

IN THE SUPREME COURT OF THE STATE OF NEVADA

TIMOTHY TOM, an individual,

Appellant,

v.

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

Respondent.

Case No.: 65419
66006

District Court Case No. A680766

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APPELLANT'S REPLY BRIEF

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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.

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IV. ARGUMENT

A. INTRODUCTION

The Response Brief (“Response”) submitted by Respondent Innovative Home Systems, LLC (“IHS”) is long on rhetoric but short on facts and law. IHS completely fails to address a primary issue on appeal, namely the binding effect, or lack thereof, of inaction of a Nevada State Contractor’s Board (“NSCB”) investigator regarding the need of IHS to hold a Nevada contractor’s license for work performed at the residence of Appellant Timothy Tom (“TOM”). To that end, rather than address the merit of the case before the Court, IHS seeks to distract the Court with accusations and personal attacks unsupported by the record and seeks to reframe the issues from what existed before the district court in an attempt to create a legally supportable position. In furtherance of this strategy IHS makes a thinly veiled attempt at portraying TOM as a well to do physician building a vacation home on the back of a sub-contractor ill-equipped to protect itself. *See* Response, p. 2. IHS’ portrayal is inaccurate, not supported by the record and ignores the fact that IHS failed to fulfill the terms of its contract with TOM and was subject of a Notice to Correct by an investigator of the NSCB requiring IHS to perform additional work. JA 00731 – 00732. Many of IHS’ arguments are based solely upon the subjective opinion of the principal of IHS and do not find support in the record on appeal. Likewise, IHS relies on legal authorities from

1 jurisdictions outside Nevada as Nevada law does not support its propositions.
2 When faced with controlling precedent from Nevada, IHS ignores entire issues
3 raised in the Opening Brief and attempts to alter the issues on appeal in such a
4 fashion as to protect the erroneous ruling of the district court rendered before
5 discovery even commenced.
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8 IHS bases much of its Response on the argument that the NSCB made a
9 determination that IHS was not required to hold a contractor's license when
10 performing work at the TOM residence as evidenced by the fact that the NSCB did
11 not issue a Cease and Desist Order. *See* Response, p. 18. As set forth in the
12 Opening Brief, such inaction on behalf of the NSCB does not establish that IHS
13 was licensed at all relevant times nor that the NSCB made a determination
14 regarding the need of IHS to be licensed. The Response ignores the fact that by the
15 time TOM had filed a consumer complaint with the NSCB, IHS had applied for
16 and received a contractor's license, thus, a Cease and Desist order would not have
17 been issued given the fact that IHS, after the fact, had acquired the needed
18 contractor's license. Additionally, whether or not the NSCB did, or did not, issue a
19 Cease and Desist Order is irrelevant as no formal proceedings were ever held by
20 the NSCB, no evidence was ever presented, no complaint was filed to initiate a
21 proceeding and TOM was never made a party to any proceeding. As set forth in
22 greater detail below, IHS does not address, in any fashion, the requirements which
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1 must be shown in order for an administrative agency's determination to be binding
2 upon a party in subsequent proceedings. IHS actually admits that the NSCB
3 ignored the issue of licensure when it was raised by TOM in his consumer
4 complaint. *See* Response, p. 16. Having ignored the issue, it is illogical to argue
5 that the NSCB somehow affirmatively ruled upon such issue and by extension that
6 this inaction could have a preclusive effect in a genuine legal dispute.
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9 IHS also argues that it has demonstrated conclusively that no issue of
10 genuine fact existed at the time the district court ruled upon its Motion for
11 Summary Judgment/Motion to Dismiss; however, in doing so IHS misrepresents
12 the record on appeal. As set forth in detail herein, IHS' claim that it has
13 demonstrated that certain items complained of by TOM were not within the scope
14 of work of IHS. As demonstrated, however, the items that IHS argues were not
15 within its scope actually appear in the final agreement between the parties, thus
16 rendering IHS' arguments meritless.
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20 Finally, IHS argues the order granting it attorneys' fees should be upheld.
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22 IHS bases this argument on the theory that the district court must have made its
23 award pursuant to the relevant factors established by this Court despite the fact that
24 the district court's order is silent on what factors it relied upon. As established by
25 this Court, district courts have certain mandatory obligations which must be met
26 when ordering the award of attorneys' fees. The record is devoid of evidence
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1 concerning what the district court considered in making its award of attorneys' fees
2 and must therefore be reversed. Likewise, the order is improper as it includes
3 attorneys' fees allegedly incurred by IHS for matters heard outside of the district
4 court proceedings.
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6 **B. ARGUMENT AND AUTHORITY**

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8 **1. The District Court's Decision Must be Reversed as it Was**
9 **Improperly Based Upon an Erroneous Reliance of Inaction of an**
10 **Investigator of the NSCB.**

11 IHS fails to address the issues raised in Tom's Opening Brief as they relate
12 to the critically important issues of claim preclusion and issue preclusion. The
13 Court should treat IHS' failure to address the issues presented as an admission that
14 TOM's arguments are meritorious and should therefore reverse the district court's
15 Order granting IHS's Motion for Summary Judgment and Motion to Dismiss.
16 Realizing that the district court's decision was in error, IHS' attempts to
17 circumvent the issues of claim and issue preclusion by claiming that such doctrines
18 are not relevant as IHS is really only claiming that the district court should have
19 given "deference" to the NSCB's inaction. *See* Response, p. 22. Despite this
20 statement, the Response argues in great length regarding the binding nature of the
21 NSCB's alleged action regarding whether IHS was required to hold a Nevada state
22 contractor's license to bid and perform the work in the contract. Such arguments
23 are repeated throughout the Response, despite the fact that the NSCB never
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1 undertook any formal action and never held a hearing on this issue. Indeed, as set
2 forth below, the repeated statements that the NSCB made any determinations in
3 this matter violate the express provisions of NRAP 28(e)(1) which require citation
4 to the record which supports an asserted fact. The record is devoid of any evidence
5 that a formal proceeding was ever commenced by the NSCB or that TOM was a
6 party to any such proceeding had one occurred. As such, these assertions must be
7 disregarded.
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11 **a. IHS Does Not Contest That Claim Preclusion Does Not**
12 **Apply in the Pending Matter and Does Not Bar TOM From**
13 **Litigating His Claims Against IHS.**

14 As stated, IHS does not address, in any fashion, the requirements which
15 must be shown for administrative claim preclusion to apply in a subsequent district
16 court proceeding. Having failed to counter such arguments, this Court should treat
17 such failure as an admission that the District Court erred when it relied upon
18 alleged actions taken by the NSCB and must be reversed. After a review of the
19 Response, the following facts are undisputed: 1) no final judgment was rendered
20 by the NSCB to which claim preclusion could apply; 2) TOM was not a party to
21 the limited actions which were taken by an NSCB investigator; and, 3) TOM's
22 claims asserted in the district court were not claims which were, or could have
23 been, asserted before the NSCB, even if an administrative proceeding had been
24 held. *Accord Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054 (2008).
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1 In failing to address the issues raised by TOM, IHS asserts that the issue
2 before this Court is not one of “preclusive effect” but rather deference to the
3 NSCB; however, IHS simultaneously argues that the NSCB is the “exclusive
4 arbiter” of who is required to hold a contractor’s license. IHS’ argument regarding
5 the actions/inactions of the NSCB are self-contradictory and border on the absurd.
6 Such argument commences on page 18 of the Response with the section entitled
7 “The NSCB is the Exclusive Arbiter of What Work Requires a Contractor’s
8 License Under Nevada Law and this Court Should Not Question is [sic] Decision
9 in this Case.” See Response, p. 18. This heading highlights the blatant
10 misunderstanding IHS has regarding the role of the NSCB. Nowhere in the
11 Response is any authority offered which would suggest that the NSCB is the
12 “exclusive arbiter” of what work requires a contractor’s license. While the NSCB
13 may be statutorily charged with administering the Nevada contracting laws (NRS
14 624.160), there is no authority which states that other administrative or judicial
15 bodies may not make factual determinations as to whether specific work requires
16 licensure. IHS does nothing short of re-write long-standing Nevada contracting
17 law to try and justify its improper actions. If, as argued by IHS, only the NSCB
18 may determine whether work performed on a specific project requires a
19 contractor’s license, then prior to any mechanic’s lien foreclosure action being
20 commenced, the foreclosing party would have to submit the question of its
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1 licensure to the NSCB, as unlicensed contractors are barred from such enforcement
2 actions. *See* NRS 108.222. Indeed, without any legal support whatsoever, IHS has
3 argued that parties, in this, and all other proceedings, must exhaust a non-existent
4 administrative remedy prior to raising the issue of licensure before the Nevada
5 Courts, this, despite the fact that NRS 108.239(1) requires that all foreclosure
6 actions be commenced in a court of competent jurisdiction in the county in which
7 the lien claim was recorded.
8

10 IHS repeatedly argues that the NSCB has made a determination that IHS
11 was not required to be licensed; however, as noted above, the record on appeal is
12 devoid of any such evidence and accordingly IHS cites to none in violation of
13 NRAP 28(e)(1). The first “determination” was a Notice to Correct and the second
14 “determination” is the letter of a single investigative employee of the NSCB which
15 states in full:
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19 Dear Licensee:

20 We wish to take this opportunity to notify you of the disposition of the
21 subject complaint filed against your license.

22 We are closing the complaint because it appears from our
23 investigation that the Issues raised in the complaint have been
24 resolved. We appreciate your cooperation in achieving this resolution.

25 *See* JA 00274. As seen, no rulings were made, no findings issued, no conclusions
26 of law determined. By IHS’ own admission, the NSCB investigator “ignored the
27 issue” of licensure. *See* Response, p. 16 (“TOM filed a complaint with the NSCB
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1 claiming IHS was unlicensed when it entered into the Contract with TOM, *but the*
2 *NSCB ignored the issue . . .*”(emphasis added).

3 IHS argues vociferously that the NSCB was under a legal duty to issue a
4 Cease and Desist Order in the event it found that IHS was currently acting as a
5 contractor without being duly licensed is absolute and binding evidence that a
6 determination was made that IHS was not required to hold a contractor’s license.
7
8 *See* Response pp. 18 – 23. IHS cites to no authority for the novel proposition that
9 an administrative body’s failure to act can be equated with an affirmative finding
10 of fact or conclusion of law. Such an argument is contradictory to Nevada law
11 which states that when an administrative agency renders a decision it must follow
12 the procedures set forth in the Nevada Administrative Code. *See* NRS
13 233B.121(2)(setting forth rights of parties to administrative proceedings).
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17 Additionally, IHS’ does not bring to the Court’s attention the fact that a
18 Cease and Desist Order would have been a futile act in this matter. IHS argues
19 that in the event that it had been determined that IHS was required to hold a license
20 for work performed, that the Executive Director of the NSCB was required to issue
21 a cease and desist order. *See* Response, p. 19. IHS fails to address the fact that at
22 the time the NSCB investigator had the matter presented to him in the form of a
23 consumer complaint [JA 00140 - 00175], IHS had already acquired a contractor’s
24 license. IHS acquired its license on September 12, 2012. *See* JA 00182. TOM’s
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1 consumer complaint was not submitted until March 25, 2013. *See* JA 00140-175.
2 As noted in TOM's consumer complaint, IHS was no longer working at TOM's
3 residence. *Id.* at 00141. Thus, there was no ongoing action to prohibit at the
4 relevant time period as no work was occurring and IHS had acquired a contractor's
5 license; therefore, a Cease and Desist order would not have been appropriate and
6 would have been a superfluous act by the NSCB. The fact that IHS acquired a
7 license shows it needed a license to perform the work in had been performing.
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11 **b. Issue Preclusion Does Not Bar the Relief Requested by**
12 **TOM's Claims and IHS Does Not Dispute this Fact.**

13 As set forth in TOM's Opening Brief, issue preclusion is closely related to,
14 but separate from the doctrine of claim preclusion. As this Court has established,
15 the following factors are necessary for the application of issue preclusion:
16

17 “(1) the issue decided in the prior litigation must be identical to the
18 issue presented in the current action; (2) the initial ruling must have
19 been on the merits and have become final; . . . (3) the party against
20 whom the judgment is asserted must have been a party or in privity
21 with a party to the prior litigation; and (4) the issue was actually and
necessarily litigated.

22 *Five Star*, 124 Nev. at 1055. IHS does not dispute the fact that the issues presented
23 in this matter were never litigated before the NSCB. IHS also does not dispute the
24 fact that no ruling upon the merits was ever made by the NSCB, but rather,
25 assumes that because the NSCB did not issue a Cease and Desist order against
26 IHS, this must necessarily mean that the NSCB found that IHS was not required to
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1 be licensed at the time it performed work at the TOM residence. Again, there is no
2 authority cited for the proposition that inaction on the part of an administrative
3 agency is the equivalent to an affirmative ruling.
4

5 IHS also fails to offer argument as to the fact that TOM was a not a “party”
6 to any proceedings before the NSCB as that term is defined by NRS 233B.035.¹
7 Finally, as was set forth in the Opening Brief, in order to be afforded preclusive
8 effect an administrative proceeding must be “quasi-judicial” in nature. *See Plaine*
9 *v. McCabe*, 797 F.2d 713, 718 (9th Cir. 1986); *Hafter v. Clark*, 992 F.Supp.2d
10 1063, 1069 (D. Nev. 2014)(Parties must have been afforded fair opportunity to
11 litigate). IHS ignores this requirement as it would not be possible to validly argue
12 that the actions of an NSCB investigator comprise a “quasi-judicial” proceeding in
13 which parties have an opportunity to be heard and to present evidence. *See Bivins*
14 *v. State Contractors Board*, 107 Nev. 281, 283, 809 P.2d 1268, 1270
15 (1991)(Proceedings before the NSCB must comport with due process).
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¹ It should be noted that IHS claims that TOM had rights to appeal the action/inaction of the NSCB’s investigator; however, IHS fails to rebut the fact that TOM was not a party to an administrative proceeding and thus would not have the ability to avail himself of such right.

1 **2. The District Court Erred in Failing to Allow Discovery Regarding**
2 **the Underlying Issues of TOM's Claims and IHS' Defenses**
3 **Including Whether IHS was Required to be a Licensed**
4 **Contractor at the Time it Bid and Performed Work at the TOM**
5 **Residence.**

6 In contesting that TOM was entitled to conduct discovery, IHS offers a
7 conclusory and misleading argument which is devoid of law or supporting facts.
8 As set forth in the Opening Brief, TOM properly requested discovery of the
9 underlying issues pursuant to the terms of NRCP 56(f). *See* JA 628.² TOM's
10 affidavit specifically identified the allegations made by IHS which were raised in
11 IHS' Motion for Summary Judgment/Motion to Dismiss, requiring the need for
12 discovery. *Id.* Given the fact that IHS has made much about actions taken by the
13 NSCB, TOM specifically identified the need to conduct discovery into the
14 investigation conducted by the NSCB investigator. *Id.* TOM likewise identified
15 the fact that he believed it may be necessary to retain an expert witness to address
16 the issue of whether or not the work conducted by IHS required appropriate
17 licensure. *Id.* IHS simply ignores these specific items upon which discovery was
18 needed in arguing that TOM did not raise specific items upon which he requested
19 discovery. The pending matter is not one of great complexity or novel legal issues,
20 but rather, centers in large part, as the Court can no doubt ascertain, upon the issue
21 of whether or not the work provided by IHS required IHS to acquire a Nevada state
22 discovery. The pending matter is not one of great complexity or novel legal issues,
23 but rather, centers in large part, as the Court can no doubt ascertain, upon the issue
24 of whether or not the work provided by IHS required IHS to acquire a Nevada state
25 discovery. The pending matter is not one of great complexity or novel legal issues,
26 but rather, centers in large part, as the Court can no doubt ascertain, upon the issue
27 of whether or not the work provided by IHS required IHS to acquire a Nevada state

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² This Affidavit was incorrectly cited as JA 00626 in the Response.

1 contractor's license in addition to the dispute as to the scope of work. The issue of
2 the necessity of a contractor's license was specifically identified as an issue that
3 required discovery.
4

5 It should be noted that IHS argues that TOM never identified a reason that
6 discovery had not taken place [Response, p. 24]; however, this statement is false.
7 As the record makes clear, discovery had not yet commenced as the required
8 NRCP 16.1 early case conference and subsequent report had not been completed.
9 JA 00616. Although IHS ignores the procedural posture of the matter at the time
10 the district court ruled upon its motions, it must be remembered that IHS had filed
11 a complaint [JA 00004 - 00011] and TOM filed his compulsory counterclaims
12 [JA00329 - 00337]. However, IHS never filed a Reply to the Counter-claim nor
13 was a Joint Case Conference Report filed as required by the provisions of NRCP
14 16.1. Thus, the case was literally in its infancy and at a point where no discovery
15 did, or could, have taken place.
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20 This Court has regularly held that even when discovery is ongoing, a
21 sufficient amount of time must be afforded a party to conduct such discovery. *See*
22 *Halimi v. Blacketor*, 105 Nev. 105, 106, 770 P.2d 531, 531-32 (1989)(holding
23 abuse of discretion to grant summary judgment one year after complaint was filed);
24 *Summerfield v. Coca Cola Bottling Co.*, 113 Nev. 1291, 1294-95, 948 P.2d 704,
25 705-06 (1997) (holding that district court abused its discretion by denying an
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1 NRCP 56(f) motion for continuance when complaint had been filed two years
2 previous and party was not dilatory in conducting discovery). By contrast, IHS
3 essentially argues that TOM's NRCP 56(f) affidavit is insufficient because it is
4 only one page long. *See* Response, p. 24 ("Again, the declaration is merely 1 page
5 long . . ."). It appears that IHS believes that it can both deny TOM the ability to
6 conduct needed discovery and simultaneously argue that summary
7 judgment/motion to dismiss should be granted because TOM has failed to set forth
8 facts relevant to his claims and defenses. If this were indeed the standard to be
9 applied, then many, if not most Plaintiffs, could simply file a complaint, fail to
10 abide by the mandates of NRCP 16.1 and thereby prevent discovery from
11 commencing, then file a dispositive motion claiming that the other side lacks
12 sufficient information to counter its claims. This runs counter to this Court's long
13 standing policy that matters should be decided upon their merits. *Accord Price v.*
14 *Dunn*, 106 Nev. 100, 104, 787 P.2d 785, 787-88 (1990)(addressing strong public
15 policy to have matters decided upon merits in context of default judgments).
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22 It is also worth noting that the order appealed from represents the second
23 time HIS brought this MSJ, as it was essentially the same motion, as it had
24 previously filed on July 25, 2014. JA 00042 – 00284. At the time of the first
25 hearing, the district court stated there was not enough information presented upon
26 which to base a ruling. JA 00799 ("I just think there's a legal issue here, and I'm
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1 not too sure I have enough information in front of me to decide.”). In so holding,
2 Senior Judge Brennan remarked during oral argument that the letter issued by the
3 NSCB investigator provided no useful information in determining whether or not a
4 contractor’s license was needed, to wit:
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6 THE COURT: The Complaint is resolved.
7 Now, what does that tell me?

8 MR. ROBINSON: It tells you absolutely nothing.

9 THE COURT: You’re right.
10

11 JA 00797, lns. 22 - 25 – 00798, ln. 1. IHS dismisses this statement by opining that
12 Judge Brennan did not have adequate time to prepare for the hearing. *See*
13 Response, p. 3, fn. 8.
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15 **3. The Court’s Granting of IHS’ Motion for Summary Judgment**
16 **Must be Reversed As Genuine Issues of Material Fact Exist**
17 **Which Preclude its Entry.**

18 As set forth in TOM’s Opening Brief, even without discovery, numerous
19 genuine issues of material fact existed which render the district court’s granting of
20 summary judgment and order dismissing TOM’s Counterclaims improper. TOM’s
21 affidavit sets forth numerous examples of work which was not completed by HIS
22 and which Tom understood to be included in the contract, in addition to the issue
23 of whether HIS needed a license to bid and perform the work. JA 00620-621.
24 TOM stated that after much of the work was completed at his residence he found
25 that much of what was provided did not function properly. *Id.* at ¶3. After IHS
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1 refused to properly remedy the issues, TOM resorted to filing a consumer
2 complaint with the NSCB. *Id.* at 4. IHS portrays itself as a small, helpless
3 contractor who has been victimized at the hands of an out of state physician [*See*
4 *Response*, p. 2]; however, in doing so IHS ignores the undisputed fact that the
5 NSCB investigator found that faulty workmanship did in fact exist and as a result
6 issued a Notice to Correct. JA 00731 -732. IHS was therefore required to conduct
7 additional work in an attempt to correct its deficient construction. Although some
8 deficient items were repaired, there existed other items, including a non-functional
9 equipment rack ventilation system [JA 00620, ¶7], a faulty sprinkler system [JA
10 000620, ¶8], a failure to install sidelite window switchable smart tint [JA 00620,
11 ¶9], a failure to honor warranty coverage for the system and a failure to fulfill
12 dealer-required duties such as authorizing additional control devices [JA 00620,
13 ¶10] and failure to provide wiring diagrams [JA 00620, ¶11] which remain
14 unresolved.

15
16 Recognizing that merely disagreeing with TOM's affidavit would be
17 insufficient to uphold the granting of summary judgment, IHS mis-portrays the
18 contents of TOM's affidavit and attempts to raise new arguments which were not
19 raised in the district court proceedings. Namely, IHS argues that it objected to the
20 admissibility of TOM's affidavit on January 14, 2014. *See Response*, p. 26, fn. 16.
21 Such a statement is belied by IHS' own citation. Below is the specific language
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1 which IHS claims constitutes an evidentiary objection:

2 And then, finally, as I mentioned before, he bases his factual disputes
3 on Mr. TOM's affidavit. Again, Mr. TOM's affidavit is a one-
4 sentence summary: "My client has laid out specifics," and a one-
5 sentence, "I deny it," is not evidence that the Court can accept as
6 raising an issue of fact.

7 *See* Response, p. 26, fn. 16 *citing* JA 00824, lns. 13-18. Although this statement
8 can hardly be considered an evidentiary objection as no specific objection is raised,
9 it is also a misrepresentation as to what is contained in TOM's affidavit. *See* JA
10 00620. As set forth, TOM identified specific items of work which were not
11 completed or which did not function as designed. The fact that IHS does not agree
12 with TOM's assertions does not provide grounds to misrepresent his statements.
13 Indeed, such allegations by IHS are properly ignored by this Court as any
14 evidentiary objections, to the extent applicable, were waived by HIS as it did not
15 raise an objection before the district court. *See Carson Ready Mix v. First Nat'l*
16 *Bk.*, 97 Nev. 474, 635 P.2d 276 (1981)(Court will not consider materials that were
17 not presented to the district court and thus are not properly part of the record on
18 appeal); *see also Canyon Villas v. State, Tax Comm'n.*, 124 Nev. 833, 845 n. 27,
19 192 P.3d 746, 754-55, n.27 (2008)(Court will generally not consider issues that are
20 raised for the first time on appeal). Even to the extent a proper objection had been
21 raised before the district court, the record is devoid of any evidence that the district
22 court addressed such an objection and IHS failed to appeal such issue, thus, again,
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1 waiving its right to argue it at this time.

2 In arguing that IHS has provided “uncontroverted” evidence that it is due
3 and owed money, IHS has argued that much of the work identified by TOM was
4 never part of its scope of work. IHS asks this Court to make large leaps of faith as
5 the record on appeal does not provide support for IHS’ assertions. For instance,
6 IHS argues that the following items were not part of IHS’ scope of work: 1)
7 Equipment Ventilation Rack System, 2) Sprinkler System, 3) Sidelight Window
8 Switchable Smart Tint, and 4) Wiring diagram for Upstairs Window Prewiring.
9 See Response, p. 29. IHS relies on the affidavit submitted in the lower court of
10 Jeffrey Brown, specifically those pages identified as JA 00367-368, ¶¶8-9 of the
11 Appendix. *Id.* A short review of those paragraphs demonstrates that the four (4)
12 items listed are never mentioned a single time. Instead, the affidavit simply
13 identifies various proposals that comprise the “contract”. Mr. Brown identified
14 eight (8) proposals which, collectively, comprised the “contract”. JA 00367, ln.
15 26. IHS states that the final agreement between the parties is found in Revision
16 9.1. See Response, p. 29; JA 00579 – 00583 (Revision 9.1). It appears that IHS is
17 playing word games in claiming that certain items are not within its scope of work.
18 This is due to the fact that the wording used by TOM does not match, *verbatim*, the
19 wording used on Revision 9.1. With regard to the Equipment Ventilation Rack
20 System it is claimed that no such item is listed in the scope of work of IHS.
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1 However, a review of Revision 9.1 does list a “rack”. *See* JA00583. The fact that
2 such work was part of IHS’ scope is confirmed in the record in an email sent from
3 IHS in which it references the need to finish the racks and exhaust fans. JA 00476.
4 Likewise, IHS claims that a sprinkler system was eliminated by TOM through
5 “change orders”. Response, p. 29. However, a review of Revision 9.1 clearly
6 identifies a line item for “irrigation” is still included in the contract. JA 00582.
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9 IHS’ claim that the “sidelight window switchable smart tint”, in its entirety,
10 was removed from IHS’ scope of work is, again, belied by IHS’ own documents.
11 As noted above, it is IHS’ position that Revision 9.1 represents the final agreement
12 between the parties. *See* Response, p. 29, first bullet point. On the final page of
13 this revision [JA 00583], there remain two line items for “Switchable Glass Install”
14 and “Pre-wire for Shade/Switchable Glass (living room Windows/Slider, foyer
15 door windows”. According to IHS’ own document, TOM was to be charged \$750
16 and \$1,775.00, respectively, for these items. *Id.* An obvious question of fact is
17 why would such items appear on the very document IHS identifies as the final
18 agreement between the parties if it had been removed, in its entirety, from IHS’
19 scope of work? IHS itself admits that it was performing work related to this scope
20 and actually increased the contract value to accommodate for it. JA 00368, ¶9;
21 00371, ¶17.
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Finally, IHS claims that it was not required to produce a “wiring diagram for

upstairs window rewiring.” *See* Response, p. 29. Again, as noted in the final Revision [JA 00583], “pre-wire for shade/switchable glass” is a line item with an attendant cost of \$1,775. It is not known if the Response is simply arguing that the work itself need not be completed or whether or not the diagram setting forth the work that is called for in the purchase order need to be provided. In either event, the argument finds no support in the record and is properly disregarded. What is clear is that there was conflicting testimony before the district court on genuine issues of material fact - whether HIS needed a license; whether HIS completed its scope; whether HIS’ work was deficient - that precludes the granting of summary judgment before discovery even commenced. As the record is replete with evidence which raises questions of fact, the Court’s order granting the Motion for Summary Judgment/Motion to Dismiss of IHS must be reversed.

4. The Attorneys’ Fees Award Entered by the District Court Must Be Reversed as it is Unsupported by Law or Facts and Awards Attorneys’ Fees Incurred Outside the Court Proceedings.

a. Attorneys’ Fees Incurred Before the NSCB Are Not Recoverable Pursuant to NRS 108.237.

IHS argues a truly unique position in suggesting that because it was required to “defend” itself before an NSCB investigator in an informal proceeding, such actions must be considered incidental to the enforcement of its mechanic’s lien right. *See* Response, p. 38. This position finds no support in either the law or facts of the pending matter. This Court has previously stated that in the context of NRS

1 108.237, the term “proceeding” out of which attorneys’ fees may arise “clearly
2 refers to steps taken to enforce a mechanic’s lien *in the courts*.” *Barney v. Mt.*
3 *Rose Heating & Air Conditioning*, 124 Nev. 821, 827 (2008)(emphasis added).
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5 This Court was abundantly clear that any attorneys’ fees amount must be an
6 amount incurred “in the courts”. Had this Court meant that attorneys’ fees could or
7 would be granted for any action which is “incidental” and outside the court
8 proceedings to the enforcement of a mechanic’s lien then it would have done so.
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10 Adopting the reasoning of IHS is antithetical to public policy. Nevada contracting
11 laws, specifically those related to licensure, exist for the protection of the public.
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13 *See Interstate Commercial Bldg. Servs., Inc. v. Bank of Am. Nat. Trust & Sav.*
14 *Ass’n*, 23 F. Supp. 2d 1166, 1173 (D. Nev. 1998) (citing *MGM Grand Hotel v.*
15 *Imperial Glass Co.*, 533 F.2d 486, 489 (9th Cir.1976)(“The primary purpose of
16 Nevada’s licensing statutes is to protect the public against both faulty construction
17 and financial irresponsibility.”) According to IHS, a person who is the victim of
18 sub-standard workmanship would not be able to avail itself of the filing of a
19 consumer complaint with the NSCB without the fear that he/she may incur
20 attorneys’ fees in a subsequent action in a different forum.
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25 Additionally, the position adopted by IHS is illogical in that it erroneously
26 assumes that a person who files a consumer complaint with the NSCB is therefore
27 necessarily a party to such an informal proceeding. The reality is, however, that
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1 the NSCB is the real party in interest and makes the determination as to whether or
2 not to pursue an action against a contractor against whom a complaint is alleged.
3 The consumer has no authority to dictate whether or not the NSCB takes formal
4 administrative action against a contractor, let alone control the proceedings if they
5 are instituted. Under IHS' theory, if a consumer were to file a complaint with the
6 NSCB and the NSCB were to take action against the contractor, which could
7 include formal proceedings as prescribed in NRS 624.323, NAC 624.6978 and
8 NRS 233B.032, *et seq.* and any subsequent appeals, decisions and proceedings to
9 which the consumer is not a party, the contractor could eventually seek to collect
10 all their attorneys' fees and costs against the consumer despite the fact that the
11 consumer had no control, and was not even a party to the administrative
12 proceedings. Such a reading of Nevada statutes would be absurd. *See Sheriff,*
13 *Clark County v. Burcham*, 124 Nev. 1247, 1253, 198 P.3d 326, 329 (2008)(". . .
14 statutory construction should always avoid an absurd result.").

15 An even more bizarre result can be seen under the facts and circumstances of
16 this matter. As is undisputed, TOM filed a consumer complaint because of
17 incomplete and/or improper work [JA 00140 - 00175]. The NSCB investigator
18 validated this complaint and found that IHS did in fact fail to complete and
19 perform its work in a workmanlike manner and issued a Notice to Correct and
20 required IHS to return to TOM's residence and perform additional work, but did
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1 not address the scope dispute. JA 00731 - 00732. There is no evidence that IHS
2 ever disputed or appealed the Notice to Correct issued by the NSCB investigator,
3 but rather, returned to the TOM residence to perform additional work. In its
4 Response, IHS asks this Court to reward it for having engaged in sub-standard
5 workmanship by requiring TOM to pay its attorneys' fees for having had to resort
6 to a complaint to the NSCB just to have IHS' work meet the bare minimum
7 standards acceptable in the industry. Such action had nothing to do with
8 prosecuting its mechanic's lien, but rather, such action dealt with avoiding formal
9 disciplinary proceedings being instituted for engaging in sub-standard
10 workmanship. NRS 624.3017(1)(establishing poor workmanship as grounds for
11 discipline). Ironically, IHS would not have been able to maintain its mechanic's
12 lien absent TOM's resort to the NSCB given the fact that IHS recorded a
13 mechanic's lien for work not performed adequately. It is IHS that acted in bad
14 faith when it recorded a mechanic's lien when numerous items still required
15 additional work and its scope was not complete. *See* Notice to Correct, JA 00731 -
16 00732.

23 Finally, IHS seeks to be awarded its attorneys' fees based upon an issue
24 which was never considered by the NSCB's investigator, let alone, the NSCB
25 itself. IHS readily admits that the NSCB investigator ignored the issue of IHS'
26 licensure. *See* Response, p. 16. As set forth in detail in TOM's Opening Brief, and
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1 as ignored by IHS in its Response, no formal proceedings ever took place before
2 the NSCB and no determinations were ever made with regard to whether or not
3 IHS was required to possess a contractor's license to perform its scope of work.
4 IHS seeks an award of fees for issues never even addressed by the NSCB or its
5 investigator. Accordingly, the award of fees as it pertains to matters heard by the
6 NSCB investigator was erroneous and must be reversed.
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9 **b. The District Court's Award of Attorneys' Fees Must Be**
10 **Reversed As the District Court Made No Findings**
11 **Regarding the *Brunzell* Factors in its Decision**

12 The district court failed to set forth the grounds for its award of attorneys'
13 fees in this matter. JA 00778 - 00780. In defending the district court's order, IHS
14 adopts the same mistaken logic previously applied to the inaction of the NSCB,
15 namely, the district court did not make any express findings pursuant to *Brunzell v.*
16 *Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969); therefore, IHS
17 claims that the Court impliedly made such findings on its behalf. IHS offers little
18 in the way of substance, but again, offers a lengthy, subjective argument as to why
19 its position is correct and TOM's is not. IHS claims that its own pleadings provide
20 facts which support the district court's ruling. *See* Response, p. 39. This argument
21 fails. The burden is upon the district court to render findings that support an award
22 of attorneys' fees; otherwise, any party is free to argue its own version of the facts
23 and claim that they were so convincing the Court must have adopted their
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1 reasoning. This is precisely what IHS does, and this Court has previously rejected
2 such claims.

3 As set forth above, IHS seeks a recovery for fees incurred outside the court
4 proceedings and for the reasons previously set forth this argument is without merit.
5 IHS' counsel submits that his "credentials" are "well-known to this Court" and
6 thus they need not be spelled out. *See* Response, p. 39. Likewise, IHS contends
7 that TOM's arguments are that IHS' counsel is "over-qualified" to handle the
8 matter. *Id.* In fact, nothing could be further from the truth. The amount of fees
9 incurred for a simple mechanic's lien foreclosure action demonstrate either a
10 willful disregard of reasonableness expected of all attorneys in the handling of a
11 matter or a misunderstanding of basic Nevada construction law.

12 IHS at least acknowledges the following in its Response: 1) an award of
13 attorney's fees must be tempered by reason and fairness. *See* Response, p. 39,
14 citing *Schuette v. Beazer Homes*, 121 Nev. 837, 864-865, 124 P.3d 530, 548-549
15 (2005); and, 2) the amount requested must be evaluated pursuant to the factors set
16 forth in *Brunzell*. It can hardly be said to be reasonable to seek an award of
17 attorneys' fees which were unrelated to the ongoing litigation but rather, dealt with
18 an informal administrative proceeding which was decided against IHS. Likewise,
19 IHS' assumption that the Court evaluated the request for attorneys' fees in light of
20 the *Brunzell* factors is unsupported by the record as there is no mention, even in
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1 passing, of *Brunzell* or its progeny, in the order awarding attorneys' fees. *See* JA
2 00778 – 00780. As it is not known what standards the Court applied in granting
3 attorneys' fees, the order making such an award must be reversed, just as the
4 summary judgment must be reversed.
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6 V. CONCLUSION

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8 For the foregoing reasons it is respectfully submitted that the district court
9 erred in granting IHS' Motion for Summary Judgment and Motion to Dismiss and
10 that questions of fact existed which should have prevented such a ruling and
11 therefore the district court's order must be reversed. Likewise, the district court
12 erred in granting attorneys' fees to IHS as the underlying matter was incorrectly
13 decided, and even in the event summary judgment/motion to dismiss were proper
14 the district court erred in awarding attorneys' fees incurred outside the court
15 proceedings and without making the required analysis as set forth in *Brunzell*.
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VI. ATTORNEY'S CERTIFICATE

I hereby certify that I have read this APPELLANT'S REPLY 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).

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VII. CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Pezzillo Lloyd and on the 5th day of March, 2015, a true and correct copy of the foregoing document was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system and by United States First-Class mail to all unregistered parties:

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