IN THE SUPREME COURT OF THE STATE OF NEVADA

TIMOTHY TOM, an individual,

Appellant,

vs.

INNOVATIVE HOME SYSTEMS LLC, a Nevada limited liability company,

Respondent.

Consolidated Case Nos.: 65419 & 66006

District Court Case No. A680766

APPEAL
From the Eighth Judicial District Court
The Honorable Adriana Escobar, District Judge

RESPONDENT'S RESPONDING BRIEF

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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.

Person / Entity	**Interest**
Innovative Home Systems LLC ("IHS")	Respondent & Plaintiff below
Jeffrey K. Brown	Member of IHS
Snell & Wilmer LLC	Attorneys for IHS
Leon F. Mead II, Esq.	Counsel for IHS

Dated: January 26, 2015.

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/s/ ***Leon F. Mead II***

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RESPONSIVE BRIEF

NOW COMES Respondent INNOVATIVE HOME SYSTEMS LLC ("IHC") and respectfully submits this Responding Brief to the Opening Brief of Appellant Dr. TIMOTHY TOM ("TOM").

I. FACTUAL SUMMARY

In 2003 and 2005, the Nevada legislature enacted significant mechanics lien statute reforms to facilitate payments to contractors and material suppliers through the mechanics lien process,[1] instituting a public policy that contractors and material suppliers get paid for their work.[2] This was necessary because such contractors and suppliers are in a vulnerable position, having invested large sums of time, labor and money into a project before payment is made.[3] This case demonstrates that even contractors and material suppliers in small residential projects need the same protection from Nevada's public policy, as this matter is a classic example of bad faith use of the legal process to avoid full payment of a legitimately owed debt for home improvements.

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[1] *In re Fontainebleau Las Vegas Holdings LLC*, 128 Nev. ___, ___, 289 P.3d 1199, 1211 (2012), citing *Hardy Companies, Inc. v. SNMARK LLC*, 126 Nev. ___, ___, 245 P.3d 1149, 1156 (2010).

[2] *Lehrer McGovern Bovis v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1115-16, 197 P.3d 1032, 1041 (2008) .

[3] *Id.*; *Fontainbleau, supra*, 3289 P.3d at 1210.

Appellant admits that a complete recitation of the facts is not necessary to this aqppeal.[4] IHS and the district court agree – there are no genuine issues of material fact in dispute and IHS was entitled to entry of summary judgment - yet for context, a brief review of the pertinent facts would be helpful to this Court.

TOM is a medical doctor, practicing in Texas, and keeping a second vacation home in Las Vegas. (JA00366). TOM began a home improvement project on the vacation home, using several contractors to perform various parts of the work (JA00366). One of those contracts involved a home automation system supplied, installed and programmed by IHS (the "Contract")./ With change orders, the Contract approached $80,000 (JA00366-367). TOM made payments to IHS as the Contract work progressed. But after IHS' work was substantially complete, TOM began a series of bad faith and harassing actions (JA00366-370) towards IHS; TOM decided to use every possible option available to harass IHS, and to make it "give up" on the effort to collect what it was remaining due for its performed work. Those tactics included the filing a complaint with the Nevada State Contractor's Board[5] ("NSCB") making the baseless allegation that IHS was unlicensed to perform its work when it entered into the Contract.[6]

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[4] *See* Appellant's Opening Brief, pg. 2, fn. 2.

[5] Purely for the Court's understanding of litigation tactics within the context of construction disputes, given the obligations of the NSCB under NRS 624.335, this tactic causes the contractor to immediately incur costs to defend itself against the

After the NSCB complaint failed to make IHS give up its claim for payment, TOM next moved to dismiss IHS complaint alleging again that IHS was unlicensed. IHS Counter-moved for summary judgment, which TOM opposed with a conclusory affidavit containing no actual facts. JA00312-313. A senior judge covering for the Honorable Judge Escobar in Department 14, denied both motions without prejudice,[7] but noted that the issue of licensure was a legal issue for the NSCB to decide.[8] Thereafter, TOM filed an answer and a counter-claim against

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power of the State, as the NSCB investigates the complaint. The complaining party only incurs a minimal cost, if any. Since the threat of Board action against a contractor's license is so drastic to its livelihood (NRS 624.341 allows the NSCB to issue a citation and take action against the licensee to make the licensee correct the issue, pay the NSCB' s investigation costs, and even pay a fine of up to $50,000), the contractor will often give up at this stage, making a business decision to take a loss and move on.

[6] It is important for the Court to recognize that when dealing with a person acting as a contractor without a proper license to do so (assuming one is needed), the NSCB *must* issue a cease and desist order to the unlicensed contractor if it discovers that the person "submit[ed] a bid on a job situated in this State without an active license of the proper classification...." NRS 624.212(1)(b). This is what TOM is alleging that IHS did, and was the basis of TOM's complaint filed with the NSCB. JA00442-443). The NSCB after investigation did not issue such an order, but rather ordered IHS merely to complete some warranty work under the contract (JA00575-576), and upon doing so, dismissed the complaint as resolved (JA00578).

[7] JA00324-328.

[8] See generally July 25, 2013 Reporter's Transcript (JA00785-799). It appeared at the hearing that the senior judge did not have sufficient time to prepare for the hearing of the motion and counter-motions, and ultimately took the matter under advisement, noting that the matter of licensure was an issue for the NSCB and they

IHS and IHS' contractor's license bond surety, ironically basing all of the causes of action on IHS' alleged unlicensed status.

IHS then renewed its motion for summary judgment, providing substantial and admissible evidence in support. JA00365-598. TOM's only submitted "evidence" in opposition to demonstrate a genuine issue of material fact was *photocopy* of the same conclusory and inadmissible affidavit he had filed four months before. *See* JA00620-621 *and compare* JA00312-313. TOM also provided an "affidavit" from its counsel allegedly in support of its NRCP Rule 56(f) request.[9] IHS replied to the opposition. Critical to the issues before this Court, TOM failed to provide any admissible evidence that supported its assertion that genuine issues of material fact existed.

IHS had always asserted that it was exempt from a license requirement, and demonstrated through factual testimony the work fell within the exemption to the obligation for a license found in NRS 624.031(6). *See* JA00365-372, ¶s 2, 3, 7, 15, 16 & 17 and Exhibits 1-9 (JA00373-418), 13-16 (JA00441-578), 20 (JA00589-

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were aware of when a license was required, but that he wasn't sure he had enough information to decide. *See* JA00799, ll. 10-25.

[9] The Robinson Affidavit was supposedly offered to support the NRCP Rule 56(f) request for discovery, however, its only reference to actual discovery and facts is a conclusory statements that discovery was needed on the "Licensing Requirements." As the license issue is one of law, no discovery from the Contractor's Board was necessary. It was entirely the burden of TOM to offer material facts that raised a genuine issue that a license was necessary. TOM did not offer any such "facts."

593) and 22 (JA00595-598). TOM provided no admissible evidence at all, however, to counter IHS' evidence on this issue. The TOM Affidavit is completely devoid of any facts that dispute IHS' evidence that the work it performed fell into the exemption of NRS 624.031(6). *See* JA00620-621. As such, the district court found that there was no genuine issue of material fact that IHS' work was exempt from licensure, stating:

> TOM submitted no evidence to support his allegation that the work provided by IHS required a license, and offered only arguments of counsel to refute IHS' substantial evidence to the contrary. As such, the Court finds ... IHS is not prohibited under the provisions of NRS 624.320 from maintaining its complaint against TOM.

See JA00655, ¶ 6, lines 10-13. As virtually TOM's entire defense and counter-claim was based on the allegation that IHS was required to be licensed to perform the work in question, once IHS submitted substantial evidence to support the applicability of the exemption, TOM was obligated to provide admissible evidence to the contrary. He did not, offering only the argument of counsel in rebuttal. Regardless of the district court's concurrent reliance on the determinations of the NSCB, the lack of admissible evidence supplied by TOM creating a genuine issue of material fact supports the district court's findings and the entry of summary judgment.[10]

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[10] As will be discussed below, it is worth noting that the district court awarded attorney's fees based in part on NRS 18.010(2)(b), which necessarily requires a

Perhaps most obviously proving the bad faith intent was TOM's offer of judgment submitted just prior to the summary judgment oral argument, offering to pay only the principal amount of the contract balance, after having forced IHS to incur substantial attorneys' fees and costs to defend itself. *See* JA00734-736. If it were not for the failure of that offer to encompass taxable costs (*See* JA00779, ¶ 2), IHS would have been in a position of being unable to obtain a better judgment, since its damages were limited to contract obligations.

Likewise, TOM complains that the district court did not consider the evidence he submitted that the work was not properly performed. However, as the district court found TOM did not provide the court with any evidence to rebut that provided by IHS: to wit, the specific items TOM alleged not working or not performed where actually not part of the Contract scope of work. *See* JA00656, ¶ 9. In actuality, the only evidence TOM submitted on this issue were mere conclusory statements, without any actual facts or foundation for them. This is plainly not sufficient to raise genuine issues of material fact sufficient to defeat a motion for summary judgment under Nevada law.

After the motions were fully briefed, and just before the hearing on those motions were to be heard, TOM served an offer of judgment on IHS for 100% of the principal amount of the debt owed to IHS, which offer "includes any and all

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finding that TOM brought or maintained his claim "without reasonable ground or to harass" IHS. *See* JA00779, ¶ 3, lines 7-12.

costs, fees and interest incurred" in IHS' prosecution of the case.(*See* JA00734-735). Although TOM misunderstood the effect of including all costs in the offered amount, the intent was to bind IHS into a position where it could not possibly obtain a better principal judgment and make it virtually impossible for IHS to recover its attorneys' fees, costs and interest. By that time, IHS has expended far more in attorney's fees than the principal sum of the claim. Because of the mistake of including costs in the offered amount, however, IHS turned down the offer. Nevertheless, IHS offered to consider a resolution with some consideration for the fees and costs TOM had forced IHS to incur. (*See* JA00739). IHS had previously served TOM with its own offer of judgment, on October 2, 2013 for $31,174.67, which included only $7,500 more than the principal sum owed for costs, fees and interest. JA00702-705. This represented a substantial discount, as IHS had already incurred $36,135.00 in fees through September 2013 because of TOM's actions. *See* JA00671, ¶ 4.

After the hearing, the Court granted summary judgment and submitted the Findings of Fact and Conclusions of Law appealed from herein. By that time, IHS had incurred $55,390.55 in attorney's fees. IHS' application for the fees did a full analysis under *Brunzell v. Golden Gate National* Bank, 85 Nev. 345, 455 P.2d 31 (1969). Thereafter, the Court granted IHS requests for costs and awarded a reduced amount of attorney's fees. Importantly, however, the Court granted IHS summary

judgment on its cause of action for a breach of the covenant of good faith and fair dealing, and also awarded attorneys' fees in part based on NRS 18.010(2)(b). This appeal followed.

II. ISSUES ON APPEAL

Although TOM's original Notice of Appeal (JA 00754-55) is broad to encompass all issues contained in the district court's Findings of Fact and Conclusions of Law (JA00649-659) (herein referred to as the "FF/CC"), TOM only addresses four (4) specific issues of error to the trial court, to wit:

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 [sic] perform as actually performed and whether the work was performed in conformance with the contract; and

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.

See Opening Brief, Pg. viii.

As will be pointed out below, these issues are not accurate as to what the district court did in entering its decisions appealed from, nor are they accurate as to the actual acts specified. Indeed, the first and second issues Appellant lists are intertwined with one another and actually one issue. But even if this was determined in TOM's favor, that issue is only part of the Court's reasoning for entry of summary judgment. Other issues which independently support the decision exist and have not been appealed from herein.

Because Appellants have only substantively addressed and discussed three of the many issues the district court's decision encompassed, any other potential arguments or issues are waived. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 14, 252 P.3d 668, 672 (2011), reh'g denied (July 1, 2011) ("Issues not raised in an appellant's opening brief are deemed waived.") (citing NRAP 28(a)(8) and *Bongiovi v. Sullivan*, 122 Nev. 556, 570 n.5, 138 P.3d 433, 444 n.5 (2006)); *see also Browning v. State*, 120 Nev. 347, 354, 91 P.3d 39, 45 (2004) (holding that under NRAP 28, an appellant must "present relevant authority and cogent argument; issues not so presented need not be addressed by this court").

When an appellant fails to identify any error in the district court's analysis, it is the same as if he had not appealed that judgment. *Brinkmann v. Dallas County Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987). This is particularly true where a district court has issued a thorough opinion. *Id.* "It is insufficient merely to state in one's brief that one is appealing an adverse ruling below without advancing reasoned argument as to the grounds for the appeal." *Am. Airlines v. Christensen*, 967 F.2d 410, 415 n.8 (10th Cir. 1992). It is not the Court's province to "raise and discuss legal issues that [the appellant] has failed to assert." *Brinkmann*, 813 F.2d at 748 (affirming grant of summary judgment where appellant did not identify any error in the district court's legal analysis). Moreover, should Appellants attempt to address these waived issues in their Reply, the Court should strike and otherwise disregard any discussion of them. *Bongiovi*, 122 Nev. at 569 n. 5, 138 P.3d at 443 n. 5 (holding that reply briefs are limited to answering any matter set forth in the opposing brief under NRAP 28(c)). The Court should, therefore, consider that even if TOM is correct that may not be sufficient to justify overturning the entry of summary judgment in IHS' favor.

III. STANDARD OF REVIEW

A motion for summary judgment will be granted when the non-moving party can prove no set of genuinely material facts are true or in dispute. Nev. R. Civ. P.

56(c). While this Court will review a decision for summary judgment *de novo*,[11] that is not the end of the inquiry. Summary judgment is appropriate when no genuine issue of material fact remains for trial and the moving party is entitled to judgment as a matter of law. *Burnett v. CBA Security Services*, 107 Nev. 787, 788, 820 P.2d 750, 751 (1991). When the pleadings and affidavits on file show that there exists no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law, the Court must grant summary judgment. *Montgomery v. Ponderosa Construction, Inc.*, 101 Nev. 416, 418, 705, P.2d 652, 655 (1985); *LaPica v. District Court*, 97 Nev. 86, 624 P.2d 1003 (1981); *Pacific Pools Constr. v. McClain's Concrete*, 101 Nev. 557, 706 P.2d 849 (1985). A genuine issue of a material fact exists when the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Valley Bank v. Marble*, 105 Nev. 366, 367, 775 P. 2d 1278, 1281 (1989).

This Court views summary judgment as a critical tool in securing the just, speedy, and inexpensive determination of disputes. *See Wood v. Safeway*, 121 Nev. 724, 731, 121 P.3d 1026, 1030 (2005). Indeed, the "purpose of summary judgment 'is to avoid a needless trial when an appropriate showing is made in advance that there is no genuine issue of fact to be tried, and the movant is entitled to judgment as a matter of law.'" *Sahara Gaming Corp. v. Culinary Workers Union Local 226*,

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[11] *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1030 (2005)

115 Nev. 212, 214, 984 P.2d 164, 166 (1999) (citing *Coray v. Hom*, 80 Nev. 39, 40-41, 389 P.2d 76, 77 (1964). "[T]he availability of summary proceedings promotes judicial economy and reduces litigation expense associated with actions clearly lacking in merit." *Elizabeth E. v. ADT Security Systems West, Inc.*, 108 Nev. 889, 892, 839 P. 2d 1308, 1310 (1992). Finally, when a party bearing the ultimate burden of proof on an issue cannot prove each essential of its claim, the opposing party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Somewhat disheartening is the fact that TOM actually misleads the Court when it asserts a district court's summary judgment decision "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."[12] That standard applies to a motion to dismiss under NRCP 12(b)(5). Summary judgment rather places the burden on the opposing party to come forward with evidence in the form of specific facts to show the existence of a genuine issue of material fact. *Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 825 P.2d 588 (1992). Although, the pleadings and proof offered in

[12] TOM cites this Court to *Munda v. Summerlin Life & Health Ins. Co.*, 127 Nev.Adv.Op. 83, 267 P.3d 771, 774 (Dec. 2011) for this proposition, however, *Munda* is a case where this Court was evaluating a dismissal after a motion to dismiss under NRCP 12(b)(5). While this Court will review both Rule 12(b)(5) motions and summary judgment motions *de* novo, contrary to TOM's assertion, the *Munda* case *does not* support this standard for review of a summary judgment decision.

a motion for summary judgment are construed in the light most favorable to the non-moving party, (*Hoopes v. Hammargren*, 102 Nev. 425, 429, 725 P.2d 238, 241 (1986)) in order to avoid summary judgment, the non-moving party must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial. As this Court stated in *Wood*:

> This [C]ourt has often stated that the nonmoving party may not defeat a motion for summary judgment by relying on the gossamer threads of whimsy, speculation or conjecture. As this [C]ourt has made abundantly clear, when a motion for summary judgment is made and supported as required by NRCP 56, the non-moving party may not rest upon general allegations and conclusions, but must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine factual issue."

Wood, supra, 121 Nev. at 731; 121 P.3d at 1030-31.

As this Court will see by its *de novo* review of the pleadings offered in this case to support the district court's decision, TOM in fact failed to provide admissible specific factual evidence to demonstrate there was a triable issue of material fact in the case.

The refusal of a trial court to grant a continuance in light of a request under NRCP Rule 56(f) for additional discovery is reviewed for an abuse of discretion. *Aviation Ventures v. Joan Morris, Inc.,* 121 Nev. 113, 117-18, 110 P.3d 59, 62 (2005).

IV. ARGUMENT

While TOM waxes eloquent about legal issues regarding the NSCB, TOM completely overlooks the fact that it failed to meet its obligation to provide admissible evidence sufficient to demonstrate a genuine issue of material fact that the Court should have sent to trial.

A. Once IHS Asserted and Supported that it was Exempt from Licensure, TOM had the Obligation to Present Contrary Facts Demonstrating a Genuine Issue of Fact Existed.

NRS 624.320 provides in pertinent part:

> No ... organization ... engaged in the business or acting in the capacity of a contractor shall bring or maintain any action in the courts of this State for the collection of compensation for the performance of any act or contract *for which a license is required by this chapter* without alleging and proving that such ... organization... was a duly licensed contractor at all times during the performance of such act or contract and when the job was bid.

(Emphasis added).

NRS 108.222(2) provides:

> *If a contractor or professional is required to be licensed* pursuant to the provisions of NRS to perform the work, the contractor or professional will only have a lien pursuant to subsection 1 if the contractor or professional is licensed to perform the work.

(Emphasis added).

NRS 624.031(6) provides:

> The provisions of this chapter do not apply to: ... (6) The sale or *installation of any finished product*, material or

> article of merchandise which is not fabricated into and does not become a permanent fixed part of the structure.

(Emphasis added).

NRS 47.250(16) provides that there is a disputable presumption that the law has been obeyed. As shown above, NRS 624.031(6) exempts from the requirement of a contractor's license the sale and installation of finished products which are not fabricated into or become a permanent fixed part of a structure. IHS has submitted the only evidence of the nature of the work performed by it. JA00365-66, ¶s 2 & 3. As such, IHS enjoys a rebuttable presumption that it followed the law in performing this work. "A presumption ... imposes on the party against whom it is directed the burden of proving the nonexistence of the presumed fact is more probable than its existence." NRS 47.180(1). TOM has not submitted any evidence at all to dispute these facts, and so the conformance of the materials with the exemption must be considered established fact. NRS 47.190

Instead of providing the district court with evidence, TOM spends a great deal of time arguing that the court was obligated to engage in fact finding on whether a license was necessary for IHS to perform its work, yet provided no facts whatsoever to the district court (or to this Court) to demonstrate a factual dispute existed. To the contrary, once IHS provided sufficient facts to support its contention that it was *exempt* from the requirements of a license, it was TOM's burden to present facts that IHS was required to have such a license. To hold

otherwise, would require IHS (or any material supplier, equipment renter or other "lien claimant" for that matter) to prove a negative (that a license is *not* required), rather than the positive (that a license *is* required). Yet IHS did support its exempt status substantially.

IHS presented admissible evidence (which TOM did not dispute):

- That its materials met the definition of NRS 624.031(6)'s license exemption (JA00365-372, ¶s 2, 3, 7, 15, 16 & 17);
- That TOM hired licensed contractors to perform work on his project that IHS refused to perform because the work required a contractor's license (JA00365-372, ¶ 4-6);
- That references in the Contract between them did not show that IHS performed work requiring a license, but merely referenced such work that was being performed by TOM's separate licensed contractor (Meridian) merely as an accommodation to TOM (JA00365-372, ¶ 9);
- At no time did IHS assert that it held a contractor's license and TOM never complained that IHS was unlicensed until he refused to pay IHS and retained counsel (JA00365-372, ¶s 10 & 13);
- TOM filed a complaint with the NSCB claiming IHS was unlicensed when it entered into the Contract with TOM, but the NSCB ignored the issue when it was under a specific legal duty to prevent IHS from continuing to perform

the contract work if a license had been required (JA00365-372, ¶ 15 and Exhibits 13-15 thereto (JA00442-573));

- That the NSCB has never demanded that IHS have a contractor's license to perform the type of work IHS performed for TOM (JA00371, ¶ 16), and
- That the NSCB has issued advisory opinions on work similar to that performed by IHS for TOM where it determined a license was not necessary (JA00596-598).

To all of this, TOM offered no evidence whatsoever. Only now for the first time[13] TOM points only to a single exhibit to the original motion for summary judgment that was denied (*See* Opening Brief, pg. 9, ll. 7-9 and JA00072-75), and a single sentence in IHS' evidence that incidental patching and painting have never been work that required a contractor's license (*See* Opening Brief, pg. 9, ll. 20-25), to *imply* the unsupported assertion that "IHS performed wiring, which is why patching was needed to cover the holes made by IHS as part of its scope of work." This is not evidence, and certainly not evidence that rises to the level of "specific facts demonstrating the existence of a genuine factual issue" to overcome the presumption that IHS complied with the law. Rather, it seems to be a textbook example of "relying on the gossamer threads of whimsy, speculation or

[13] This Court has consistently held that arguments made only for the first time on appeal will not be considered.

conjecture"[14] that this Court forbids be used to overcome a summary judgment motion. Having offered no facts to dispute IHS substantial evidence that it is exempt from licensure, there is no basis for TOM's claim that genuine issues of material fact exist to justify a trial in this matter on the issue of licensing. Even if the district court had jurisdiction over this issue, its decision is justified and should be upheld.

B. The NSCB is the Exclusive Arbiter of What Work Requires a Contractor's License under Nevada Law and this Court should Not Question is Decision in this Case.

Notwithstanding the fact that there is no genuine issue of material fact to support TOM's claim, the district court was correct that the NSCB' s position is controlling in this case and should not be overturned as a matter of law. It is simply not a function of the courts to substitute their judgment for an Administrative agency charged with handling a specific function. As this Court has stated:

> This court, like the district court, gives considerable deference to the [administrative agency's] rulings. [citations] Unless the board *should act arbitrarily, unreasonably or capriciously beyond administrative boundaries* *the court must give credence to the findings of the board*. An agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action."

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[14] *Wood, supra*, 121 Nev. at 731; 121 P.3d at 1030-31.

City of North Las Vegas v. State of Nevada, 127 Nev.Adv.Op. 57, 261 P.3d 1071, 1074 (2012) (emphasis added).

As the facts demonstrate, TOM complained to the NSCB about the lack of a license (JA00442-498) and IHS explained its position to the NSCB in detail (JA00500-572). Rather, after reviewing the work performed by IHS, the NSCB found that complaint about a lack of a license at bidding to be meritless and dismissed it. JA00574-576. The NSCB was provided the same information that this Court has before it, yet as the Administrative Agency charged with interpreting NRS Chapter 624 and with *drafting* the Nevada Administrative Code Chapter 624 (See NRS 233B.040(1) and NRS 624.100), made no finding that a contractor's license was necessary to bid on or enter into the Contract. This is a function solely within the purview of the NSCB. NRS 624.112. In fact, if a contractor's license would have been necessary for IHS to enter into the Contract as TOM asserts, the NSCB Executive Director was *required* to issue an order to IHS to cease work. As NRS 624.212(1) provides:

> The Executive Officer, on behalf of the Board, *shall* issue an order *to cease and desist* to any person:
> (a) Acting as a contractor, including, without limitation, *commencing work as a contractor*; or
> (B) *Submitting a bid* on a job situated in this State,
> → *without an active license of the proper classification* issued pursuant to this chapter.

(Emphasis added.)

The literal interpretation of this duty would have required the NSCB investigator to stop IHS from performing *any* work on DR. TOM's Property, if DR. TOM's complaint about no license at the time of contracting held any merit. They did not. In fact, the NSCB investigator ordered IHS to *complete* its work (which IHS did) and then the NSCB closed its file, deeming the matter completely resolved.[15] JA00578.

TOM attacks the district court for reviewing the NSCB advisory opinions. Yet the NSCB's advisory opinions are in accord with other jurisdictions dealing with this same issue and provide insight into the NSCB's license considerations. In *Walker v Thornsberry*, 158 Cal. Rptr. 862 (Cal.Ct.App. 1979), a manufacturer of pre-fabricated restrooms, designed and furnished "prefabricated pieces consisting of steel columns, beams, girders, steel connections, metal siding and roof, all pre-cut to size. [It's] employees assembled the component parts and attached the completed unit to the concrete foundation by means of bolts through a metal channel along the base of the wall." *Id.*, at 862. The Court held that California Business & Professions Code § 7031 (California's equivalent to NRS 624.320) did *not* apply to "construction activity that is merely incidental, such as the installation of kitchen appliances." *Walker, supra*, 158 Cal.Rptr. at 847, quoting *E.A. Davis &*

[15] For this Court to undertake the responsibility to question whether or not a contractor's license was needed in this case, after the NSCB was specifically confronted with the issue, would be opening the door to a very slippery slope.

Co. v. Richards, 120 Cal.App.2d 237, 260 P.2d 805 (Cal.Ct.App 1953). While TOM correctly points out that the advisory opinions are limited to their facts, IHS was under no obligation to obtain a specific advisory opinion from the NSCB that it was not required to have a contractor's license to perform its work, as TOM asserts is possible under NRS 624.160(3). To the contrary, TOM (being the party disputing IHS' claim of exemption) had every ability himself to seek its own advisory ruling from the NSCB on the issue, but did not chose to do so.

The evidence before the district court, *which TOM does not dispute* on appeal, was that the components sold and installed by IHS under the Contract are standalone components that are placed and plugged into existing electrical outlets in the TOM property. JA00365-372, ¶s 2 & 3. For the most part, the connections these components are actually *wireless*. To the extent any actual wired connections were required, such connections were made by connecting the equipment to *existing cabling infrastructure* or cabling installed by other licensed contractors hired by TOM. JA00365-372, ¶ 4-6. In fact, this work did not even require a building permit. For example, Section 22.02.200 of the 2010 Clark County Building Code (JA00590-592) states:

> An electrical permit shall not be required for the work as listed in the following:...
> (E) Repair or replacement of current-carrying parts of any switch, contactor or control device,
> (F) Replacement of attached plug receptacles, but not the outlet box.

> (G) Repair or replacement of any over current device of the required capacity in the same location.
> ...
> (N) Power-limited wiring of 50 volts or less in or associated with single family dwellings.
> (O) Exposed surface-mounted power limited wiring.
> (P) Replacement of lighting fixtures in single family residences...
> *(Q) Installing low voltage devices and data links.*

(Emphasis added.)

As the above referenced undisputed facts demonstrate, the materials IHS sold and installed IHS are standalone finished products, that are merely set or bolted into place, connected wirelessly or into previously installed and existing electrical wires or new wiring installed by other licensed professionals under separate direct contracts between TOM and his other contractors. IHS was in no way responsible for that other work, nor was it included in the Contract. TOM failed to dispute any of these offered facts. As such, the district court determined IHS did not need a contractors' license to perform the work under the Contract for which it seeks payment. TOM offered no evidence to contradict these facts at the district court level, and cannot do so here. IHS was entitled to summary judgment as a matter of law, and this Court should not reverse that ruling by the district court.

Likewise, the district court had no reason to dispute or call into question the NSCB' s determination. This is not an issue of issue preclusion, but of deference to the administrative agency with jurisdiction over the issue of licensure. If TOM

disputed the NSCB' s decision not to validate TOM's complaint that IHS did not have a license, TOM should have challenged that decision with the NSCB, under the Administrative Procedures Act (NRS Chapter 233B). Regardless, having placed the matter of necessarily licensure before the NSCB, TOM is not in a position to challenge the issue again before the district court, especially without having first provided the district court with admissible evidence of a material factual dispute that called the NSCB' s decision not to hold IHS to having a license into question. This Court should not disturb the district court's entering of summary judgment.

C. The District Court's Denial of a Continuance for Discovery under NRCP Rule 56(f) Should Not Be Reversed Because TOM Failed to Demonstrate Such Discovery Would Likely Produce Evidence Leading to Creation of Genuine Issues of Material Fact.

The mere fact that TOM's counsel submitted a conclusory affidavit in support of a request under NRCP Rule 56(f) is not the end of the discussion on whether or not the district court abused its discretion in denying the request, such that summary judgment should be reversed. Rather, the affidavit must demonstrate that the requesting party was unable to marshal facts in support of its opposition, and affirmatively express how further discovery will lead to the creation of a genuine issue of material fact. *Aviation Ventures Inc. v. Joan Morris, Inc.*, 121 Nev. 113, 117-18, 110 P.3d 59, 62 (2005).

It should first be noted that TOM submitted a "declaration" of his counsel, George E. Robinson, Esq., in support of the request for additional discovery. Again, the declaration is merely 1 page long (JA00626) and like's TOM's affidavit contains nothing more that the bald assertion that discovery should be allowed:

> 4. Timothy Tom should be afforded an opportunity to conduct discovery pursuant to NRCP 56(f), with regard to the allegations raised in IHS' Motion ..., as neither party has had an opportunity to conduct needed discovery.
> 5. As an example of the discovery needed, discovery should be allowed on the investigations of the NSCB and the NSCB as to the licensing requirements of IHS.
> 6. Expert witnesses must also be retained as to the licensing requirements for the work performed.

(*See* JA00626). There is no attempt to dispute the fact that the materials supplied by IHS meet the exception of NRS 624.031(6). There is no statement as to why TOM could not marshal any facts at all to support his position that a license was required. The uncontradicted facts are that TOM hired separate licensed contractors to perform work that required a license, because IHS refused to perform such work. TOM does not deny that at all. TOM does not provide the district court with *any* substantive facts or basis why it could not provide any evidence at all, nor what it expects the discovery to reveal. The declaration merely says TOM wants discovery, not what discovery he specifically wants to undertake or what he believes that discovery will reveal. This is simply not sufficient to allow

this Court to find the district court abused its discretion in denying TOM's NRCP Rule 56(f) request for discovery.

D. TOM's Affidavit in Opposition to the Motion for Summary Judgment Raised No Admissible Evidence of a Genuine Issue of Material Fact.

As has been mentioned to previously, the affidavit submitted by TOM in opposition to IHS' motion for summary judgment was legally insufficient to raise a genuine issue of material fact that would have defeated summary judgment. It is only through the misunderstanding of this Court's standards for evidence sufficient to raise a genuine issue of material fact in opposition to a motion for summary judgment that TOM can assert that his affidavit does so.

While this Court will review an order granting summary judgment by conducting a de novo review of the pleadings and proof offered, the essential question on appeal is whether those pleadings and proof created genuine issues of material fact. *Whealon v. Sterling*, 121 Nev. 662, 666, 119 P.3d 1241, 1244-45 (2005). Those pleadings and proofs must present substantial evidence sufficient for a jury to find in favor of the non-moving party; evidence that is merely colorable or not sufficiently probative is not sufficient to preclude summary judgment. *Oehler v. Humana, Inc.*, 105 Nev. 348, 351, 775 P.2d 1272, 1273 (1989). If an affidavit submitted in opposition to a motion for summary judgment does not contradict the affirmative representations made by the moving party, the affidavit cannot create a

genuine issue of material fact sufficient to defeat a summary judgment motion. *Lockitch v. Boyer*, 74 Nev. 36, 39, 321 P.2d 254, 255 (1958).

1. TOM's affidavit does not present admissible facts, but rather mere conclusions without any support or evidentiary foundation.

The affidavit submitted by TOM in opposition to IHS' motion for summary judgment contained insufficient facts and foundations to be admitted into evidence, or to support the conclusions it contains. First, TOM's affidavit was not executed in response to the evidence submitted by IHS in support of its motion for summary judgment. IHS based its motion on the Affidavit of Jeffrey K. Brown, which was executed on October 18, 2013 before a notary public (JA00372). The TOM Affidavit (JA00620-621) was allegedly signed on July 23, 2013 – *4 months before* the Brown Affidavit was signed or IHS' motion for summary judgment was filed. The statements made therein certainly were not made specifically in response to IHS' motion.

Secondly, the affidavit contains mere conclusions, omitting key facts necessary to remotely understand what TOM is alluding to in his testimony, and requiring the reader to assume far too much to be admissible.[16] Specifically, TOM makes the statement in paragraph 3 that "after much of the work on his residence

[16] IHS objected to the admission of the TOM Affidavit, and raised arguments as to its sufficiency in oral argument multiple times. *See example*: Reporter's Transcript dated 01/14/2014, JA00824, ll. 13-18.

was complete and the majority of the contract was paid for" equipment installed by IHS was not working properly.[17] But this statement begs several questions:

1. What "work" was complete? IHS had provided evidence that its work was merely part of lots of work performed for TOM, and offered evidence that TOM had entered into contracts with other contractors. *See* JA00366, ¶ 6. TOM offered no evidence to rebut this evidence.
2. What residence? The unrebutted evidence is that TOM is a resident of the State of Texas. JA00366, ¶ 6.
3. Why was the IHS installed equipment not functioning correctly? The unrebutted evidence is that this equipment connects to existing wiring or

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[17] As foundation, TOM provides merely two sentences:

> 1. I am personally knowledgeable about the facts contained herein and am competent to testify.
> 2. I am the owner of the residence located at 1840 Claudine Drive, Las Vegas, NV 89156.

JA00620, ll. 6-9.

These statements provide no foundation to support TOM's competency or his having personal knowledge about the issues raised in the Brown affidavit submitted by IHS. "A witness may not testify to a matter unless (a) Evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." NRS 50.025(1). TOM's statements that he is "personally knowledgeable" about facts and that he is "competent to testify" are mere conclusions. While the fact that he is the owner of a residence at a certain address, this does not establish that he occupied the residence, or that he has any information obtained by his personal involvement in the transaction. While IHS provided some context that *may* help to establish some direct involvement in the transaction, there is no evidence that TOM has personal knowledge of the basis for the balance of his affidavit testimony.

work installed by others. JA00365-366. Nothing in this affidavit establishes that IHS' work was the cause of the non-functioning.

Without providing affirmative answers to these questions, TOM's affidavit is not admissible evidence and therefore cannot be used to create a genuine issue of material fact to defeat summary judgment. The balance of the affidavit similarly just makes conclusory statements that have no foundation, are mostly irrelevant, and have little bearing on the actual dispute as they relate to issues that are not even part of the contract between the parties. They cannot create a genuine issue of material fact sufficient to overcome summary judgment.

2. TOM's Affidavit does not contradict the evidence submitted by IHS and therefore cannot create genuine issues of material fact to defeat summary judgment.

Likewise, after TOM admits that "after some of the issues were corrected by IHS," he claims there were still issues with some of "the work." JA00620, ¶ 6. He then makes general statements about several items but provides no facts to support his statements. He makes no affirmative statements of facts that these were ever part of the scope of work under the contract, that IHS was ever obligated to provide them that IHS was seeking payment for these items or that IHS was somehow liable for the alleged issue. It is important to note that the NSCB investigator made no mention of these in directing IHS to complete the unfinished contracted for scope of work. That was undoubtedly because, as the district court

determined, the uncontroverted evidence is that these items were either never part of the contract or were specifically deleted by TOM through change orders:

- *Equipment Ventilation Rack System* – Jeff Brown testified (JA00367-368, ¶s 8 & 9, JA00371, ¶ 17 & 18) that the final scope of work under the contract is reflected in Scope Revision 9.1 which is Exhibit 17 to his Affidavit (JA000579-583). A review of this scope shows that no "Equipment Rack Ventilation System" was part of IHS' scope of work.
- *Sprinkler System* – Again, the uncontradicted evidence shows that TOM was never charged for the sprinkler system, as it was deleted by TOM through change orders. (JA00367-368, ¶s 8 & 9, JA00410-414; JA00371-372, ¶s 17 & 18, JA00579-583).
- *Sidelight Window Switchable Smart Tint* – Uncontroverted evidence is that this items was deleted by TOM by Change Order, TOM had a different contractor install a different product, and signed a change order with IHS while it was completing work under the NSCB direction to hook up this different product to the Control4 system. JA00368, ¶ 9, JA00371, ¶17.
- *Wiring Diagram for Upstairs Window Prewiring* – Uncontroverted evidence is that there never was a contract scope item to provide such a diagram (JA00367-368, ¶s 8 & 9, JA00410-414; JA00371-372, ¶s 17 & 18,

JA00579-583); that IHS installed its components into existing wiring or wiring installed by other contractors (JA00365-367, ¶s 2-8).[18]

While TOM's assertion that these items were not complete or performed may raise a question about the function or existence of these items, TOM fails entirely to rebut the definitive evidence provided by IHS that they were not part of IHS' scope of work under its Contract with TOM. Therefore, TOM's conclusory self-serving affidavit does not address the key issue on which the district court based its decision that there was no genuine issue of material fact. The only way that TOM's affidavit can do so, is to make the *assumption* from his statement that the items were part of IHS' scope of work. But, there is simply no evidence to support that assumption.

In summary, apart from providing no facts laying a foundation or context for the conclusions that certain issues did not function, the TOM Affidavit (executed 4 months before IHS filed its motion and Brown executed his Affidavit) does not controvert the facts submitted by IHS that these items were not part of the Contract scope. As such, these items are not sufficient to create a genuine issue of material

[18] It is important to note here that TOM makes the legal argument that through looking at IHS' evidence one needs to "imply" the fact that IHS installed wiring in the Project (Opening Brief, pg. 9-10), but TOM does not even mention installing wiring when he claims IHS did not provide a wiring diagram for upstairs window "prewiring." If something is "prewired" it implies that the wiring already exists for the purpose of someone later hooking something up to the existing wires without running new ones.

fact sufficient to defeat summary judgment. *Lockitch v. Boyer*, 74 Nev. 36, 39, 321 P.2d 254, 255 (1958). But beyond this, TOM's abject failure to even attempt to rebut this key fact in a contemporaneously prepared rebutting affidavit is yet another indication of TOM's lack of legitimate and good faith interest in prosecuting an actual grievance against IHS. The *laissez faire* attitude which TOM approached this motion for summary judgment is significant and substantial proof that TOM's actions in this matter were maintained without reasonable grounds and were intended merely to harass IHS into capitulation.

E. The District Court's Awarding of Attorney's Fees were Absolutely Justified under Both NRS 18.010(2)(b) and NRS 108.239.

Finally, TOM argues that attorney's fees and costs should not be awarded for two reasons: 1) there were allegedly reasonable grounds for TOM to dispute the amount owed to IHS and his actions were not meant to harass IHS; and 2) the Court failed to consider the factors on attorneys' fees under *Brunzell* and the claim included fees incurred in defending IHS from the complaint filed against TOM with the NSCB. TOM's appeal on both should fail and not be sustained by this Court. As this Court has consistently maintained, however, an award of attorney's fees will not be overturned except when there is a manifest abuse of discretion. *Cuzze v. University & Cmty Coll. Sys.*, 123 Nev. 598, 606, 172 P.3d 131, ___ (2007). In this case, the district court was more than justified in awarding the

reduced attorney's fees she did, as the evidence fully proves that TOM's alleged "complaints" were only raised in a bad faith effort to force IHS to accept less that what it was lawfully owed.

1. Ample Evidence Supports the Court's Finding that TOM Acted in Bad Faith in Pursuing its Alleged "Claims" and "Defenses" and therefore its Award of Attorney's Fees under NRS 18.010(2)(b) is Justified.

NRS 18.010(2)(b) specifically provides:

> In addition to cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees to a prevailing party: (b) *Without regard to the recovery* sought, when the court finds that the claim, counterclaim, cross-claim or third party complaint or defense of the opposing party was brought or maintained *without reasonable ground or to harass the prevailing party*. The court shall liberally construe the provisions of this paragraph in favor of awarding attorneys' fees in all appropriate situations. It is the intent of the Legislature that the Court award attorney's fees pursuant to this paragraph ... *to punish for and deter frivolous ... defenses* because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and *increase the costs of engaging in business and providing professional services to the public.*

(Emphasis added).

It should be initially noted that the district court made specific findings that TOM failed to provide any admissible evidence to support its allegations and granted IHS summary judgment on its causes of action, including the cause of

action for breach of the covenant of good faith and fair dealing. JA00658, ll .9-10. Judgment on this cause of action was based on the district court's finding, based on substantial evidence, that after TOM had made progress payments throughout the performance of the IHS work, when in December 2012 IHS believed the work was substantially complete, sought an additional progress payment and asked for TOM to do a final walk through of the work with it, TOM suddenly refused to make any further payment, alleged for the first time that no payment was actually due until he said the work was complete, and refused to agree to a final inspection of the work to determine what remained to be finished. JA00651, ll. 5-14; JA00368, ¶s 10-13 & Exhibit 10 (JA00419-435). Instead, TOM asserted a number of complaints in various correspondence and hired counsel. JA00651, ll. 12-14; JA00368, ¶s 10-13 & Exhibit 10 (JA00419-435).

When TOM turned this matter over to his counsel, IHS initially consulted with another attorney. TOM's counsel had written to this attorney in January and February 2013, making unsubstantiated demands that various additional work was part of the Contract and remained to be done. JA00455-496. For the very first time, however, TOM's counsel suggested in its January 2013 letter that IHS was not licensed when it entered into the Contract and threatened IHS with *criminal* penalties (*see* JA00455-458, *and specifically* the first full paragraph of JA00458) if

IHS did not capitulate to TOM's demands.[19] Upon seeing this threat and recognizing this to be a construction / mechanics lien potential dispute, referred IHS to the undersigned counsel, Leon F. Mead II, Esq., of Snell & Wilmer LLP, based on the undersigned counsel's experience with contractor's board citation investigation hearings and mechanics lien issues. IHS retained Snell & Wilmer and Mr. Mead to handle this matter and specifically requested Mr. Mead to handle the matter personally.[20]

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[19] In some jurisdictions, it is a violation of a lawyer's code of professional conduct to make a threat of criminal liability or to present an administrative complaint against a party to gain an advantage in a civil matter. *See* Cal. Rules of Professional Conduct, Rule 5-100. Indeed, the filing of the complaint with the NSCB would have been a violation of this rule had this dispute arose in California, as the NSCB has the power to order the suspension of a contractor's license. While the Nevada Rules of Professional Conduct does not have a similar professional conduct rule, NRS 205.320(1) makes the threat to accuse another of a crime with the intent to obtain something of value a class B Felony. Certainly, the impact of such a threat, if not specifically in violation of NRS 205.320, could be prejudicial to the administration of justice, and doing so a potential violation of NRPC Rule 8.4. While IHS does not make such an allegation against opposing counsel in this matter, it does wish to impress upon the Court that the severity of such a threat to the very livelihood of a contractor will certainly justify that contractor retaining the best and most experienced counsel available to defend itself. Moreover, the act of actually filing the license board complaint in the middle of negotiations was of no practical purpose and did nothing other than harass and threaten IHS.

[20] While it is not directly relevant to the Court's decision on summary judgment, part of the reason IHS hired the undersigned counsel for this matter was the hope that prior relationship between counsel would help to reduce the tension in this matter to foster resolution. *See* JA00758, ll. 24-25. Unfortunately, that relationship was not helpful to resolving the matter.

As shown by the billing entries in support of the motion for attorneys' fees and costs, within the first week of representation (February 12-20, 2013), IHS' counsel discussed with TOM's counsel who confirmed their intention on the license issue and demanded a written response to their lengthy claims of unfinished work. (JA00681). That response took a while to track down and verify, and was completed on March 27, 2013. JA00682. Before the response was even received, however, TOM made good on his threats and filed a complaint with the NSCB.[21]

It should also be noted that at no time did TOM *ever* seek to have the work IHS performed removed from the property. If TOM was legitimately concerned that the home automation system was installed by an "unlicensed contractor" one would expect TOM to demand it be removed and his money returned. But that was never TOM's goal – TOM's only goal was to have the minor remaining work completed and to pressure IHS into walking away from the balance due. But as the negotiations between the parties showed, IHS was always willing to perform the work if TOM made a reasonable partial payment. JA00651, ll. 5-14; JA00368, ¶s 10-13 & Exhibit 10 (JA00419-435). There was no legitimate reason to file a complaint with the NSCB – it was pure harassment.

The harassing nature of TOM's action is also demonstrated by the fact that after the NSCB had investigated the matter and IHS completed the minor items the

[21] It should also be fully understood that these allegations made by TOM to the NSCB are not trivial issues for a licensed contractor such as IHS. The NSCB

NSCB directed them to complete, TOM still refused to pay IHS for its now complete work. Instead, TOM continued to assert that some things were not complete – things as shown above where never in the scope of work IHS was contracted to perform at all. But the most damning evidence that TOM's motivation was purely to harass IHS is his last minute "offer of judgment" for the principal sum of the debt only. JA00734-735. By that time, TOM had caused IHS to incur over $50,000 in attorney's fees in order to fend off a frivolous complaint of unlicensed contracting to the NSCB and to prosecute this matter almost to its final conclusion. Under these circumstances the existence of TOM's bad faith and a purpose to harass is palpable. This more than justifies an award of the full amount of requested fees under NRS 18.010(2)(b).

2. The Attorneys' Fee award was justified under both NRS 108.237 and *Brunzell*

Finally, TOM objects to the reduced attorney fee award because it included fees incurred in defense of the NSCB Complaint that TOM filed and because it asserts the *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969). But the reduced award of attorney's fees is proper under both arguments. TOM included IHS' recording of its lien in filing the NSCB complaint, which has to power to sanction IHS if it was wrongly recorded, and the Court absolutely analyzed the *Brunzell* factors in its award.

The portion of the reduced attorneys' fees that may be attributed to the NSCB investigation is nevertheless still recoverable under the provisions of NRS 108.237 because the NSCB investigation was *incidental to the defense* of the mechanics lien claim. Despite TOM's protestations to the contrary, this Court's determination in *Barney v. Mt. Rose Heating & Air Cond.*, 124 Nev. 821, 192 P.3d 730 (2008) does not preclude the award of attorney's fees to IHS in this matter under NRS 108.237.[22] Rather, *Barney* supports the district court's award of attorney's fees in this matter.

In *Barney*, the lien claimant had been awarded attorney's fees and costs incurred after the judgment foreclosing on its mechanics lien but before an actual foreclosure of the property to which the lien attached. *Barney*, 124 Nev. at 824. The lien claimant attempted to levy the judgment debtor's personal bank accounts prior to the sale of the property, and fees incurred in subsequent litigation over the propriety of that personal property levy were included by the district court in the mechanics lien attorney fee award. *Id.* This Court reviewed the order of the district court for abuse of discretion "given that those fees were incurred to contest issues that might not have been necessary and on which Barney ultimately prevailed" (*Id.*, at 829) and ultimately determined that the fees awarded for litigation on the

[22] It is also important to note that unlike the district court in *Barney*, here the district court awarded attorney's fees and costs under NRS 18.010(2)(b) as well as NRS 108.237. Therefore, the district court was not limited to the award fees incurred solely under the mechanics lien law foreclosure case.

personal property levy were not incidental to the lien foreclosure but were "outside of the lien enforcement and foreclosure proceedings." *Id.* at 830. The fees objected to here, however, are wholly distinguishable from *Barney* because they were incurred prior to the final judgment foreclosing the lien and were necessary for the defense of the lien against TOM's strategy to undermine its legitimacy.

As noted above, IHS had already begun the process of enforcing and foreclosing its lien when TOM's filed his complaint to the NSCB.[23] TOM's strategy was to have the NSCB determine that IHS was unlicensed and potentially to determine the lien was not property recorded as a result. TOM points this Court to NRS 108.222(2) and its requirement that a lien claimant to have a contractor's license in order to enforce a mechanics lien under NRS 108.221 through 108.246, inclusive, *if one is necessary* for the work giving rise to the lien. TOM was fully aware of this and included the fact that IHS had recorded its lien as part of his complaint to the NSCB (*See* JA00442-443, Item 23 (on JA00443)) while asserting that IHS was unlicensed (*See* JA00443, Item 12). As noted above, the NSCB has

[23] IHS served its notice of intent to lien under NRS 108.226(6) on TOM January 25, 2013 (JA00437-438), recorded and served its Notice of Lien on February 13, 2013 (JA00440). Thereafter, TOM filed his complaint with the NSCB on March 25, 2013 (JA00442-498), and included the recorded lien as Exhibit 3 to that NSCB complaint (J00497-498). Thus, TOM was definitively seeking the NSCB' s adjudication of the legitimacy of the lien in light of his allegations that IHS was unlicensed. Hence, any action that TOM took that may have negatively impacted the legitimacy of IHS' right to enforce the lien necessarily was incidental to the enforcement of that lien even if it involved matters before the NSCB.

the power to take disciplinary action against a contractor for improper conduct related to the recording of a lien under Nevada's mechanics lien statutes. NRS 624.3016(3). A negative determination by the NSCB that IHS was unlicensed and was subject to citation for improperly recording its lien would have gone a long way to defeat IHS' claim for payment. Thus, the fees and costs IHS incurred to fend off this NSCB Complaint were not only *incidental* to the lien foreclosure, *it was critical* to the lien foreclosure.

When considered in this light, the district court's consideration and award in light of the *Brunzell* factors becomes readily apparent. The undersigned counsel's credentials on the legal aspects of Nevada construction, mechanics liens and related matters are well known to this Court and need not be repeated in detail here.[24] Indeed, TOM bases its argument that counsel was *over-qualified* to handle this matter. Instead, TOM claims that the prominence and character of the parties is minimal, the issues were not unique and the matter was not sufficiently developed to support such large fees. *See* Opening Brief, pgs. 29-30. But TOM overemphasizes the district court's analysis obligation. In awarding attorney's fees, the district court has broad discretion to determine how a reasonable attorney's fee is calculated "tempered only by reason and fairness." *Shuette v. Beazer Homes*,

[24] Counsel's credentials were spelled out in detail in IHS' motion for attorney's fees and the Court can review them in detail there, if it is so inclined. *See* JA00660-679).

121 Nev. 837, 864-865, 124 P.3d 530, 548-549 (2005). It then must "continue its analysis by considering the requested amount in light of the *Brunzell* factors. *Id.* The ultimate award "will prove reasonable as long as the court provides sufficient reasoning and findings in support of its ultimate determination." *Id.* As such, a factor by factor determination is not required to uphold an attorney's fee award. In this case, the district court did not issue a decision with a factor by factor analysis, but nevertheless it award should be upheld when the findings of fact and conclusions of law are considered in conjunction with the award of attorney's fees and costs.

As discussed above, the district court found that TOM's actions in the case were not undertaken in good faith and specifically found that TOM refused to make payment, allow a final inspection of the work and instead filed a complaint with the NSCB (JA00651, ¶ 7), and even after the minor workmanship issues were resolved JA00652, ¶ 13), TOM did not take any action with the NSCB to assert any claim still remained (JA00654, ¶ 3). In opposing summary judgment, TOM failed to provide the district court with admissible facts or supportable authority to oppose the summary judgment motion (JA00655, ¶s 6, 7, 8, 10 and 11). As such, the district court found in favor of IHS on all counts, including the cause of action for breach of the covenant of good faith and fair dealing (JA00657-658).

Thereafter, IHS fully briefed the issue of costs and attorney's fees under both NRS 108.237 and NRS 18.010(2)(b) (JA00660-710), including a complete analysis of the *Brunzell* factors (JA00664-666). TOM opposed this motion (JA00711-), specifically making the same argument it asserts here that the fee is not justified under *Brunzell* (JA00718-721). IHS replied to that opposition (JA00757-767), and again discussed the *Brunzell* factors in light of the case facts (JA00764-765). After considering the analysis and argument of the Parties, the district court made an award of attorney's fees in a *reduced* amount, dropping the award 36% ($20,040.50 / $55,390.50=.361). In doing this, the district court determined that it would only allow 30 hours at the standard rate of $495 per hour and 82 hours at the rate of $250 – essentially, 50% of counsel's standard rate. While this was not a reduction in the time expended, it was a substantial reduction in the rate charged to the IHS for counsel's time. In doing this, the district court had to take into account TOM's arguments and applied the *Brunzell* factors accordingly. Given all of this, the district court's award of attorney's fees in the amount of $35,350.00 is reasonable.

TOM chose to complicate this matter unnecessarily by making false allegations to the NSCB in an attempt to avoid the lien by claiming IHS was not licensed. The administrative predicament that TOM put IHS in as an attack on its right to payment and lien more than justifies the additional expense, especially at

the reduced fee amount of $250 per hour. All of that activity was necessary for IHS to undertake to defend its lien claim and right to payment from TOM. As such, the fees awarded were reasonable and incidental to the lien foreclosure. Since TOM really had no good faith and legitimate argument that IHS was not licensed to perform the work, had no actual qualms with IHS' work (evidenced by asking IHS to perform additional work when showed it was outside of IHS contract scope) and did not provide admissible evidence to support its claims in opposition to the summary judgment motion, the district court reasonably found fees appropriate under NRS 18.010(2)(b) as well. The district court's judgment should be upheld in total.

V. CONCLUSION

This case is one that IHS never wanted to happen. IHS performed its work in good faith and was fair to TOM in every instance. The evidence submitted to the district court (and supplied to this Court in the joint appendix) demonstrated that IHS was merely attempting to obtain its next progress payment and to conduct a final walk-through of the work, in order to make sure that TOM was fully satisfied. For no legitimate reason TOM escalated this matter to a NSCB complaint, threatened criminal charges, and put IHS in potential jeopardy not only of losing its right to payment for the work it performed for TOM but of its right to hold a

contractor's license at all in this state. There was no need for TOM's aggressive and harassing actions, at all.

IHS determined that it would not be bullied. So it did not capitulate to unreasonable demands and faced the potential consequences of TOM's actions believing that it was in the right and that the Courts and Nevada law would protect it. As IHS stood firm (at significant financial expense), TOM's claims were shown for the frivolousness that they were and wilted under the light of forensic examination. TOM provided no admissible evidence to defeat summary judgment, and demonstrated pure contempt for the law and IHS by his failure to take this matter seriously. The district court saw the lack of good faith in TOM's disputes and considering the lack of admissible evidence in dispute of genuine factual issues, entered summary judgment and found TOM acted in bad faith. It awarded a reasonable attorney's fee in its discretion. That determination, and all of it, should be upheld. TOM should not be allowed to use the NSCB complaint procedures and this Court's guidance of summary judgment review merely to harass IHS. This Court should uphold the district court's determination because it was the correct one based on what was presented to it.

IHS respectfully requests this Court to affirm the district court's judgment against TOM entirely.

Respectfully submitted.

Dated: January 26, 2015.

SNELL & WILMER L.L.P.

/s/ ***Leon F. Mead II***

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CERTIFICATE OF COMPLIANCE

I hereby certify that the **RESPONDENTS' ANSWERING BRIEF** complies with the typeface and type style requirements of NRAP 32(a)(4)-(6), because this brief has been prepared in a proportionally spaced typeface using a Microsoft Word 2010 processing program in 14-point Times New Roman type style.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because it contains approximately 12,280 words.

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

/s/ Leon F. Mead II
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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I electronically filed the foregoing **RESPONDENT INNOVATIVE HOME SYSTEMS RESPONSE TO CASE APPEAL STATEMENT** with the Clerk of Court for the Supreme Court of Nevada by using the appellate e-filing system on January 27, 2015.

I further certify that all participants in this case are registered e-filing users and that service will be accomplished by the appellate e-filing system.

/s/ Rita Tuttle
An employee of Snell & Wilmer L.L.P.