

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 APCO CONSTRUCTION, INC., A
3 NEVADA CORPORATION,

4 Cross Appellant/Respondent,

5 vs.

6 HELIX ELECTRIC OF NEVADA, LLC

7 Cross Respondent/Appellant.

Case No. 77320

District Court Case No. A571228

Electronically Filed
Aug 27 2019 02:50 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

AMENDED

DOCKETING STATEMENT

8 **1. District Court:**

9 Eighth Judicial District Court, Department 13, Clark County, Judge
10 Mark Denton, District Court Case No. A571228

11 **2. Attorney Filing this Docket Statement:**

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6 *Attorneys for Appellant/Cross Respondent Helix Electric of Nevada, LLC*

7 **4. Nature of Disposition (check all that apply):**

8 ☐ Judgment after bench trial

☐ Dismissal:

9 ☐ Judgment after jury verdict

☐ Lack of jurisdiction

☐ Summary judgment

☐ Failure to state a claim

☐ Default judgment

☐ Failure to prosecute

10 ☐ Grant/Denial of NRC 60(b) relief

☐ Other (specify):

11 ☐ Grant/Denial of injunction

☐ Divorce Decree:

☐ Grant/Denial of declaratory relief

☐ Original ☐ Modification

12 ☐ Review of Agency determination

☒ Other disposition (specify)
Post Judgment special order
denying attorneys' fees and
costs.

13
14 **5. Does this appeal raise issues concerning any of the following? No.**

15 ☐ Child Custody

☐ Venue

16 ☐ Termination of parental rights

17 **6. Pending and prior proceedings in this court.** List the case name and
18 docket number of all appeals or original proceedings presently or
previously pending before this court which are related to this appeal:

19 ///

Case No.	Short Caption
57784	Club Vista Financial Services v. Dist. Ct. (Scott Finical)
57641	Club Vista Financial Services vs. Dist. Ct. (Scott Finical Corp.).
61131	APCO Construction, Inc. v. Dist. Ct. (Scott Finical)
75197	APCO Construction, Inc. v. Zitting Bros. Constr., Inc.
76276	Helix Electric of Nevada, LLC v. APCO Construction, Inc.
79301	Zitting Bros. Constr., Inc. v. Fennemore Craig, P.C.

7. **Pending and prior proceedings in other courts:** List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (*e.g.*, bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

This case, A587168, was consolidated by the district court with the following cases: A571228, A 574391, A571228, A574391, A574792, A577623, A579963, A580889, A583289, A584730, A587168, A589195, A589677, A590319, A592826, A596924, A597089, A606730, A608717, A608718. *See* Eighth Judicial District Court Docket, attached as **Exhibit 1**.

8. **Nature of the action.** Briefly describe the nature of the action and the result below:

This action arises out of a failed construction project that closed, incomplete, in 2008. A trial was held in February 2018 on subcontractors claims against the project's general contractors, including Appellant/Cross Respondent Helix Electric's claims against Cross Appellant/Respondent APCO. The district court entered a judgment denying relief to Helix Electric as to its claims against APCO, and that judgment was appealed by Helix Electric to this Court in Case No. **76276**. The appeal in Case No. 76276 was subsequently dismissed by this Court.

In this appeal, Helix Electric and APCO both challenge the

1 district court's orders granting (1) APCO's Motion for Attorneys'
2 Fees and Costs, (2) APCO's Memorandum of Costs in part, and
(3) Helix Electric's Motion to Retax in Part.

3 **9. Issues on appeal.** State concisely the principal issue(s) in this appeal
(attach separate sheets as necessary):

- 4 1. Whether the District Court erred in failing to determine APCO
5 was entitled to attorneys' fees under relevant subcontract
6 provisions governing the award of attorneys' fees?
7 2. Whether the District Court erred in failing to award APCO all of
its recoverable costs?

8 **10. Pending proceedings in this court raising the same or similar**
9 **issues.** If you are aware of any proceeding presently pending before
this court which raises the same or similar issues raised in this appeal,
list the case name and docket number and identify the same or similar
issues raised:

10 Respondent/Cross Appellant is not aware of any proceedings
presently pending before this court which raise similar issues.

11 **11. Constitutional issues:** If this appeal challenges the constitutionality
12 of a statute, and the state, any state agency, or any officer or employee
thereof is not a party to this appeal, have you notified the clerk of this
13 court and the attorney general in accordance with NRAP 44 and NRS
30.130?

- 14 ☒ N/A
15 ☐ Yes
☐ No

If not, explain:

16 **12. Other issues.** Does this appeal involve any of the following issues?

- 17 ☐ Reversal of well-settled Nevada precedent (identify the case(s))
18 ☐ An issue arising under the United States and/or Nevada
Constitutions
19 ☐ A substantial issue of first-impression
☒ An issue of public policy

- 1 ☐ An issue where en banc consideration is necessary to maintain
2 uniformity of this court's decisions
3 ☐ A ballot question

4 If so, explain:

5 The question at issue in the cross appeal is whether equity
6 bars a party to a contract who could have recovered its fees
7 under an attorneys' fee provision in that contract from
8 avoiding liability to pay fees under the same contractual
9 attorneys' fee provision for an unsuccessful contract action
10 against the alleged assignor of the contract. APCO's award of
11 full attorneys' fees pursuant to the relevant subcontract was
12 denied based on Helix's argument that APCO could not
13 collect fees under the subcontract since APCO assigned the
14 subcontract to the replacement contractor and thus, was not a
15 party to the contract. APCO argued its fees were permitted
16 pursuant to equitable estoppel because Helix's claims were all
17 based on the subcontract and Helix would have been entitled
18 to its fees had it prevailed.

19 **13. Assignment to the Court of Appeals or retention in the Supreme Court.** Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17 and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

 Issues regarding the award of fees and costs in a post judgment motion are presumptively assigned to the Court of Appeals. NRAP 17(b)(7). However, APCO believes the Supreme Court should retain this case because it raises an issue of public policy – namely, does equitable estoppel prevent a party that if successful could have recovered attorneys' fees under a contractual attorneys' fee provision from arguing that the other party cannot recovery attorneys'

1 fees under the same contract provision when the contract
2 claims fail?

3 **14. Trial.** If this action proceeded to trial, how many days did the trial
4 last?

5 This action proceeded to a six-day bench trial.

6 **15. Judicial Disqualification.** Do you intend to file a motion to disqualify
7 or have a justice **recuse** him/herself from participation in this appeal?
8 If so, which Justice?

9 No.

10 **TIMELINESS OF NOTICE OF APPEAL**

11 **16. Date of entry of written judgment or order appealed from**

12 September 27, 2018

13 **Attach a copy. If more than one judgment or order is appealed**
14 **from, attach copies of each judgment or order from which appeal**
15 **is taken.**

16 *See Notice of Entry of Order and Order (1) Granting APCO*
17 *Construction, Inc.'s Motion for Attorneys' Fees and Costs (2)*
18 *Granting APCO Construction, Inc.'s Memorandum of Costs in*
19 *Part, (3) Granting Helix Electric of Nevada LLC's Motion to*
20 *Retax in Part and Denying in Part, (4) Granting Plaintiff In*
21 *Intervention National Wood Products LLC's Motion to Retax in*
22 *Part and Denying in Part and (5) Granting National Wood*
23 *Products, Inc.'s Motion to File a Surreply, attached hereto as*
24 **Exhibit 2.**

25 (a) If no written judgment or order was filed in the district court,
26 explain the basis for seeking appellate review:

27 N/A

28 **17. Date written notice of entry of judgment or order was served**

29 September 28, 2018

Was service by:

☐ Delivery ☐ Unknown ☒ Mail/Electronic/Fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

N/A

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing _____

☐ NRCP 52(b) Date of filing _____

☐ NRCP 59 Date of filing _____

NOTE: : Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev._____, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion _
N/A

(c) Date written notice of entry of order resolving tolling motion was _____ by:

☐ Delivery

☐ Mail

19. Date notice of appeal was filed

If more than one party has appealed from the judgment or order, list date each notice of appeal was filed and identify by name the party filing the notice of appeal:

Appellant/Cross Respondent Helix Electric of Nevada, LLC
filed its Amended Notice of Appeal, appealing the September
27, 2018 attorneys' fee order, on October 25, 2018.

**20. Specify statute or rule governing the time limit for filing the notice
of appeal, e.g., NRAP 4(a) or other**

NRAP 4(a)(2). This cross appeal was filed within 14 days after
Helix Electric of Nevada LLC's Amended Notice of Appeal,
which appealed the September 27, 2018 attorneys' fee order, on
October 25, 2018.

SUBSTANTIVE APPEALABILITY

**21. Specify the statute or other authority granting this court
jurisdiction to review the judgment or order appealed from:**

- (a) ☐ NRAP 3A(b)(1) ☐ NRS 38.205
☐ NRAP 3A(b)(2) ☐ NRS 233B.150
☐ NRAP 3A(b)(3) ☐ NRS 703.376
☒ Other (specify) NRAP 3A(b)(8), as the order appealed is
a
special order entered after final judgment

- (b) Explain how each authority provides a basis for appeal from the
judgment or order:

Post judgment orders involving attorneys' fees and costs are
appealable special orders made after final judgment. *Smith v.*
Crown Financial Services, 111 Nev. 277, 280 n. 2, 890 P.2d
769, 771 n.2 (1995).

**22. List all parties involved in the action or consolidated actions in the
district court:**

- (a) Parties:

- Accuracy Glass & Mirror Co.
- APCO Construction, Inc.
- Bruin Painting Corp.

- Cactus Rose Construction, Inc.
- Camco Pacific Construction Co.
- HD Supply Waterworks, LP
- Helix Electric of Nevada, LLC
- Heinaman Contract Glazing
- Interstate Plumbing and Air Conditioning, Inc.
- WRG Design, Inc.

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

A chart outlining the claims brought by and against each of the above-listed parties and how each claim was resolved is attached hereto as **Exhibit 3**.

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims or third-party claims, and the date of formal disposition of each claim.

A chart outlining the claims brought by and against each of the above-listed parties and how each claim was resolved is attached hereto as **Exhibit 3**.

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☐ Yes

☒ No

25. If you answered "No" to question 23, complete the following:

(a) Specify the claims remaining pending below: None

(b) Specify the parties remaining below: None

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☒ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment? N/A

☐ Yes

☐ No

26. If you answered “No” to any part of question 24, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):

The order appealed from in APCO’s cross appeal is appealable as a special order after final judgment. NRAP 3A(b)(8). The judgment resolving Helix Electric’s claims against APCO was entered on April 25, 2018, and the final order resolving all the remaining claims in Eighth Judicial District Court Case No. A587168 was entered on July 19, 2018. The order at issue in this cross appeal was thereafter entered as a special order after final judgment on September 27, 2018.

A chart outlining each the claims brought by and against the parties to Eighth Judicial District Court Case No. A587168 and how each claim was resolved is attached hereto as **Exhibit 3**.

27. Attach copies of the last-filed version of all complaints, counterclaims, and/or cross claims filed in the district court, any tolling motion, the order challenged on appeal and written notice of entry for any attached orders.

See Exhibits to APCO Construction, Inc.’s Amended Docketing Statement, filed herewith.

The exhibits filed herewith are as follows:

Exhibit No.	<u>Pleading</u>
1	Eighth Judicial District Court Docket in Case No. A587168 and consolidated cases in A571228
2	Notice of Entry of Order and Order (1) Granting APCO Construction, Inc.’s Motion for Attorneys’ Fees and Costs (2) Granting APCO Construction, Inc.’s Memorandum of Costs in Part, (3) Granting Helix Electric of Nevada LLC’s Motion

Exhibit No.	<u>Pleading</u>
	to Retax in Part and Denying in Part, (4) Granting Plaintiff In Intervention National Wood Products LLC's Motion to Retax in Part and Denying in Part and (5) Granting National Wood Products, Inc.'s Motion to File a Surreply
3	Chart outlining each the claims brought by and against the parties to Eighth Judicial District Court Case No. A587168 and how each claim was resolved
4	Accuracy Glass & Mirror Co.'s First Amended Complaint
5	APCO Construction, Inc.'s Counter and Claim Claims to Interstate Plumbing and Air Conditioning, Inc.'s Third Party Complaint
6	Bruin Painting Corp.'s Third Party Complaint
7	Cactus Rose Construction, Inc.'s Third Party Complaint dated April 1, 2010
8	Camco Pacific Construction Co.'s Answer and Counterclaim re: Dave Peterson Framing
9	Camco Pacific Construction Co.'s Answer and Counterclaim re: Helix Electric
10	Camco Pacific Construction Co.'s Answer and Counterclaim re: Accuracy Glass
11	Camco Pacific Construction Co.'s Answer and Counterclaim re: Bruin Painting
12	Camco Pacific Construction Co.'s Answer and Counterclaim re: WRG Design, Inc.
13	Camco Pacific Construction Co.'s Answer and Counterclaim re: Cactus Rose Construction
14	Camco Pacific Construction Co.'s Answer and Counterclaim re: Heinaman Contract Glazing
15	Camco Pacific Construction Co.'s Amended Answer and Counterclaim re: HD Supply & Waterworks
16	HD Supply Waterworks, LP's Third Party Complaint
17	Helix Electric of Nevada, LLC's Third Party Complaint
18	Heinaman Contract Glazing's Third Party Complaint
19	Interstate Plumbing and Air Conditioning, LLC's Third Party Complaint
20	WRG Design, Inc.'s Third Party Complaint
21	April 5, 2010 Voluntary Dismissal
22	May 26, 2010 Order Striking Gemstone's Answer and Counterclaims and Entering Default

Exhibit No.	<u>Pleading</u>
23	May 7, 2012 Order and Judgement on Scott Financial's Motion for Summary Judgment as to Priority of Liens
24	April 4, 2013 Stipulation and Order to Dismiss
25	October 7, 2016 Special Master Report Regarding Remaining Parties to the Litigation, Special Master Recommendation, and District Court Order
26	September 20, 2017 Order Granting Plaintiff's Motion to Dismiss
27	September 20, 2017 Stipulation and Order of Dismissal of All Claims Relating to Cardno WRG, Inc.
28	February 5, 2018 Stipulation and Order to Dismiss Third Party Complaint of Interstate Plumbing & Air Conditioning, LLC Against APCO Construction With Prejudice
29	April 25, 2018 4.25.18 Findings of Fact and Conclusions of Law as to the Claims of Helix Electric and Cabenetec Against APCO
30	April 26, 2018 Findings of Fact and Conclusions of Law as to the Claims of Cactus Rose Construction Co., Inc.
31	April 26, 2018 Findings of Fact and Conclusions of Law as to the Claims of Heinaman Contract Glazing
32	April 26, 2018 Findings of Fact and Conclusions of Law as to the Claims of Helix Electric of Nevada, LLC Against Camco Pacific Construction, Inc.
33	July 19, 2018 Order Granting Motion to Deposit Bond Penal Sum With Court, Exoneration of Bond, and Dismissal
34	July 26, 2018 Order Approving Distribution of Fidelity and Deposit Company of Maryland's Bond

1 **VERIFICATION**

2 I declare under penalty of perjury that I have read this docketing
3 statement, that the information provided in this docketing statement is true and
4 complete to the best of my knowledge, information and belief, and that I have
attached all required documents to this docketing statement.

5 Name of Respondent/Cross Name of counsel of record:

6 Appellant:

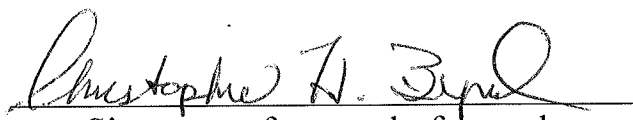
7 **APCO Construction, Inc.**

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14 Dated this 27th day of
15 August, 2019.


Signature of counsel of record

16 State and county where
17 signed:
18 Clark County, Nevada
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