrative proceeding must be “quasi-judicial” in nature in order to allow the  
9 party against whom preclusion is sought the opportunity to be heard and to present  
10 evidence. *See Plaine v. McCabe*, 797 F.2d 713, 718 (9<sup>th</sup> Cir. 1986); *Haft v.*  
11 *Clark*, 992 F.Supp.2d 1063, 1069 (D. Nev. 2014)(Parties must have been afforded  
12 fair opportunity to litigate).

13  
14  
15  
16  
17  
18 **a. Tom’s Claims Are Not Precluded Because a Final Judgment**  
19 **Was Not Rendered by The NSCB**

20 The record in this matter is devoid of a previously issued “final judgment” to  
21 which the doctrine of claim preclusion could apply. The District Court erroneously  
22 held that because the NSCB closed the consumer complaint of Tom, its inaction  
23 somehow meant that a contractor’s license was not necessary for the work  
24 performed by IHS. JA 00655, Ins. 7 – 8. Unlike formal litigation or quasi-judicial  
25 actions of an administrative agency, the filing of a consumer complaint does not  
26 result in the initiation of formal proceedings by the NSCB. NRS 624.335 provides  
27  
28



1 as follows with regard to the actions taken in response to a consumer complaint  
2 such as the one filed by Tom:

- 3 1. The Investigations Office of the Board shall:
  - 4 (a) Upon the receipt of a complaint against a licensee, initiate  
5 an investigation of the complaint.
  - 6 (b) Within 10 days after receiving such a complaint, notify  
7 the licensee and, if known, the person making the  
8 complaint of the initiation of the investigation, and  
9 provide a copy of the complaint to the licensee.
  - 10 (c) Upon the completion of its investigation of a complaint,  
11 provide the licensee and, if known, the person making the  
12 complaint with written notification of any action taken on  
13 the complaint and the reasons for taking that action.
- 14 2. The Investigations Office of the Board may attempt to resolve  
15 the complaint by:
  - 16 (a) Meeting and conferring with the licensee and the person  
17 making the complaint; and
  - 18 (b) Requesting the licensee to provide appropriate relief.

19 It is expressly contemplated by Nevada statutes that the informal investigatory  
20 actions set forth in NRS 624.335 are a precursor to, and separate from, formal  
21 action of the NSCB. Specifically, NRS 624.323 states that a "formal disciplinary  
22 proceeding" may follow if probable cause is found to exist after an investigation is  
23 concluded. This demonstrates a clear demarcation between the informal resolution  
24 process which took place in this matter and formal proceedings which may result  
25 in an adjudication of a contested, disciplinary matter.

26 Formal proceedings conducted by the NSCB, as with any administrative  
27 agency, must adhere to concepts of due process. *See Bivins v. State Contractors*  
28 *Board*, 107 Nev. 281, 283, 809 P.2d 1268, 1270 (1991). Such NSCB action is



1 governed by the provisions of NAC 624.6975 *et seq.* To commence such  
2 proceedings NAC 624.6978 requires the filing of a formal "complaint" which sets  
3 forth the alleged violations of Nevada law. Such cases are defined by NAC  
4 624.6981 as being "contested cases" as that term is defined and applied by NRS  
5 233B.032, the Nevada Administrative Procedures Act. NRS 233B.032 states that a  
6  
7 "contested case" means a proceeding, including but not restricted to rate making  
8 and licensing, in which the legal rights, duties or privileges of a party are required  
9 by law to be determined by an agency, or in which an administrative penalty may  
10 be imposed." (emphasis added). There is no evidence that any hearing, or  
11 opportunity for a hearing ever took place. Indeed, the matter did not proceed  
12 beyond the informal investigatory actions of the NSCB's designated investigator.  
13 IHS, and the District Court, improperly equate the inaction of the NSCB in  
14 prosecuting an alleged violation with the making of an affirmative finding that no  
15 violation existed.

16 **b. Tom Was Not a Party to a NSCB Adjudication and**  
17 **Therefore is Not Precluded From Litigating the Issue of**  
18 **Licensure.**

19 In order for claim preclusion to apply the parties in each proceeding must be  
20 the same or in privity with one another. *Five Star Capital Corp.*, 124 Nev. at 1054.  
21 Even if a formal adjudication had taken place before the NSCB, Tom was not a  
22 party, nor in privity with a party to such proceeding. As is made clear by the  
23  
24  
25  
26  
27  
28

1 Administrative Procedures Act a "party" to an action "means each person or  
2 agency named or admitted as a party, or properly seeking and entitled as of right to  
3 be admitted as a party, in any contested case." NRS 233B.035. No evidence exists  
4 in the record which would support a finding that an administrative adjudication  
5 took place nor that Tom was a "party" to such a proceeding and was presented with  
6 an opportunity to litigate the issues which were ultimately presented to the District  
7 Court.  
8

9  
10 Likewise, whenever a "contested case" is held certain minimum procedural  
11 safeguards must be adhered to. Namely, the opportunity for a hearing which  
12 includes the time, place and nature of the hearing, the legal authority pursuant to  
13 which the hearing will be conducted, a reference to the specific statutes and  
14 regulation involved as well as a short and plain statement of the matters asserted  
15 must be provided to the parties. *See* NRS 233B.121(2). All parties are entitled as  
16 a matter of law to respond and present evidence and argument on all issues  
17 involved. *See* NRS 233B.1219(4). The only purported factual basis upon which  
18 IHS argued, and upon which the District Court ruled, is a letter issued by an  
19 investigative officer of the NSCB in which it is alleged certain findings were made  
20 by implication. *See* JA00274. Not only were no such findings actually made,  
21 such correspondence clearly does not comport with the requirements of the Nevada  
22 Administrative Procedures Act and did not afford Tom an opportunity to be heard  
23  
24  
25  
26  
27  
28

1 on all salient issues and accordingly may not serve as the basis for granting  
2 judgment against Tom in the underlying action. The letter was also not properly  
3 before the court as it is hearsay. *Id.* Additionally, any administrative action of the  
4 NSCB constitutes disciplinary proceedings between the NSCB and IHS, not Tom.  
5

6 **c. The Ruling of the District Court Does Not Pertain to Claims**  
7 **that Were or Which Could Have Been Brought Before the**  
8 **NSCB.**

9 Although not specifically addressed by either IHS or the District Court,  
10 certain issues complained of by Tom were not, and could not be raised before the  
11 NSCB. As this Court has previously ruled, the NSCB's authority is limited and the  
12 NSCB may not rule upon matters which invade the province of the Courts  
13 including issues related to contract interpretation and enforcement. *See Bivins*  
14 *Const. v. State Contractor's Board*, 107 Nev. 281. In *Bivins*, the Court stated that  
15 the "Board [NSCB] does not have the authority to impose damages upon parties  
16 pursuant to its licensing authority." *Id.* at 284. The Court was troubled by the  
17 Board's assumption of what was essentially a judicial role in the resolution of the  
18 dispute when the Board's actions were tantamount to the award of contract  
19 damages. *Id.* at 283 - 284. Tom sought damages based upon IHS' breach of  
20 contract, where there existed a dispute over IHS' failure to be properly licensed  
21 and concerning the completion of and scope of work IHS was to perform. The  
22 NSCB lacks jurisdiction to adjudicate such a dispute. As seen, the NSCB is  
23  
24  
25  
26  
27  
28

1 without authority to resolve contested issues of contract, and thus, even if the  
2 NSCB found that the actions of IHS met the minimum standards of construction,  
3 this does necessarily translate into a ruling that the requisite contractual  
4 requirements were met and that IHS had fulfilled all obligations that were required  
5 of it pursuant to the terms of the contract. Such a determination is reserved to the  
6 authority of the Court, not the NSCB.  
7

9 **2. The Doctrine of Issue Preclusion Does Not Bar the Requested**  
10 **Relief of Tom.**

11 In *Five Star Capital Corp., supra.*, the Court clarified the test to be applied  
12 in determining whether the doctrine of "issue preclusion" is applicable in a given  
13 action. This Court found that:  
14

15 . . . the following factors are necessary for application of  
16 issue preclusion: "(1) the issue decided in the prior  
17 litigation must be identical to the issue presented in the  
18 current action; (2) the initial ruling must have been on the  
19 merits and have become final; . . . (3) the party against  
20 whom the judgment is asserted must have been a party or  
21 in privity with a party to the prior litigation; and (4) the  
22 issue was actually and necessarily litigated.

23 124 Nev. at 1055. As seen, there is significant overlap between the two doctrines,  
24 although the two are separate legal doctrines. *Id.* (citing clear need for both  
25 doctrines). In the present matter neither doctrine applies as IHS has failed to  
26 establish the requirements for either and the district court erred in applying  
27  
28

1 preclusive effect to the inaction of the NSCB and a letter issued by an investigative  
2 officer of the NSCB.

3  
4 **a. The Issue Presented Has Not Been Litigated and Therefore  
Issue Preclusion Cannot Apply**

5 Whether IHS was required to possess a valid Nevada contractor's license has  
6 not been litigated in any forum, including the NSCB. As set forth in detail above,  
7 the sole action taken by the NSCB was to have an investigative officer perform an  
8 informal investigation, order certain work to be performed and subsequently issue  
9 a letter closing the file. No findings of fact or conclusions of law were made, no  
10 hearing was ever held, no evidence was ever taken nor was any formal complaint  
11 or proceeding ever initiated by the NSCB.

12  
13  
14  
15 **b. No Ruling Was Ever Made Upon the Merits of Tom's Claim  
16 Before the NSCB and Therefore Issue Preclusion Cannot  
17 Apply**

18 As set forth above, no ruling upon the merits was ever made by the NSCB.  
19 The only activity which took place before the NSCB was an informal investigation  
20 by an investigative officer of the NSCB. As seen in the correspondence dated June  
21 17, 2013, the individual investigator rendered his personal opinion that no further  
22 action would be taken. *See* JA00274. At no time was an actual ruling regarding  
23 the need for IHS to hold a contractor's license made by the NSCB. The District  
24 Court acknowledges this fact in its ruling by stating that because the investigative  
25 officer did not make a finding that a contractor's license was required, somehow  
26  
27  
28

1 concluding that such inaction necessarily means that no license was required. JA  
2 000654. The record is devoid of any evidence of what, if any, facts were  
3 considered in relation to whether a contractor's license was required of IHS in  
4 order to complete the work performed. The Court's reliance on the NSCB's  
5 inaction has not basis in the law.  
6

7  
8 **c. Tom Was Not a Party, or in Privity With a Party, to the**  
9 **NSCB in any Prior Proceedings.**

10 Even if the informal activities of a single investigator rose to the level of a  
11 quasi-judicial proceeding, Tom was not a party, or in privity with a party to the  
12 proceeding. As set forth above, in order to be considered a "party", Tom would  
13 have had the legal right to intervene in the administrative proceeding and the right  
14 to present evidence. *See Five Star Capital Corp.*, 124 Nev. at 1055. In the present  
15 action, however, no formal proceedings were initiated by the NSCB through the  
16 filing of a complaint as required by NAC 624.6978. As a result there was no  
17 proceeding in which Tom could appear and present evidence.  
18  
19  
20

21 **d. The Issues On Appeal Were not Actually and Necessarily**  
22 **Litigated by the NSCB and Therefore Issue Preclusion Does**  
23 **Not Bar the Claims of Tom**

24 The issue of IHS' licensure, or lack thereof, was never litigated as no  
25 hearings took place, no evidence was presented, no fact finding tribunal was  
26 convened and no determinations of law were ever made. The most that can be said  
27 is that an investigator closed the consumer complaint of Tom without making any  
28

1 affirmative findings or rulings. As noted, *supra*, in order to be given preclusive  
2 effect, administrative proceedings must be quasi-judicial in nature and all relevant  
3 parties afforded an opportunity to litigate. *See Plaine*, 797 F.2d at 718; *Haftner*, 992  
4 F.Supp.2d at 1069. If it were true, as argued by IHS that the investigative officer  
5 acted in manner to determine the legal rights of the various parties without  
6 adhering to the most basic concepts of due process, then such action would be void  
7 and would constitute an *ultra vires* action. There is no authority for an investigator  
8 to reach legal conclusions or render opinions absent compliance with governing  
9 law. This is particularly true when one of the ultimate issues to be determined is  
10 whether IHS complied with its contractual and legal obligations.

11  
12 **D. The Trial Court Erred in Granting Summary Judgment as Genuine**  
13 **Issues of Material Fact Were Raised Regarding Whether IHS Fulfilled**  
14 **its Contractual Obligations.**

15  
16 **1. The Trial Court Erred Granting IHS' Motion For Summary**  
17 **Judgment And Motion To Dismiss Because Tom Provided A**  
18 **Sworn Statement Stating That The Work At His Residence Was**  
19 **Not Complete And Had Poor Workmanship.**

20  
21 The trial court erred in granting IHS' Motion for Summary Judgment and  
22 Motion to Dismiss as there were genuine issues of material fact set forth in Tom's  
23 affidavit as to whether IHS' work was complete and completed in a workmanlike  
24 manner. JA 00620 - 621. This testimony directly contradicted the "facts" set forth  
25 by IHS. Tom stated that: the programming was never completed, the equipment  
26 rack ventilation system appears not to function, and there is a constant beeping  
27  
28

1 sound because of an "overheat" warning most of the time in the theater. *Id.* The  
2 sprinkler system never functioned properly. *Id.* IHS failed to install the sidelite  
3 window switchable smart tint. *Id.* IHS failed to honor warranty coverage for  
4 entire system, and failed to fulfill dealer-required duties such as authorizing  
5 additional control devices. *Id.* Also, IHS has never provided a wiring diagram for  
6 upstairs window prewiring. *Id.*

9       Whether the work was complete and completed in conformance with the  
10 contract is clearly material to this case as IHS should not be compensated for work  
11 that was not completed or that was not completed properly. The trial court could  
12 not have viewed the evidence in the most favorable light to Tom because Tom  
13 stated in his affidavit that numerous items were incomplete or were not working  
14 properly, even after the NSCB's Notice to Correct. *Id.* Therefore, the trial court  
15 erred in granting Summary Judgment and the Motion to Dismiss as Tom provided  
16 an affidavit attesting to still existing workmanship issues and the fact that he paid  
17 IHS approximately \$60,000.00 pursuant to the Contract where the work was not  
18 completed and IHS abandoned its contractual duties. IHS's duties pursuant to its  
19 contract with Tom should not be confused with its duties to meet the bare  
20 minimums of standard which the NSCB would be concerned with addressing,  
21 when it comes to evaluating workmanship.



1           **2. The Trial Court Erred In Granting IHS' Motion For Summary**  
2           **Judgment And Motion To Dismiss Because Discovery Should**  
3           **Have Been Allowed Pursuant To NRCP 56(f).**

4           NRCP 56(f) provides that "[s]hould it appear from the affidavits of a party  
5           opposing the motion that the party cannot for reasons stated present by affidavit  
6           facts essential to justify the party's opposition, the court may refuse the application  
7           for judgment or may order a continuance to permit affidavits to be obtained or  
8           depositions to be taken or discovery to be had or may make such other order as is  
9           just." This is in keeping with Nevada's strong public policy that matters should be  
10          heard and decided upon their merits. *Accord Price v. Dunn*, 106 Nev. 100, 104,  
11          787 P.2d 785, 787-88 (1990)(addressing strong public policy to have matters  
12          decided upon merits in context of default judgments). This Court has routinely  
13          held that it is an abuse of discretion when a party is not permitted to engage in  
14          discovery prior to a dispositive ruling of the court. In *Halimi v. Blacketor*, this  
15          court concluded that a district court had abused its discretion when it denied an  
16          NRCP 56(f) motion for a continuance and granted summary judgment in a case  
17          where the complaint had been filed only a year before summary judgment was  
18          granted. 105 Nev. 105, 106, 770 P.2d 531, 531-32 (1989). Summary judgment is  
19          improper when a party seeks additional time to conduct discovery to compile facts  
20          to oppose the motion. Furthermore, this Court held that when no dilatory motive  
21          was shown, it was an abuse of discretion to refuse a request for further discovery at  
22  
23  
24  
25  
26  
27  
28

1 an early stage in the proceedings. *Halimi*, 105 Nev. at 106, 770 P.2d at 531-32; *see*  
2 *also Ameritrade*, 105 Nev. 696, 700, 782 P.2d 1318, 1320 (1989); *Summerfield v.*  
3 *Coca Cola Bottling Co.*, 113 Nev. 1291, 1294-95, 948 P.2d 704, 705-06 (1997)  
4 (holding that district court abused its discretion by denying an NRCP 56(f) motion  
5 for continuance when complaint had been filed two years previous and party was  
6 not dilatory in conducting discovery). *Aviation Ventures, Inc. v. Joan Morris, Inc.*,  
7 121 Nev. 113, 118 (2005).

8 Tom properly submitted a Rule 56(f) affidavit within its opposition seeking  
9 to conduct discovery on specific items including: allegations raised in IHS'  
10 Motion to Dismiss and Resubmitted Motion for Summary Judgment; the  
11 investigators of the NSCB and the NSCB as to the licensing requirements of IHS;  
12 and expert witnesses regarding the licensing requirements. JA 00628. This  
13 request comports with the rule and was even more necessary here where IHS had  
14 not even filed a reply to Tom's counterclaim and discovery had not yet begun. The  
15 denial of Tom's request and granting of summary judgment in favor of IHS was in  
16 error and in contravention of this Court's prior holdings in similarly situated cases.

1 **E. The District Court Erred in Awarding Attorneys' Fees to IHS as No**  
2 **Legal Basis Exists for Such an Award.**

3 **1. The Trial Court Erred in Awarding IHS Attorneys' Fees**  
4 **pursuant to NRS 18.010(2)(b).**

5 Tom maintains that the Court should be reversed which would result in a  
6 reversal of the award of fees as well because the district court's decision was in  
7 error by ignoring genuine issues of material facts and governing law. However,  
8 Tom will address substantively the Court's error in awarding fees to IHS.  
9

10 The District Court erred in awarding fees to IHS based on NRS  
11 18.010(2)(b). In order for a litigant to receive an award for attorneys' fees  
12 pursuant to this statute, the district court must make a finding that the claims or  
13 defenses of the opposing party were brought without reasonable ground or to  
14 harass the prevailing party. "To support an award of attorney fees based on a party  
15 asserting claims without reasonable grounds, there must be evidence in the record  
16 supporting the proposition that the complaint was brought without reasonable  
17 grounds or to harass the other party." *Kahn v. Morse & Mowbray*, 117 P.3d 227,  
18 121 Nev. 464 (2005). "Although a district court has discretion to award attorney  
19 fees against a party for unreasonably maintaining a lawsuit, there must be evidence  
20 supporting the district court's finding that the claim or defense was unreasonable or  
21 brought to harass." *Bower v. Harrah's Laughlin, Inc.*, 215 P.3d 709, 125 Nev. 470  
22  
23  
24  
25  
26  
27  
28

1 (2009). The frivolousness of a claim is determined as of time claim is initiated.  
2 *Barozzi v. Benna*, 918 P.2d 301, 112 Nev. 635 (1996).

3 An award for attorney's fees was not warranted pursuant to NRS  
4 18.010(2)(b), as there were reasonable grounds for Tom to dispute the amounts  
5 claimed by IHS, and Tom's claims and defenses were not meant to harass IHS.  
6  
7 There is no dispute that IHS was unlicensed when it bid and performed work.  
8  
9 There is no dispute that the investigator for the NSCB issued a Notice to Correct  
10 which required IHS to complete and repair work, which was not performed in a  
11 workmanlike manner. Tom attempted to resolve the issue without litigation; and it  
12 was IHS who filed the litigation against Tom. Tom made offers to resolve this  
13 matter repeatedly before seeking assistance from the NSCB, and as set forth above,  
14 there existed genuine issues of material fact demonstrating that Tom's defenses  
15 and prosecution of his claims was not unreasonable or made to harass IHS.  
16  
17  
18

19 **2. The Award of Attorney's Fees Included Fees Incurred Outside of**  
20 **the Proceedings and Relating to the Nevada State Contractor's**  
21 **Board Action.**

22 The District Court's award of attorney's fees was improper, as the award  
23 included fees relating to the NSCB investigation. NRS 108.237 allows for costs  
24 and attorney's fees for the "proceedings" of the mechanic's lien claim. The actions  
25 taken by the NSCB investigator are not a part of the mechanic's lien claim;  
26 therefore, attorney's fees incurred in conjunction with the Board's investigation  
27  
28

1 should not have been awarded in this case. *Barney v. Mt. Rose Heating & Air*  
2 *Conditioning*, 124 Nev. 821 (2008).

3  
4 In *Barney*, the Court held, "NRS 108.237(1) entitles a prevailing mechanic's  
5 lien claimant to the enforcement proceedings' costs, including reasonable attorney  
6 fees." *Id.* at 823. In defining the term "proceeding", this Court has stated: "As  
7 used in NRS 108.237(1), the term "proceedings" appears within the statutory lien  
8 statutes and clearly refers to *steps taken to enforce a mechanic's lien in the*  
9 *courts*. The scope of that term, therefore, must be viewed in light of other  
10 mechanic's lien statutes and, in particular, NRS 108.239, which generally governs  
11 court actions to enforce mechanic's liens." *Barney* at 827 (emphasis added). The  
12 Court also held that the mechanic's lien claimant, Mt. Rose Heating, was  
13 improperly awarded attorney fees for matters outside of the lien enforcement and  
14 foreclosure proceedings. *Id.* As the record did not support the total amount of the  
15 district court's award as being incurred in the lien foreclosure action the Court held  
16 that the district court had abused its discretion in awarding to Mt. Rose Heating all  
17 the attorney's fees requested and lacked specific findings supporting its award. *Id.*

18  
19 Here, IHS requested an award of fees totaling \$55,390.50 [JA00660 - 672];  
20 however, the district court reduced the amount of awarded fees as follows: (30)  
21 hours at \$495.00 per hour and (82) hours at \$250.00 per hour, for a total award of  
22 \$35,350.00 in attorney's fees. JA00779. It is not known how these amounts were  
23  
24  
25  
26  
27  
28

1 calculated and derived. As set forth below, the Court did not engage in a *Brunzell*  
2 analysis, thus rendering an award of fees improper.

3 Of this amount, \$15,790.50 is allocated for fees relating to the NSCB  
4 investigation. JA00741 -750. These fees were incurred prior to the filing of the  
5 complaint inciting the legal proceedings to foreclose the lien. As set forth in  
6 *Barney*, an award of fees to a lien claimant is limited to reasonable fees incurred in  
7 the legal proceeding. Therefore, there is no question that at least \$15,790.50 must  
8 be deducted from the total amount of the fees awarded. The Court erred in  
9 awarding fees to IHS relating to the investigative action by the NSCB and the  
10 award reversed at least in the amount of \$15,790.50.

11  
12  
13  
14  
15 **3. The Trial Court Did Not Analyze the *Brunzell* Factors in Making**  
16 **its Award for Attorneys' Fees.**

17 This Court has stated that it is within the trial court's discretion to determine  
18 the reasonable amount of attorney's fees to be awarded under a statute, and in  
19 exercising that discretion, *the court must evaluate the factors* set forth in *Brunzell*  
20 *v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969) (emphasis added).  
21 *See also Parodi v. Budetti*, 115 Nev. 236, 984 P.2d 172 (Nev. 1999). In *Brunzell*,  
22 the Court identified four factors that should be considered in determining the  
23 amount of reasonable attorney's fees to be awarded in mechanic's lien actions: (1)  
24 the advocate's qualities, including ability, training, education, experience,  
25 professional standing, and skill; (2) the character of the work, including its  
26  
27  
28

1 difficulty, intricacy, importance, as well as the time and skill required, the  
2 responsibility imposed, and the prominence and character of the parties when  
3 affecting the importance of the litigation; (3) the work performed, including the  
4 skill, time, and attention given to the work; and, (4) the result-whether the attorney  
5 was successful and what benefits were derived. *Barney v. Mt. Rose Heating & Air*  
6 *Conditioning*, 124 Nev. 821, 192 P.3d 730 (Nev. 2008), citing *Brunzell v. Golden*  
7 *Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969) and *Shuette v. Beazer*  
8 *Homes Holdings Com.*, 121 Nev. 837, 124 P.3d 530 (2005). The district court did  
9 not provide an analysis of the *Brunzell* factors, and the award must be reversed on  
10 that basis alone. However, the award is not justified even when the *Brunzell*  
11 factors are considered.

12  
13  
14  
15  
16 **a. The Billing Rate Is Not Appropriate For The Character Of**  
17 **The Work.**

18 It is unreasonable to have a partner, whose billing rate is nearly \$500.00 per  
19 hour, completing mundane tasks such as preparing a lis pendens or a notice of  
20 foreclosure [JA 743], and personally billing for all of the legal research as was  
21 done here. Another factor to consider is that the prominence and character of the  
22 parties is minimal. This case centers around a dispute between a residential  
23 homeowner and a contractor regarding a claim for approximately \$23,000.00 on a  
24 contract with a total value of less than \$85,000.00. The main issue in the case had  
25 to do with IHS' failure to be properly license and failure to complete the contracted  
26  
27  
28

1 for work. There were no particularly unique issues presented in the case, nor any  
2 novel concepts of law which would support such an extravagant billing rate.  
3 Accordingly, the Court erred when it failed to consider that the nature of the work  
4 performed was straight forward and did not require any specialized knowledge to  
5 prosecute.  
6

7  
8 **b. An Award of \$35,350.00 In Fees Is Unreasonable in Light of**  
9 **the Work Performed.**

10 As the record reflects, this matter was in its infancy at the time the district  
11 court granted summary judgment in favor of IHS and IHS' Motion to Dismiss  
12 Tom's Complaint. Indeed, IHS had not even filed a Reply to Tom's  
13 counterclaims. No discovery was conducted, no experts were retained and no  
14 evidentiary hearings were held. The District Court erred in not considering the very  
15 limited actions taken in the litigation in comparison with the exorbitant fees which  
16 were charged to IHS. As noted above, at least \$15,790.50 of fees awarded do not  
17 even pertain to the pending lien foreclosure action, but rather, to the informal  
18 process which took place before the NSCB which resulted in IHS being forced to  
19 correct deficient work. The work that was provided was minimal given the  
20 procedural posture of the case. Again, given the fact that the district court failed to  
21 apply any of the *Brunzell* factors, it is not possible to know how or why the Court  
22 decided as it did. Therefore, at a minimum, the matter must be reversed for the  
23 district court to engage in the mandatory *Brunzell* analysis.  
24  
25  
26  
27  
28



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

X. CONCLUSION

For the foregoing reasons, Tom respectfully requests this Court to reverse the summary judgment in favor of IHS and order dismissing the claims of Tom and remand the case to the district court for further proceedings pursuant to NRS 624.320 as well as for a determination as to whether IHS fully performed its contractual obligation pursuant to its agreement with Tom.

PEZZILLO LLOYD

By: /s/ Jennifer R. Lloyd  
Jennifer R. Lloyd, Esq.  
Nevada Bar No. 9617  
Marisa L. Maskas, Esq.  
Nevada Bar No. 10928  
PEZZILLO LLOYD  
6725 Via Austi Pkwy., Suite 290  
Las Vegas, Nevada 89119  
Tel: 702 233-4225  
Fax: 702 233-4252  
*Attorneys for Appellant,*  
*Timothy Tom*

PEZZILLO LLOYD

## ATTORNEY'S CERTIFICATE

I hereby certify that I have read this APPELLANT'S OPENING 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 N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure. This brief complies with the formatting requirements of Rule 32(a)(4)-(6), and either the page- or type-volume limitations stated in Rule 32(a)(7).

PEZZILLO LLOYD

By: /s/ Jennifer R. Lloyd  
Jennifer R. Lloyd, Esq.  
Nevada Bar No. 9617  
Marisa L. Maskas, Esq.  
Nevada Bar No. 10928  
PEZZILLO LLOYD  
6725 Via Austi Pkwy., Suite 290  
Las Vegas, Nevada 89119  
Tel: 702 233-4225  
Fax: 702 233-4252  
*Attorneys for Appellant,*  
*Timothy Tom*

1                                   **IX.    CERTIFICATE OF SERVICE**

2

3    I hereby certify that I am an employee of Pezzillo Lloyd and on the 16<sup>th</sup> day of

4    December, 2014, a true and correct copy of the foregoing document was e-filed

5    and e-served on all registered parties to the Supreme Court's electronic filing

6    system and by United States First-Class mail to all unregistered parties:

7

8

9           Leon Mead, Esq.  
10          SNELL & WILMER  
11          3883 Howard Hughes Pkwy. Ste. 1100  
12          Las Vegas, NV 89169  
13          Attorneys for Plaintiff,  
14          Innovative Home Systems LLC

15                                   /s/ Marisa Maskas, Esq.  
16                                   Marisa L. Maskas, Esq.

17

18

19

20

21

22

23

24

25

26

27

28