IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 77320
Consolidated with Case No. 80508

HELIX ELECTRIC OF NEVADA, LLC

Appellant/Cross-Respondent

v.

APCO CONSTRUCTION, INC., A NEVADA CORPORATION,

Respondent/Cross-Appellant.

Appeal from Judgment
Eighth Judicial District Court, Clark County
The Honorable Mark Denton, District Court Judge
District Court Case No. **08A571228**

APPELLANT/CROSS RESPONDENT'S COMBINED REPLY TO ANSWERING BRIEF AND ANSWERING BRIEF TO CROSS-APPEAL

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following is an entity 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.

No publicly held company owns ten percent or more of the stock of Appellant/Cross-Respondent, Helix Electric of Nevada, LLC ("Helix"). Peel Brimley LLP is the only law firm that has appeared on behalf of Helix in this case or is expected to appear on behalf of Helix in this Court.

Dated this 21st day of April, 2021.

PEEL BRIMLEY LLP

/s/ Eric B. Zimbelman

_____

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TABLE OF CONTENTS

NRAP 26.1 DISCLOSURE ii

TABLE OF CONTENTS ..... iii, iv

TABLE OF AUTHORITIES ..... v, vi, vii, viii, ix

SUMMARY OF THE ARGUMENT ON REPLY 1

REPLY ARGUMENT 3

I. **APCO MISREPRESENTS HELIX'S CONSISTENT RELIANCE ON ALTERNATIVE LEGAL THEORIES AS "ABOUT-FACE" ARGUMENT, WHICH IT IS NOT** 3

II. **THE CONDITIONS PRECEDENT OF SECTION 3.8 IMPAIR HELIX'S LIEN RIGHTS AND ARE VOID AND UNENFORCEABLE** 5

A. Retention Is Money Earned For Work Performed 7

B. The Conditions Of Payment In Section 3.8 Limit Helix's Right To Prompt Payment And Recourse To A Mechanics' Lien 9

III. **APCO'S TERMINATION OF THE PRIME CONTRACT ENTITLED APCO AND HELIX TO RECOVER THE COSTS OF THEIR COMPLETED WORK** 16

IV. **APCO DID NOT INTEND FOR CAMCO TO "TAKE OVER APCO'S OBLIGATIONS"** 19

V. **THE PRIME CONTRACT PROHIBITS ASSIGNMENT OF SUBCONTRACTS EXCEPTAFTER TERMINATION BY DEVELOPER FOR CAUSE** 24

VI. **APCO IS THE "PARTY LEGALLY LIABLE"** 25

VII. **TRIAL COMMENCED ON OCTOBER 12, 2012** 26

ANSWERING BRIEF TO CROSS-APPEAL.....28

ARGUMENT IN RESPONSE TO APCO'S CROSS-APPEAL.....28

I. APCO HAS NO CONTRACTUAL BASIS FOR AN AWARD OF ATTORNEY FEES 28

II. APCO HAS NO STANDING TO SEEK AN AWARD OF ATTORNEY FEES UNDER THE SUBCONTRACT AND IS NOT THE REAL PARTY IN INTEREST WITH RESPECT TO THE SUBCONTRACT 33

CONCLUSION.....37

CERTIFICATE OF COMPLIANCE 38,39

CERTIFICATE OF SERVICE 40,41

TABLE OF AUTHORITIES

Cases

Allianz Ins. Co. v. Gagnon
109 Nev. 990 (1993) 31

Allstate Insurance Company v. Medical Lien Management, Inc.
348 P.3d 943, 947 (Colorado 2015) 38

APCO Constr., Inc. v. Zitting Bros. Constr., Inc.
136 Nev. Adv. Op. 64, 473 P.3d 1021 (2020) ..... passim

Applied Medical Technologies, Inc. v. Eames
44 P.3d 699 (Utah 2002) 40

Arguello v. Sunset Station, Inc.
127 Nev. 365 (2011) 40

Beattie v. Thomas
99 Nev. 579, 588, 668 P.2d 268, 274 (1983) 32

Boarman v. Boarman
556 S.E.2d 800, 804 (W.Va 2001) 38

Butler v. Poulin
500 A.2d 257, 260 n. 5 (Me.1985) 26

Butwinick v. Hepner
128 Nev. 718, 721–22, 291 P.3d 119, 121 (2012) 40

Cashman Equip. Co. v. W. Edna Assocs., Ltd.
132 Nev. 689, 692, 380 P.3d 844, 847 (2016) 14

City Council of Reno v. Reno Newspapers, Inc.
105 Nev. 886, 891, 784 P.2d 974, 977 (1989) 22

Dept. of Rev. v. Bank of America
752 So.2d 637 (Fla. 1st DCA 2000) 36

Easton Bus. Opp. v. Town Executive Suites
126 Nev. 119 (2010) 41

Estate of Basile v. Famest, Inc.
718 So.2d 892 (Fla. 4th DCA 1998).....37

Hudson v. Horseshoe Club Operating Co.
112 Nev. 446, 457, 916 P.2d 786, 792 (1996).....24

Imel v. Travelers Indem. Co.
281 N.E.2d 919, 921 (Ind.App. 1972) 37

In re David C.
152 Cal.App.3d 1189, 200 Cal.Rptr. 115, 127 (1984).....26

In re Discipline of Drakulich
111 Nev. 1556, 1566–67, 908 P.2d 709, 715 (1995).....25

In re Fontainebleau Las Vegas Holdings, LLC
128 Nev. 556, 574, 289 P.3d 1199, 1210 (2012).....14

Kaintz v. PLG, Inc.
147 Wash. App. 782, 197 P.3d 710 (2008).....43

Kaur v. Singh
136 Nev. Adv. Op. 77, 477 P.3d 358, 362–63 (2020).....6

Las Vegas Plywood v. D & D Enterprises
98 Nev. 378, 380, 649 P.2d 1367, 1368 (1982).....17

Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.
124 Nev. 1102, 197 P.3d 1032 (Nev. 2008) 6, 13, 17

Locken v. Locken
98 Nev. 369, 650 P.2d 803 (1982) 34

Merrill v. DeMott
113 Nev. 1390, 1399, 951 P.2d 1040, 1045–46 (1997) 24, 25

Oral Roberts University v. Anderson
11 F.Supp.2d 1336 (N.D. OK 1997) 38

Ryder Truck Rental, Inc. v. Transportation Equipment Co., Inc.
339 N.W.2d 283 (Neb., 1983) 37

Scarano v. Central R. Co of N.J.
203 F.2d 510, 513 (3d Cir. 1953) 5

Schofield v. Copeland Lumber
101 Nev. 83, 85, 692 P.2d 519, 520 (1985) 17

Schwartz v. Estate of Greenspun
110 Nev. 1042, 1047, 881 P.2d 638, 641 (1994) 33

Szilagyi v. Testa
99 Nev. 834, 838, 673 P.2d 495, 498 (1983) 40

Trustees of Carpenters for S. Nevada Health & Welfare Tr. v. Better Bldg. Co.
101 Nev. 742, 747, 710 P.2d 1379, 1382 (1985) 42

United Fire Ins. Co. v. McClelland
105 Nev. 504, 509, 780 P.2d 193 (1989) 25, 26

United States v. Nixon
418 U.S. 683, 710, 94 S. Ct. 3090, 3108, 41 L. Ed. 2d 1039 (1974) 27

Von Ehrensmann v. Lee
98 Nev. 335, 647 P.2d 377 (1982) 34

Statutes

Fed.R.Civ.P. 17(a) advisory committee's note (1966) 41

NRCP 17(a) 40, 41

NRCP 42(a) 31

NRCP 42(b) 31

NRCP 68 ..... 30, 32, 33, 43

NRS 108.221 ..... 15, 16
NRS 108.222(1)(a) 17

NRS 108.239(12) 3, 29

NRS 108.239(3) 31

NRS 108.2453(2) 2, 5, 15

NRS 108.2457 .....5, 16

NRS 108.2457(1) 3

NRS 108.2457(5) 14

NRS 108.2457(5)(e) 14

NRS 18.010(1) 34

NRS 624 11

NRS 624.609(2) 9

NRS 624.610 ..... 13, 28

NRS 624.610(5) 22

NRS 624.610(6), ...21

NRS 624.624 ..... 5, 8, 15

NRS 624.624(1) ..... passim

NRS 624.624(2) 9

NRS 624.624(2)(a).....9

NRS 624.624-.630..... 1, 6, 18

NRS 624.626 13

NRS 624.628(3) 3, 5, 7, 15

NRS 624.628(3)(a).....7

Treatises

3 Philip L. Bruner & Patrick J. O'Connor Jr., Bruner & O'Connor on Construction Law § 8:18 (2016 ed.).....9

6A C.J.S. Assignments § 96 (1975).....37

Corbin on Contracts, § 50.1, at 223 38

Restatement (Second) of Contracts §317.....36

SUMMARY OF THE ARGUMENT ON REPLY

Helix's Opening Brief (hereinafter, "OB") demonstrates, and APCO fails to refute, that the District Court's conclusions of law conflict with long-standing Nevada law and practice recently affirmed by this Court in *APCO Constr., Inc. v. Zitting Bros. Constr., Inc.*, 136 Nev. Adv. Op. 64, 473 P.3d 1021 (2020), petition for re-hearing *en banc* denied (March 5, 2021). Specifically, the District Court's conclusions impermissibly require a subcontractor (Helix) to waive or limit its rights provided under NRS 624.624-.630, relieve the general contractor (APCO) of its obligations or liabilities under NRS 624.624-.630, and require the subcontractor (Helix) to waive its rights to damages and right to lien.

Here, APCO hired Helix to perform work on a doomed Project and withheld as retention $505,021.00 earned by Helix for its completed work. Despite terminating its own agreement with the Project Owner, Gemstone, APCO advised Helix that it remained bound to its contract with APCO. APCO then refused to pay Helix (i) all of the monies earned by Helix for work completed before APCO left the Project (i.e., the withheld retention) and (ii) additional unpaid amounts earned by Helix ($834,476.45.78) trying to complete the work APCO hired it to perform until Gemstone closed the Project just three months later. APCO does not challenge the District Court's orders *in limine* that precluded APCO from asserting or offering any evidence that any of Helix's work was defective, unworkmanlike or non-conforming

that might justify its continuing withholding of retention. 22-JA-001177. Instead, APCO pretends that the retention is something other than monies due to Helix for its completed work (without explaining what that something is). APCO relies on pretextual and futile contract provisions excusing its payment of the withheld and earned retention, but those provisions constitute impermissible "pay-if-paid" agreements and/or conditions, stipulations or provisions that "limit [Helix's] right to prompt payment under NRS 624.624(1) and limit [Helix's] recourse to a mechanics' lien." *Zitting Brothers,* 473 P.3d at 1027.

Similarly, APCO fails to demonstrate by clear and convincing evidence that Helix's work for Gemstone's replacement "general contractor," Camco, somehow serves to novate (and thereby waive) APCO's obligations to Helix. Such work does not and, under Nevada law, cannot serve to release APCO of its payment obligations or waive Helix's statutory right (i) to prompt payment for completed work (contrary to the prohibitions of NRS 108.2453(2) and NRS 108.2457(1)) or (ii) to lien (contrary to the prohibitions of NRS 624.628(3).

Finally, and because APCO's written subcontract does not and cannot serve to waive Helix's lien rights, APCO has no valid defense to payment of Helix's retention and is the "party legally liable" against whom judgment was proper

pursuant to NRS 108.239(12) when (as here) the sale proceeds of the property are insufficient to satisfy all liens.[1]

REPLY ARGUMENT

I. APCO MISREPRESENTS HELIX'S CONSISTENT RELIANCE ON ALTERNATIVE LEGAL THEORIES AS "ABOUT-FACE" ARGUMENT, WHICH IT IS NOT.

As more fully discussed in the OB, Helix demonstrated that the parties never reached a meeting of the minds with respect to the written document referred to as the Helix-APCO Subcontract. Despite many months of negotiations, revisions, proposals and counterproposals, the parties were still exchanging proposed versions of the document as late as July 11, 2008, shortly before APCO stopped work on the Project. OB 31-32; 29-JA-001779-1780; 36-JA-002189-2198.[2] Given these facts adduced at trial, Helix argued to the District Court that Helix's entitlement to payment for the withheld retention should be analyzed, ***in the alternative***, as an oral contract, *quasi*-contract and/or *quantum meruit*. Helix also argued that ***if*** the District Court deemed the Helix-APCO Subcontract to be the controlling document, it could not be used to deny payment to Helix without impermissibly impacting Helix's right to prompt payment and a mechanic's lien. While APCO certainly understands this,

[1] Owing to page limitations, Helix has been unable to address every argument asserted in the Answering Brief but in no way concedes that APCO's arguments are correct.

[2] 1TR112:3-5, 114:7-8; TE506.

it takes words out of context to disingenuously mischaracterize Helix's proposed Findings of Fact and Conclusions of Law as "about-face argument." APCO's Answering Brief on Appeal and Opening Brief on Cross-Appeal ("AB")20. Nothing could be further from the truth.

Helix proposed, in the first instance, a conclusion of law by the District Court (as it does here) that "there was no meeting of the minds with respect to material terms of the [Helix-APCO Subcontract]" and that the Court should conclude the document "does not constitute the parties' agreement." 81 JA005973. Helix further proposed, as it does here, that the parties "entered into a contract for an agreed-upon sum for the work performed by Helix," i.e., an oral contract. 81 JA005973-5974. Expressly ***in the alterative***, Helix also proposed that "there is an implied contract between Helix and APCO and that Helix is entitled to *quantum meruit* damages for recovery of the full and reasonable value" of its work. 81 JA005974. Finally, and also expressly ***in the alterative***, Helix proposed that if the District Court were to deem the Helix-APCO Subcontract to be the controlling document, the Court should also conclude that "APCO is nonetheless in breach of that agreement for its failure to pay Helix in full as required by that document for the work Helix performed while APCO was on site as the general contractor." 81 JA005975.

Helix then went on to argue, as it does here, that APCO's proposed application of Section 3.8 of that document should be rejected because, among other things, it

(i) violates NRS 108.2453(2), NRS 108.2457(1) and this Court's prohibition on pay-if-paid agreements by denying Helix a right to lien, and (ii) is a condition, stipulation or provision that violates NRS 624.628(3) by impermissibly requiring Helix to waive its right to prompt payment provided by NRS 624.624. 81 JA005976.

While the evidence presented at trial permitted the application of multiple legal theories entitling Helix to judgment against APCO, Helix has consistently applied these legal theories at the District Court level and here. The Court should therefore reject APCO's disingenuous argument that such alternative legal theories somehow require the application of judicial estoppel. Helix gained no "unfair advantage"[3] in sequentially applying the facts to alternative legal theories. Moreover, that doctrine cannot apply unless Helix "was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true)." *Kaur v. Singh*, 136 Nev. Adv. Op. 77, 477 P.3d 358, 362–63 (2020). Plainly, Helix here appeals the District Court decision because it was ***not*** successful in asserting its alternative arguments.

II. THE CONDITIONS PRECEDENT OF SECTION 3.8 IMPAIR HELIX'S LIEN RIGHTS AND ARE VOID AND UNENFORCEABLE.

As discussed more fully in its OB, this Court in *Zitting Brothers* recently clarified its holding pertaining to pay-if-paid agreements from *Lehrer McGovern*

[3] AB21 citing *Scarano v. Central R. Co of N.J.*, 203 F.2d 510, 513 (3d Cir. 1953).

Bovis, Inc. v. Bullock Insulation, Inc., 124 Nev. 1102, 197 P.3d 1032 (Nev. 2008). Specifically, *Zitting Brothers* held that pay-if-paid provisions "are unenforceable if they require subcontractors to waive or limit rights provided under NRS 624.624-.630, relieve general contractors of their obligations or liabilities under NRS 624.624-.630, or require subcontractors to waive their rights to damages, as further outlined under NRS 624.628(3)."). 473 P.3d at 1027. This Court specifically affirmed the District Court's conclusion that the pay-if-paid provisions in the Zitting-APCO subcontract agreement were void and unenforceable because they "limit Zitting's right to prompt payment under NRS 624.624(1) and limit Zitting's recourse to a mechanics' lien. We therefore hold that the pay-if-paid provisions in the parties' subcontract are void and unenforceable under NRS 624.628(3)(a)." 473 P.3d at 1027.

APCO does not (and cannot) dispute that the Helix-APCO Subcontract (i) is the exact same form of subcontract presented in *Zitting Brothers*, and (ii) contains the same subcontract language that is at issue here. Like Zitting Brothers, Helix was a subcontractor to APCO that was not fully paid for the Work it performed on the Project for APCO. The only difference here is that while only part of the money owed Zitting Brothers for work performed before APCO's departure was for

retention,[4] all of the monies APCO owed to Helix before APCO's departure was for retention. But this is a distinction without a difference.

A. Retention Is Money Earned For Work Performed.

APCO argues that because the money owed to Helix was ***retention***, APCO had no obligation to pay Helix. AB30-31. Specifically, APCO argues that "there is no indication in the statutory text or the legislative history to show that recovering the costs of 'all' work, labor, etc. inevitably includes retention." AB30-31. Of course, APCO ignores the fact that this Court affirmed the Zitting Brothers' judgment that included retention.[5] Moreover, where (as here) no statutorily-permissible basis exists for offsetting the withheld retention, there is no justifiable reason to treat retention differently from any other payment obligation without running afoul of NRS 624.624 and denying Helix its right to lien for those monies.

As APCO admits, retention is "money ***that has been earned*** but has been [withheld] until the project is completed." AB35 (emphasis added). Retention is not a "bonus" or some additional payment, but rather (as the undisputed testimony demonstrated) an "escrow account" of the temporarily-withheld portion of monies otherwise earned by a subcontractor for the work it has provided. 78-JA-005321-

[4] 473 P.3d at 1024 ("Zitting sought $750,807.16 for work completed prior to APCO's departure, including $403,365.49 in unpaid retention.").
[5] 473 P.3d at 1024.

5322.[6] APCO accurately cites 3 Philip L. Bruner & Patrick J. O'Connor Jr., Bruner & O'Connor on Construction Law § 8:18 (2016 ed.) for the proposition that retention is employed to hedge against the possibility that a contractor will fail to fully perform its contractual obligations. Indeed, NRS 624.624(2)(a)[7] expressly limits the withholding of retention to these same reasons, as follows:

> (I) Any work or labor that has not been performed or materials or equipment that has not been furnished for which payment is being sought, unless the agreement otherwise allows or requires such a payment to be made; and
>
> (II) Costs and expenses reasonably necessary to correct or repair any work which is the subject of the request for payment and which is not materially in compliance with the agreement…

Stated differently, the $505,021.00 that APCO withheld from and has never paid to Helix was for the ***sole purpose*** of remedying incomplete, defective or non-conforming work for which specific payment application(s) were submitted by Helix to APCO. APCO can point to ***no*** evidence or claims against Helix that would have

[6] 2TR38:8-13; 2TR39:1-3.

[7] In its discussion, APCO cites to NRS 624.609(2), an essentially identical provision relating to Gemstone's right to withhold retention and the limits to that right. AB44. Because Helix's retention is at issue here, Helix will address the issues under NRS 624.624(2).

allowed APCO to offset Helix's retainage against such claims. 78-JA-005321-5322.[8] For this reason, the District Court correctly granted Helix's Motions *in Limine* Nos. 1-3 against APCO precluding APCO from asserting or offering ***any*** evidence that Helix's Work was defective, not done in a workmanlike manner or otherwise not in compliance with the terms of the Helix-APCO Subcontract. 22-JA-001177. Stated differently, Helix fully and correctly performed its Work for which (i) Helix billed APCO, and (ii) APCO withheld retention from Helix. APCO did not appeal and does not challenge these Orders *in Limine*. Because no statutory basis exists for continuing to withhold Helix's retention, Helix is entitled to release and payment by APCO of the entire amount of its retention – i.e., $505,021.00.

B. The Conditions Of Payment In Section 3.8 Limit Helix's Right To Prompt Payment And Recourse To A Mechanics' Lien.

In its AB, APCO argues that unless and until Helix meets certain pre-conditions in Section 3.8 of the Helix-APCO Subcontract, APCO has no obligation to pay Helix. Specifically, Section 3.8 purports to make retention payable "***only*** upon the occurrence of ***all*** of the following events:"

(a) Completion of the entire project described in the Contract Documents;

(b) The approval and final acceptance of the project Work by Owner;

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[8] Compare to *Padilla Constr. Co. of Nev. v. Big-D Constr. Corp*., Docket Nos. 67397 & 68683, 2016 WL 6837851 (Order of Affirmance, Nov. 18, 2016) (retention withheld ***because of*** defective work) as discussed in *Zitting Brothers*, 473 P.3d at 1027.

(c) Receipt of final payment by Contractor from Owner;

(d) Delivery to Contractor from Subcontractor all as-built drawings from its scope of work and other close-out documents; and

(e) Delivery to Contractor from Subcontractor a Release and Waiver of Claims from all of Subcontractor's laborers, material and equipment suppliers, and subcontractors.

As discussed above, APCO cannot deny that Helix has fully earned the retention because such retention represents the unpaid portion of Helix's payment applications to APCO for which there is no statutorily allowable basis for offsetting those monies. Further, APCO does not deny that condition (c) (receipt of payment from the Owner) is a prohibited pay-if-paid provision. APCO instead suggests the remainder of Section 3.8 merely contains benign conditions to payment that either Helix neglected to perform, or never occurred, and which do not implicate the prompt payment provisions of NRS 624 and this Court's holding in *Zitting Brothers*. As discussed below, APCO is wrong.

APCO also incorrectly contends that by way of the severability provisions of Section 18.3, Section 3.8 makes retention payable "***only***" upon the occurrence of "***all of***" the listed events, including the pay-if-paid agreement that even APCO acknowledges is impermissible under this Court's holding in *Zitting Brothers*. However, because Gemstone's release of final payment to APCO is itself

inextricably tied to the remaining conditions set forth in Section 3.8 (i.e., completion of the Project, approval and final acceptance by Gemstone and delivery of close-out documents) it is factually and legally impossible to sever the express pay-if-paid event from the other closeout events, especially when (as here) the Project was never completed under contract with APCO or Camco.

APCO nonetheless argues that "requiring that the project be completed before issuing a retention payment does not force a contractor to waive its rights or relieve a general contractor from its obligations." AB35. Yet were that true no contractor (or its lower-tiered subcontractors) would ever be entitled to lien for withheld retention if (i) a contractor exercised its statutory right to stop work before project completion, or (ii) the project is otherwise never completed, both of which occurred here. Instead, there would be no "completion of the entire project," no "approval and final acceptance of the Project Work by Owner," and no delivery of "close-out documents" (because the Project did not "complete" or "close out").

In essence, APCO proposes that an owner (or, in this case, a higher-tiered contractor) can deprive a contractor or subcontractor of its retention (money already earned and owed) by simply closing a project before it is completed. If affirmed, APCO's proposition also means that any contractor (or subcontractor) properly exercising its right to stop work and/or terminating its contract pursuant to NRS 624.610 (or NRS 624.626) would lose all rights to prompt payment and a right to

lien for the unpaid balance of its contract because retention is never "due" until the project is completed, the owner has approved and finally accepted the project work and all close-out documents have been delivered, none of which will ever occur. See *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1115, 1117-18, 197 P.3d 1032 (Nev. 2008) (a pay-if-paid provision impairs the subcontractor's statutory right to place a mechanics' lien on the construction project because it limits a subcontractor's ability to be paid for work already performed).

Like the pay-if-paid provision, the other conditions of Section 3.8, if applied here, "limit [Helix's] right to prompt payment under NRS 624.624(1) and limit [Helix's] recourse to a mechanics' lien" and cannot be used to deprive Helix of judgment against APCO. See *Zitting Brothers*, 473 P.3d at 1027.[9] Were this Court to affirm APCO's argument, a contractor's right to prompt payment and lien would exist only for successfully completed projects, regardless of the reason why the project failed to complete. However, this cannot be the case.

As this Court has repeatedly stated, "the purpose of mechanics' lien statutes is to protect contractors and prevent unjust enrichment of property owners." *Zitting*

[9] Similarly, and because the premise of a lien action is non-payment, there would be no delivery of all waivers and releases (specifically, but not limited to, lien waivers), which would in any event only be effective upon receipt of the payment that, here, has never been made. See NRS 108.2457(5) and *Cashman Equip. Co. v. W. Edna Assocs., Ltd*., 132 Nev. 689, 692, 380 P.3d 844, 847 (2016) (pursuant to NRS 108.2457(5)(e) an otherwise unconditional lien release given in exchange for a check that does not clear the payor's bank is void.).

Brothers, 473 P.3d at 1029 citing *In re Fontainebleau Las Vegas Holdings, LLC*, 128 Nev. 556, 574, 289 P.3d 1199, 1210 (2012). The legislature "'created a means to provide contractors secured payment' since 'contractors are generally in a vulnerable position because they extend large blocks of credit; invest significant time, labor, and materials into a project; and have any number of workers vitally depend upon them for eventual payment.'" *Id.*

By purporting to condition payment of Helix's retention on completion of a Project that APCO itself abandoned (by stopping work), APCO seeks to (i) require its lower-tiered subcontractor, Helix, to "waive or limit the rights provided in NRS 624.624 to 624.630, inclusive," (ii) require Helix to "waive, release or extinguish a claim or right for damages," and (iii) relieve itself of "any obligation or liability imposed pursuant to NRS 624.624 to 624.630, inclusive." All of these actions are expressly prohibited by NRS 624.628(3).

Likewise, and in contravention to NRS 108.2453(2), APCO seeks to require Helix to (i) "waive rights provided by law to lien claimants or to limit the rights provided to lien claimants, other than as expressly provided in NRS 108.221 to 108.246, inclusive;" and (ii) relieve itself of an obligation or liability imposed by the provisions of NRS 108.221 to 108.246, inclusive." However, NRS 108.2457 voids "[a]ny term of a contract that attempts to waive or impair the lien rights of a contractor, subcontractor or supplier." As such, conditioning a contractor's right to

final payment and retention upon completion of a failed project (as APCO seeks to do here) or one for which the contractor has stopped work and/or terminated in accordance with the Nevada statute (which APCO did, yet liened for all such amounts anyway) limits Helix's right to prompt payment under NRS 624.624(1) and its recourse to a mechanics' lien. For this reason, Helix's right to prompt payment from APCO of its unpaid retention (and a right to lien for the same) is no different than Zitting Brothers' right to prompt payment and lien rights for its entire unpaid contract balance (including retention).

APCO fails to acknowledge that this Court's decision in *Zitting Brothers* served to clarify the Court's holding in *Bullock* where, consistent with long-standing policy of the State of Nevada, this Court affirmed:

> A contractor has a statutory right to a mechanic's lien for the unpaid balance of the price agreed upon for labor, materials, and equipment furnished.[10] "The object of the lien statutes is to secure payment to those who perform labor or furnish material to improve the property of the owner."[11] This court has held on numerous occasions "that the mechanic's lien statutes are remedial in character and should be liberally construed."[12]

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[10] 124 Nev. at 1115 citing NRS 108.222(1)(a).
[11] *Id*. citing *Schofield v. Copeland Lumber*, 101 Nev. 83, 85, 692 P.2d 519, 520 (1985).
[12] *Id*. citing *Las Vegas Plywood v. D & D Enterprises*, 98 Nev. 378, 380, 649 P.2d 1367, 1368 (1982).

Based on these principles, this Court then overruled its previous holding in *Dayside Inc. v. District Court*, 119 Nev. 404, 75 P.3d 384 (2003) allowing enforcement of prospective lien waivers if "clear and unambiguous" because "*Dayside* removes public policy from the analysis of the enforceability of particular lien waiver provisions." 124 Nev. at 1116. *Bullock**Error! Bookmark not defined.*** also declared pay-if-paid provisions unenforceable because they "limit[] a subcontractor's ability to be paid for work already performed … [and] impairs the subcontractor's statutory right to place a mechanic's lien on the construction project." *Id*.

Zitting Brothers then clarified *Bullock* by holding that while pay-if-paid provisions are not *per se* void and unenforceable, they are nonetheless unenforceable "if they require any subcontractor to waive or limit its rights provided under NRS 624.624-.630, relieve general contractors of their obligations or liabilities under NRS 624.624-.630, or require subcontractors to waive their rights to damages or time extensions." 473 P.3d at 1027.

In evaluating the Zitting-APCO Subcontract (which is the same form of subcontract entered between Helix and APCO), this Court expressly found that the pay-if-paid provisions contained therein "limit Zitting's right to prompt payment under NRS 624.624(1) and limit Zitting's recourse to a mechanics' lien." *Id*. For these same reasons, this Court should reverse and direct the District Court to enter

judgment for Helix in the undisputed amount of its unpaid retention ($505,021.00) (i) to make certain that a subcontractor is entitled to lien and be paid for work already performed, and (ii) because no public policy is served by distinguishing a contractor's right to retention from any other amounts due and owing for completed work.

III. APCO'S TERMINATION OF THE PRIME CONTRACT ENTITLED APCO AND HELIX TO RECOVER THE COSTS OF THEIR COMPLETED WORK.

As more fully discussed in the OB, even if Section 3.8's preconditions to payment of Helix's retention are enforceable when, as here, the Project was never completed, APCO's statutory termination of its contract with Gemstone triggered APCO's contractual obligation under Section 9.4 to pay Helix for Helix's completed Work. Specifically, by stopping work and terminating its contract with Gemstone (84-JA-006217),[13] APCO was "***entitled"*** to payment from Gemstone for "***the cost of all work, labor, materials, equipment and services furnished*** by [APCO], including any overhead [APCO and its] … lower-tiered subcontractors and suppliers incurred …" NRS 624.610(6) (Emphasis added).[14]

[13] FF104.

[14] Insofar as it is accurate, APCO's argument that NRS 624.610(6) "does not apply to a prime contractor-subcontractor relationship" entirely misses the point: NRS 624.610(6) provides the mechanism to APCO's entitlement to the amounts due and earned by APCO and its subcontractors; Section 9.4 requires APCO to pay Helix its portion of those amounts due.

Having terminated the Prime Contract, Section 9.4 of the Helix-APCO's Subcontract obligated APCO to pay Helix "the amount due from [Gemstone] to [APCO] for [Helix's] completed work …" 35-JA-002129.[15] Accordingly, and even if the preconditions of Section 3.8 are enforceable, the termination event (of APCO's choosing) triggered an ***independent*** contractual obligation requiring APCO to pay Helix all amounts "due" from Gemstone for Helix's completed work, which, as discussed *supra*, includes retention.

Under Section 9.4, "[Helix] shall be paid the amount due ***from [Gemstone] to [APCO]*** for [Helix's] completed work." Stated differently, APCO becomes obligated to pay amounts ***due to APCO from the Owner***, which "amount due" in no way implicates the Section 3.8 preconditions. That APCO itself liened and obtained summary judgment for all such amounts demonstrates the disingenuousness of APCO's present argument. *See e.g.*, 81-JA-005817-5818[16] and OB 19-20.

Were APCO not due such sums, it would not have liened for them or applied to the District Court for summary judgment of such sums, which it, in fact, did. *Id*. As discussed more fully in the OB, APCO's Notice of Lien asserts that $20,782,659.96 is due and owing from Gemstone including work ***performed and***

[15] As discussed in the OB, the ellipted phrase "after payment by [Gemstone] to [APCO]" can be disregarded as a pay-if-paid provision that limits Helix's right to prompt payment under NRS 624.624(1) as well as Helix's recourse to a mechanics' lien. See *Zitting Brothers*, 473 P.3d at 1027.
[16] TE3176.

billed through the date of termination of its prime contract with Gemstone. 81-JA-005817-5818.[17] Having thereby admitted that Helix's retention was "***due,***" APCO cannot dispute that Section 9.4 expressly requires it to "pay [Helix] the amount due."

Although APCO billed and liened for work Helix and other subcontractors performed, APCO now argues that NRS 624.610(6), giving APCO the right to "recover the cost of 'all' work labor, etc.," does not include Helix's retention. Yet APCO included in its payment applications to Gemstone the amounts billed by the subcontractors, including those submitted to APCO by Helix. See e.g., 30-JA-001885; 29-JA-001695-1696.[18] As these payment applications show, APCO (like Helix and the other APCO subcontractors) billed Gemstone for the ***total cost*** of the work performed in the payment application period, which the subcontractors were entitled to be paid after the applicable retention was withheld. Like Helix's retention, APCO's retention (most of which was subcontractors' retention) was earned for completed work and was, therefore an unpaid "cost of work" for which APCO ultimately liened and obtained summary judgment. To now argue, as APCO does here, that the "cost of all work, labor, etc." awarded by NRS 624.610(6) does not include retention is disingenuous at best.

[17] TE3176.
[18] TR4:1-19; 1TR28:25 - 29:8.

Finally, APCO incorrectly argues that Section 9.4 "only applies to a termination for convenience" (i.e., by Gemstone) and therefore does not apply when, as here, APCO terminated the APCO-Gemstone Contract pursuant to NRS 624.610(5). APCO further incorrectly argues that Helix's Robert Johnson (a lay witness) "admitted that Section 9.4 of the Subcontract only applies to a termination for convenience." AB41. In fact, the colloquy APCO relies on demonstrates at best that Mr. Johnson agreed that Section 9.4 ***also*** (not exclusively) applies to an owner termination. More importantly, the plain language of the provision rejects APCO's argument. Section 9.4 applies "***[i]f there has been a termination*** of the [APCO-Gemstone Contract]." 35-JA002129. All parties agree that the APCO-Gemstone Contract was terminated and the District Court so found. 84-JA-006217. [19] "When the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it." *Zitting Brothers*, 473 P.3d at 1029 citing *City Council of Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 891, 784 P.2d 974, 977 (1989).

IV. APCO DID NOT INTEND FOR CAMCO TO "TAKE OVER APCO'S OBLIGATIONS."

In its OB, Helix demonstrated that the District Court incorrectly concluded that Helix "knowingly replaced APCO with Camco under the [Subcontract] on all

[19] FF104.

executory obligations, including payments for future work and retention." OB at 50 (citing 84-JA006246, CL ¶ 18). Without limitation, Helix demonstrated that at all times Helix believed that it remained "under contract" with APCO precisely as APCO repeatedly advised Helix it was in notices to Helix and other subcontractors. 33-JA-002015;[20] 41-JA-002357. [21] It is undisputed that APCO never advised Helix that it intended to terminate the Helix-APCO Subcontract. 29-JA-001737.[22] Nor did Helix believe it had a legal right to stop work on the Project and it worried that if it stopped work it "would [be] at full risk of [APCO] pursuing [it] for abandoning the contract." 29-JA-001793.[23]

Lacking any evidence that its obligations to Helix were legally obviated, APCO instead argues that Helix's continued work on the Project – under the circumstances left to it when APCO abandoned the Project – is evidence that Helix "waived its right to seek retention from APCO." AB45.

The Parties agree that waiver occurs only when one "intends to relinquish [an existing] right or exhibits conduct so inconsistent with an intent to enforce the right

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[20] TE23 **("[a]ll subcontractors, until advised in writing by APCO CONSTRUCTION, remain under contract with APCO CONSTRUCTION.**") (CAPS and bold in original)

[21] TE48 ("ALL SUBCONTRACTORS ARE STILL CONTRACTUALLY BOUND TO THE TERMS OF THEIR RESPECTIVE SUBCONTRACTS WITH APCO CONSTRUCTION …"_ (CAPS in original)

[22] 1TR70:15-19

[23] 1TR128:12-16.

as to induce a reasonable belief that the right has been relinquished." *Hudson v. Horseshoe Club Operating Co.*, 112 Nev. 446, 457, 916 P.2d 786, 792 (1996). In *Hudson*, this Court found waiver when the plaintiff's employer "***affirmatively misled*** [plaintiff] and her doctor into believing that it would put [her] back to work at a light duty position if the doctor released her to return to work." 112 Nev. at 457 (emphasis added). By contrast, in *Merrill v. DeMott*, 113 Nev. 1390, 1399, 951 P.2d 1040, 1045–46 (1997) this Court reversed the district court's holding that landlord "waived performance" by his tenants when he allowed them to continue seeking county approval for a use permit without paying rent. While this and other concessions were effective as to their stated scope, they did not "have the legal effect of relinquishing the general right to collection of future rents under the lease, either intentionally or unintentionally." 113 Nev. at 1400.

Here, APCO fails to identify any evidence that ***Helix*** intended such a relinquishment, and as discussed *supra*, the undisputed testimony disputes the existence of such intent. Further, APCO cannot point to ***any*** evidence in the record that Helix's continued work on the Project somehow "induced" APCO to believe (reasonably or otherwise) that Helix ceased to look to APCO for payment of (at a minimum) all of the monies it earned for work completed while APCO was the prime contractor. In fact, within six months after Gemstone closed down the Project, Helix filed suit seeking monies due from APCO. 1-JA-000001.

By arguing that APCO's obligations to Helix were somehow novated to Camco (thereby relieving APCO of any obligation to pay Helix for its completed Work), APCO ignores the applicable standard of proof, as did the District Court, of "clear and convincing evidence." *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 509, 780 P.2d 193 (1989). See *In re Discipline of Drakulich*, 111 Nev. 1556, 1566–67, 908 P.2d 709, 715 (1995) citing with approval *Butler v. Poulin*, 500 A.2d 257, 260 n. 5 (Me.1985) (defining clear and convincing evidence as "evidence establishing every factual element to be highly probable") and *In re David C.*, 152 Cal.App.3d 1189, 200 Cal.Rptr. 115, 127 (1984) ("evidence [which] must be so clear as to leave no substantial doubt.").

APCO's only "evidence" of a novation[24] is an incorrect and subsequently disavowed statement in Helix's pleading suggesting it entered a ratification agreement, for which there is no other proof. It is undisputed that Helix declined to execute that document and the proposed subcontract agreement between Helix and Camco. 29-JA-001790-1792; 61-JA-003845.[25] The record contains ***no*** signed ratification agreement or signed subcontract agreement between Camco and Helix.[26]

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[24] Under Nevada law, a novation requires that "(1) there must be an existing valid contract; (2) all parties must agree to a new contract; (3) the new contract must extinguish the old contract; and (4) the new contract must be valid." *McClelland*, 105 Nev. at 508.

[25] 1TR123:1 - 124:25; TE 510:6.

[26] The District Court finding that "Helix has not produced a signed copy of the ratification," 84-JA-006237, FF219, is highly misleading and unfair. No such signed

A trier-of-fact should search for the truth[27] and a single misstatement does not establish "clear and convincing evidence" to contradict the mountain of evidence showing the parties never consummated the alleged ratification agreement in the brief time after APCO left the Project and Gemstone closed it down. Indeed, despite making a finding as to this misstatement, the District Court made no finding that Helix ***actually*** entered a ratification agreement, though it did so for other subcontractors, such as CabineTec. 84-JA-006223.[28]

APCO nonetheless argues that Helix, "by its words and conduct waived its right to seek payment from APCO" by attempting to complete its work on the Project through the only means available to it (i.e., working with the Project Owner and its replacement "contractor"). AB45.[29] APCO's argument is particularly peculiar since

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copy was produced by ***any*** party (including Helix, APCO, Camco, Gemstone, lenders or other third parties) in more than 10 years of litigation ***because no such signed copy exists***.

[27] *See e.g., United States v. Nixon*, 418 U.S. 683, 710, 94 S. Ct. 3090, 3108, 41 L. Ed. 2d 1039 (1974) (noting that privileges are "in derogation of the search for truth").

[28] FF144.

[29] As more fully discussed in the OB, Camco was "more of a construction manager than a general contractor." 81-JA-005850. Camco did not have any responsibility for much of anything, including the "acts, errors or omissions" of subcontractors and its "only role in the payment process was to complete and submit each initial payment application." 81-JA-005865; 46-JA-002582. In short, Camco was there to "lend [its] license" to Gemstone. 81-JA-005869-5870.

it also argues that Helix is not entitled to be paid its retention from APCO unless and until the Project is completed. See *supra*. [30]

V. THE PRIME CONTRACT PROHIBITS ASSIGNMENT EXCEPT AFTER TERMINATION BY DEVELOPER FOR CAUSE.

Helix's OB demonstrates that (i) the Helix-APCO Subcontract ***was not*** assigned or somehow novated to Gemstone or Camco, and (ii) under the terms of the APCO-Gemstone Contract, it ***could not*** have been assigned. Specifically, by its clear and unambiguous terms, Section 10.04 permits assignment of "Third-Party Agreements" "***only after termination*** of the Agreement ***by Developer*** for cause pursuant to Section 10.02." 29-JA-001850, emphasis added. However, the District Court expressly found that APCO, not Gemstone "properly terminated the Contract for cause in accordance with NRS 624.610 ..." 84-JA-006217, emphasis added. [31]

APCO nonetheless argues that language in Section 10.02 ***allowing*** Gemstone to terminate the APCO-Gemstone Contract under certain circumstances (e.g., APCO's uncured breach) somehow alters Section 10.04's ***express requirement*** of such a termination (by Gemstone for cause) before there can be an assignment of the

[30] Such disingenuous argument has been the hallmark of APCO's failure to deal fairly and in good faith with Helix from the outset. Among other actions discussed at length in the OB, APCO abandoned Helix and the other subcontractors while advising them that they "remain under contract" and were "STILL CONTRACTUALLY BOUND" to the subcontract. See e.g., OB45; 33-JA-002015; 41-JA-002357.

[31] FF104.

Helix-APCO Subcontract. APCO's conflation of termination and assignment – two independent events with independent requirements and consequences – is pure sophistry. Even where Section 10.02(b) permits Gemstone to "accept assignment of any Third-Party Agreement," it must ***first*** give notice to APCO, ***then*** terminate APCO, and ***then*** accept an assignment. Under the plain language of Sections 10.02 ***and*** 10.04, there cannot be assignment without termination by Gemstone for cause.

VI. APCO IS THE "PARTY LEGALLY LIABLE."

In *Zitting Brothers*, this Court held that the plain language of NRS 108.239(12) permits a judgment against the "'party legally liable for it' - not necessarily the "owner." 473 P.3d at 1029. APCO was the "party legally liable" to Zitting for its unsatisfied lien claim because "Zitting is claiming amounts that APCO owes on retention and change orders based on its contract with APCO." *Id*. This is precisely the argument Helix makes here with respect to its unsatisfied lien claim.

APCO nonetheless argues that, based on the judgment below, it is not "the party legally liable." AB51. While Helix did not prevail before the District Court, the foregoing discussion demonstrates that (i) Helix earned its retention for Work performed for APCO, (ii) the retention was withheld by APCO pursuant to the Helix-APCO Subcontract, and (iii) Helix **should have** prevailed and is entitled to judgment against APCO for is unpaid lien claim.

VII. TRIAL COMMENCED ON OCTOBER 12, 2012.

As more fully discussed in the OB, the District Court impermissibly awarded fees and costs to APCO pursuant to NRCP 68 even though APCO's offer of judgment was made more than five years after "trial of [the] consolidated matter" commenced pursuant to the District Court's October 30, 2012 Order ("the 2012 Order"). The 2012 Order, proposed and drafted by APCO's attorneys, established a trial commencement date as to the ***entire*** "consolidated matter" so as to ensure that the Five-Year Rule did not result in the mandatory dismissal of any of the consolidated actions, including APCO's claims against Gemstone. 96-JA-06925. At no time were the parties or claims at issue ever bifurcated from the consolidated matter, and in fact, the claims of multiple parties, were tried together.

APCO argues that this Court should ignore the 2012 Order and the express terms of Rule 42 and declare that the Helix-APCO action was, in effect, bifurcated - but, it was not!

NRCP 42(a) allows a district court to consolidate actions that involve a common question of law or fact.[32] Conversely, and "[f]or convenience, to avoid prejudice, or to expedite and economize," NRCP 42(b) conversely permits the district court to "***order*** a separate trial of one or more separate issues, claims,

[32] In addition, NRS 108.239(3) also permits consolidation of claims by "[a]ll persons holding or claiming a notice of lien" so that all claims pertaining to a specific project may be administered in a consolidated action, which is what occurred here.

crossclaims, counterclaims, or third-party claims." Here it is undisputed that related cases were consolidated but never bifurcated, and that a single trial occurred involving multiple parties and claims. See e.g., 29-JA-001671.[33]

Despite the five-year gap between the commencement of trial and APCO's offer of judgment, APCO argues that its offer was timely pursuant to *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990 (1993). Unlike the facts of *Allianz*, the District Court here did not bifurcate the consolidated matter into phases or stages or even by parties. While APCO could have requested such bifurcation, it failed to do so.[34] Had it done so, perhaps there would have been a different result. Perhaps following one bifurcated action, and the District Court's decisions thereon, different settlement calculations may have been made. We will never know. Instead, APCO chose not to seek bifurcation, resulting in a single action involving multiple parties and claims. Having made that choice, APCO cannot now complain that the express language of NRCP 68 rendered its offer of judgment toothless. See *Beattie v. Thomas*, 99 Nev. 579, 588, 668 P.2d 268, 274 (1983) ("while the purpose of NRCP 68 is to encourage settlement, it is not to force plaintiffs unfairly to forego legitimate claims.").

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[33] 1TR4:6-8 ("We're convening for a non-jury trial in the case of APCO Construction versus Gemstone Development West, Inc., et al.").

[34] Helix does not, by this argument, concede that a subsequent bifurcation order could in fact re-start the commencement of a trial date. Indeed, even if the Helix-APCO claims had been subsequently bifurcated, their trial would still have been commenced by virtue of the 2012 Order.

APCO also nonsensically argues that application of the plain language of NRCP 68 would mean that every pretrial submission, such as motions in limine, would have been made "five years after trial." AB53. Yet while such filings occurred after ***commencement*** of trial (in October 2012), they did not occur "after trial." In any event, APCO cites no rule that precludes the District Court from receiving, at its discretion, motions in limine after commencement of trial. As of the date of the offer of judgment (before the 2019 amendments to the rule), NRCP 68 permitted any party to serve an offer of judgment "[a]t any time more than 10 days before the trial ***begins***...." See *Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1047, 881 P.2d 638, 641 (1994).

As noted in the OB, compliance with the Five-Year Rule was the foundation of the 2012 Order. Its underpinnings (commencement of trial of the "consolidated matter") cannot be later unmoored from that order so as to create an entirely different meaning and to imply the existence of a bifurcated trial that never occurred. Because trial began in 2012 when evidence was taken in the "consolidated matter," APCO's offer of judgment, made years later, was plainly untimely.

ARGUMENT IN RESPONSE TO APCO'S CROSS-APPEAL

I. APCO HAS NO CONTRACTUAL BASIS FOR AN AWARD OF ATTORNEY FEES.

APCO argues that the District Court should have awarded APCO attorney's fees pursuant to Section 18.5 of the Helix-APCO Subcontract. As argued above

and in the OB, Helix and APCO never reached a meeting of the minds with respect to the Helix-APCO Subcontract, and as such, Section 18.5 is inapplicable. Yet even if the Helix-APCO Subcontract is deemed to have been adopted by the parties, APCO has no right to seek enforcement of a provision of a document it persuaded the District Court to determine had been assigned and novated to Gemstone and/or Camco.

It is settled law that attorney's fees are not recoverable absent a statute, rule or contractual provision to the contrary. *Locken v. Locken*, 98 Nev. 369, 650 P.2d 803 (1982); *Von Ehrensmann v. Lee*, 98 Nev. 335, 647 P.2d 377 (1982). Nevada law provides that "the compensation of an attorney and counselor for his services is governed by agreement, express or implied, which is not restrained by law." NRS 18.010(1). Thus, unless APCO has a contract that includes a provision entitling it to an award of attorney's fees, it must seek the same through some other means, if at all. Having successfully argued that it contractual rights and obligations were assigned to another, APCO has no contractual basis and no standing to seek an award of fees from Helix.

Here, APCO waived, assigned and relinquished all rights arising or derived from the Subcontract, when (by its own admission and as it urged the District Court to find) it knowingly acquiesced to the assignment of the Subcontract to Gemstone and/or Camco. *See Nevada Yellow Cab Corp. v. Eighth Judicial Dist.*

Court ex rel. Cty. of Clark, 123 Nev. 44, 49, 152 P.3d 737, 740 (2007) (Waiver requires the intentional relinquishment of a known right).

By way of its Findings of Fact and Conclusions of Law (that APCO urged the District Court to adopt for its express benefit), the District Court determined that APCO is not and (since at least 2008) has not been a party to the Subcontract because the Subcontract, and all of APCO's rights thereunder (including a claim to entitlement to an award of attorney's fees) were assigned to the project owner, Gemstone and, subsequently, to Camco. Specifically, but without limitation, the District Court determined that:[35]

- "[T]he Subcontracts were assigned to Gemstone." 85-JA-006261;[36]
- Each party's behavior is consistent with the assignment of the Helix and CabineTec Subcontracts to Gemstone;" *Id*.[37]
- "The [prime] Contract contained a subcontract assignment provisions that assigned Gemstone APCO's subcontracts upon termination of the Contract." 85-JA-006262;[38]
- "The Contract was incorporated into the subcontracts." *Id*.[39];

[35] As repeatedly demonstrated, Helix disputes these findings and does not waive such positions by arguing in the alternative.
[36] (heading).
[37] CL116.
[38] CL117.
[39] CL118.

- "Once APCO left the Project, the Helix and Cabinetec Subcontracts were assigned to Gemstone per Gemstone's written notice to APCO." *Id*.[40]; and
- Once Gemstone had those Subcontracts, it facilitated Camco's assumption of those subcontracts." *Id*.[41]

An assignment of a right is a manifestation of the assignor's intent to transfer such right and the assignor's right to performance by the obligor is extinguished and the assignee acquires a right to such performance. Restatement (Second) of Contracts §317. An assignment is a transfer of **all the interests and rights** to the thing assigned. *Dept. of Rev. v. Bank of America*, 752 So.2d 637 (Fla. 1st DCA 2000) (emphasis added).

Here, APCO argued, and this Court concluded, that pursuant to its contractual obligations with Gemstone, APCO voluntarily assigned the Helix-APCO Subcontract, and all rights and remedies thereunder, when the APCO-Gemstone Contract was terminated. APCO's actions in assigning the Subcontract plainly constitute a voluntary relinquishment of known rights. *See Nevada Yellow Cab Corp, supra.*

[40] CL119.
[41] CL120.

More directly, APCO assigned to Gemstone and Camco all rights of contractual enforcement, including the attorney's fees provision. "An assignment vests in the assignee the right to enforce the contract, an **assignor retains no rights** to enforce the contract after it has been assigned." *Estate of Basile v. Famest, Inc*., 718 So.2d 892 (Fla. 4th DCA 1998) (emphasis added). *See also Ryder Truck Rental, Inc. v. Transportation Equipment Co., Inc*., 339 N.W.2d 283 (Neb., 1983) citing 6A C.J.S. Assignments § 96 (1975) (generally, an assignor retains only those rights which have not passed to the assignee by the assignment. The **assignor loses all right to control or enforce** an assigned right against the obligor) (emphasis added); *Imel v. Travelers Indem. Co*., 281 N.E.2d 919, 921 (Ind.App. 1972) ("assignment is an **outright transfer of the claim**.") (emphasis added); *Allstate Insurance Company v. Medical Lien Management, Inc.*, 348 P.3d 943, 947 (Colorado 2015) citing Corbin on Contracts, § 50.1, at 223 (an assignment "**extinguishes a contract right** in the assignor and recreates that right in the assignee") (emphasis added).

This universally accepted maxim that the assignor "deprives himself of all interest and control" over the assigned rights applies equally to a judgment for attorney's fees. *See Boarman v. Boarman*, 556 S.E.2d 800, 804 (W.Va 2001). *See also Oral Roberts University v. Anderson*, 11 F.Supp.2d 1336 (N.D. OK 1997) (a

party can assign away its contractual right to ***receive*** an award of attorney's fees but cannot, by assignment, delegate the obligation away).

Here, and as requested and encouraged by APCO, the Court ruled that APCO's rights and duties under the Subcontract were, in or about August 2008, voluntarily assigned to Gemstone and Camco. As such, APCO has had no right to enforce any provisions of the Subcontract since before this Action was commenced. Based on the District Court's decision, APCO assigned away APCO's rights under the Subcontract. APCO therefore had no basis to seek an award of attorney's fees pursuant to a contract it urged the District Court to deem novated to another.

II. APCO HAS NO STANDING TO SEEK AN AWARD OF ATTORNEY FEES UNDER THE SUBCONTRACT AND IS NOT THE REAL PARTY IN INTEREST WITH RESPECT TO THE SUBCONTRACT.

This Court has held that an assignment of rights "eliminates the standing of the assignor to pursue the litigation, and the assignee acquires standing instead." *Manko Holdings Ltd. v. Reno Project Management, LLC*, 385 P.3d 43 (Unpublished Decision, Docket No. 70525, September 27, 2016[42]) citing *Butwinick v. Hepner*, 128 Nev. 718, 721–22, 291 P.3d 119, 121 (2012); *Applied Medical Technologies, Inc. v. Eames*, 44 P.3d 699 (Utah 2002) (granting a

[42] Pursuant to NRAP 36(c)(3), a party may cite an unpublished disposition of the Nevada Supreme Court issued on or after January 1, 2016.

defendant judgment creditor's motion to dismiss an appeal, after the defendant purchased at a constable's sale claims asserted against him by the plaintiff judgment debtor).

The inquiry into whether a party is a real party in interest overlaps with the question of standing. *Arguello v. Sunset Station, Inc.*, 127 Nev. 365 (2011) citing *Szilagyi v. Testa*, 99 Nev. 834, 838, 673 P.2d 495, 498 (1983). NRCP 17(a) provides that "[e]very action shall be prosecuted in the name of the real party in interest." A real party in interest "is one who possesses the right to enforce the claim and has a significant interest in the litigation." *Id*. The purpose of the rule, since it was amended in 1971 to conform to the federal rule, "was to make unmistakably clear that 'the modern function of the [real party in interest] rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata.'" *Easton Bus. Opp. v. Town Executive Suites*, 126 Nev. 119 (2010) citing Fed.R.Civ.P. 17(a) advisory committee's note (1966).

Here, APCO seeks to enforce a right that – by virtue of the assignment - belongs to another (i.e., Gemstone and/or Camco). For instance, if Camco had prevailed in defending Helix's contractual claims, it surely would have asserted a right to an award of attorney's fees with respect to the assigned Subcontract. Such

exposure to liability to both APCO and Camco arising out of the same contractual provision is exactly what NRCP 17(a) is designed to prevent. *See Town Executive Suites, supra.* Having voluntarily assigned away ***all*** its rights under the Subcontract, APCO is not the real party in interest with respect to the Subcontract and has no standing to seek recovery of its attorney's fees based on rights derived from the Subcontract that were assigned to and are owned by another.

Finally, APCO argues that "because Helix sued APCO for an alleged breach of the Subcontract," the "equitable principle of mutuality of remedy" required the District Court to award it fees pursuant to Section 18.5 of the Helix-APCO Subcontract. AB56-7. First, and as repeatedly noted here and in the OB, Helix urged the District Court to find that the parties never had a meeting of the minds with regard to the Helix-APCO Subcontract but rather entered an oral contract or an implied contract for which Helix is entitled to the equitable remedy of *quantum meruit*.[43] In any event, this Court has never adopted the principle of mutuality to require an award of attorney's fees to a party. *See e.g., Trustees of Carpenters for S. Nevada Health & Welfare Tr. v. Better Bldg. Co*., 101 Nev. 742, 747, 710 P.2d 1379, 1382 (1985) (refusing to construe a unilateral provision for attorney's fees as

[43] For this reason also, the Court should reject APCO's argument that Helix is equitably estopped to deny APCO's entitlement to fees pursuant to Section 18.5. See AB59.

requiring an award to the other, prevailing, party). APCO's reliance on a case from Washington[44] has no bearing on this action.

Finally, and even if this Court were to conclude that attorney fees should have been awarded to APCO pursuant to Section 18.5, it cannot simply award APCO the amount it requested from (but was not awarded by) the District Court and must instead remand for further findings. In seeking such relief from this Court, APCO misrepresents the District Court's finding of reasonableness, which applied not to the total fees sought, but rather the "fees sought by APCO ***based upon the offers (sic) of judgment***." 100-JA-007263. In fact, APCO acknowledges that the District Court already "reduced APCO's post-offer attorneys' fees attributable to Helix from $130,933.73 to $85,000." AB55. Stated differently, the District Court did not even deem all of the fees requested under NRCP 68 (which formed a portion of the $447,809.28 APCO asks this Court to award) to be reasonable.

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[44] See AB57 citing *Kaintz v. PLG, Inc.*, 147 Wash. App. 782, 197 P.3d 710 (2008).

CONCLUSION

Based on the foregoing, Helix respectfully requests that the Court reverse the decision below.

Dated this 21st day of April, 2021.

PEEL BRIMLEY LLP

/s/ Eric B. Zimbelman

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[**X**] This Brief has been prepared in a proportionally spaced typeface using Microsoft Word, Version 16 in 14 points, Times New Roman; or

[ ] This Brief has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style].

2. I further certify that this Consolidated Brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[**X**] Proportionately spaced, has a typeface of 14 points or more, and the ***Reply*** contains 6,580 words (of an allowed 7,000 words) and the ***Response to Cross-Appeal*** contains 1,793 words (of an allowed 14,000 words);[45] or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

[ ] Does not exceed 30 pages.

[45] To the extent the Courts deems the ***combined*** page limitation for this consolidated Reply and Answering Brief to Cross Appeal to be the 7,000 words permitted for a Reply, Helix respectfully moves the Court to permit enlargement of the page limitation (by a total of 1,373 words) to permit Helix the opportunity to respond to the many arguments made in APCO's Combined Answering Brief on Appeal and Opening Brief on Cross-Appeal.

3. Finally, I hereby certify that I have read this 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.

Dated this 21st day of April, 2021.

PEEL BRIMLEY LLP

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. P. 25(b) and NEFCR 9(f), I certify that I am an employee of **PEEL BRIMLEY LLP**, and that on this 21st day of April, 2021, I caused the above and foregoing document, **APPELLANT/CROSS RESPONDENT'S COMBINED REPLY TO ANSWERING BRIEF AND ANSWERING BRIEF TO CROSS-APPEAL**, to be served as follows:

- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
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- ☐ pursuant to EDCR 7.26, to be sent **via facsimile;**
- ☐ to be hand-delivered; and/or
- ☐ other _____

to the attorney(s) and/or party(ies) listed below at the address and/or facsimile number indicated below:

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