IN THE SUPREME COURT OF THE STATE OF NEVADA

DESERT VALLEY CONTRACTING, INC. a Nevada corporation, Appellant, vs. IN-LO PROPERTIES, a Nevada limited liability company; EUGENE INOSE, an individual; JEFFREY LOUIE, an individual; DOES 1 through 10; and ROE ENTITIES 1 through 10, Respondents,	CASE NO. 79751

REPLY

From the Eight Judicial District Court, Department XV
The Honorable Joe Hardy, District Judge
District Court Case No. A-16-734351-C

APPELLANTS' REPLY BRIEF

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NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

Desert Valley Contracting, Inc. has no parent company and no publicly listed company owns 10% or more of the Appellant's stock.

This representation is made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 20th day of August 20, 2020

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INTRODUCTION

On or about 2008, Respondent, EUGENE INOSE and IN-LO PROPERTIES, LLC (hereafter "Respondent"), built the custom residential home located at 587 Saint Croix Street, Henderson, Nevada 89012 (APN: 178-27-114-001) (hereinafter "Subject Property") through various subcontractors. In early August, 2014, the Subject Property sustained substantial water damage due to a burst pipe. At the time, the Respondent did not reside at the Subject Property, so the leak remained undetected for an unknown amount of time. Once the leak and water damages were detected, a friend of the Respondent contacted ServPro of Henderson, to begin the clean-up of the extensive water damage. ServPro of Henderson is a completely separate corporate entity from DESERT VALLEY CONTRACTING, INC. (hereafter referred to as "Appellant") with different ownership and different employees. ServPro of Henderson conducted the initial demolition of the water damaged property.

Thereafter, ServPro of Henderson referred Respondent to Appellant. After the Appellant and Respondent made contact, Mr. Inose and Appellant's Employee Daniel Merritt met at the property and discussed the damage and the remodel of the property. Thereafter, on August 24, 2014, Appellant, and Respondent, entered into a Contract wherein Appellant would complete perform the remediation and perform the restoration at the Subject Property. The Contract stated that;

"The undersigned hereby transfers, assigns and conveys to Contractor his/her/their right...to the insurance proceeds...The undersigned agrees to immediately endorse and tender all drafts as produced to the Contractor. The undersigned further agrees to authorize Desert Valley Contracting Inc. to sign on its behalf and/or deposit all insurance checks that are issued to pay for the services performed pursuant to the contract."

The Respondent never endorsed or tendered the payment drafts he received from the insurance company, FIREMANS FUND, to the Appellant as required by the Contract. Respondent also never allowed the Appellant to sign on Respondent's behalf or deposit the insurance checks themselves. The Respondent never relinquished control of the purse strings for this project. The documents show that the Respondent doled out payments to Appellant over the course of a year, from September 2014 to September 2015.

The Contract contemplates that work may be performed outside the scope of the Insurance Claim. The Contract states twice that all uninsured work, including uninsured code-upgrade work, or any form of work not covered under Owner's Insurance Policy would be the responsibility of the Appellant as signatory of the contract. The contract also states in multiple places that if the contractor is forced to bring suit the prevailing party would be entitled to attorney's fees and the legal interest rate of Prime Plus Two (2) points. The contract also states that requests for

additional work must be in writing so that they can be added to the Scope of Work. The contract does not say that they need to be signed by the Appellant to be added to the Scope of Work.

Respondent insisted that the Appellant retain, wherever possible, the same contractors that were involved in the original construction. These subcontractors were not companies that the Appellant regularly hired for construction work. Respondent also insisted that Appellant retain Robert Ramirez as a supervisor for the project. Mr. Ramirez had served as a supervisor during the original construction of the property. Mr. Ramirez's salary of approximately Ninety-Eight Thousand, Four Hundred, Seventeen Dollars and Sixty Cents ($98,417.60) was paid out of the insurance proceeds. The Court has heard testimony that if Appellant did not acquiesce to hiring Mr. Ramirez then Appellant would be removed from the job.

In September of 2014, Appellant began reconstruction of the Subject Property. During the demolition and reconstruction of the house, several revised budgets were presented to Respondents insurance company, FIREMAN'S FUND. During the performance of the Contract, Respondent chose to have several upgrades in materials and work added onto the Contract's scope of work, which increased the original Contract's scope of work and cost. Basically, the Respondent took this opportunity to remodel home on the insurance company's dime. These changes also caused delays in construction. The Court has heard testimony regarding the upgraded

wine room, the upgrades to the pool area, and Master Bathroom. Additionally, other uncontrollable delays bedeviled the reconstruction, in particular, marble had to be imported from Tuscany and was not available for Three (3) months while it was held up in customs due to a dock workers labor dispute.

The testimony and exhibits have shown that the Respondent was a ubiquitous presence on the Property during the reconstruction. Mr. Inose received constant emails and telephone calls from the Appellant and from Rob Ramirez. He spoke directly to subcontractors as well and was intimately aware of Change Orders and the status of the project at all times. It is of course his right as owner to be involved in the reconstruction of his home, but he cannot then feign ignorance later when the bill comes due.

On June 19, 2015, the Respondent was sent a copy of the Final Estimate and among other documents in an email from Brian Lynch of FIREMAN'S FUND. Against the advice of the Appellant, the Respondent closed out the claim following the production of this estimate. Then, in October 2015, the Appellant could no longer abide by the Respondent's demands for the upgrades and changes that were overrunning the insurance proceeds that were designed to reconstruct, not improve the residence.

On November 18, 2015, the parties and their attorneys met at Appellant's counsel's offices and attempted to reach a compromise to compete the project.

Following the meeting, Appellant believed that an agreement was made to pay off the subcontractors change orders and complete the project. However, following the meeting the Respondent barred the Appellant from the Subject Property and negotiated with the subcontractors directly. On December 7, 2015 sent Appellant correspondence terminating their contract. The Contract specifically states that should the Client (Respondent) terminate the Contractor (Appellant) after the work has begun, the Respondent is responsible for any fees and costs plus the profit the Appellant would have made had the Respondent not repudiated the Contract. To date, the Respondent has not paid that amount. Following the termination, the Appellant attempted to continue negotiations through their counsel to no avail and filed this action on March 31, 2016.

A Bench Trial held on April 8, 9, 10, and 11, 2019, June 19, 20 and 21, 2019, and July 24, 2019. On July 24, 2019, the Court rendered its verdict wherein the Court did not award damages to either party. The Notice of Entry of Findings of Fact and Conclusions of Law was filed on September 4, 2019. DVC filed a timely Notice of Appeal on September 30, 2019. INOSE had previously sent DVC an Offer of Judgment in the amount of Fifty Thousand Dollars and Zero Cents ($50,000.00). Therefore, on November 18, 2019, the Court Granted INOSE's Motion for Attorney's Fees and Costs based on the Courts award of no damages. If the award of damages is overturned then the Offer of Judgment is no longer satisfied.

LEGAL ARGUMENT

A. Desert Valley Contracting, Inc. Presented a Clear Calculation of Damages to the Court.

The Trial Court was clearly in error in ruling that the Appellant failed to prove its damages. The Appellant was damaged by the breach of the Respondent. The Appellant had a reasonable expectation of their profit and overhead for the project under the industry standard Ten Percent (10%) overhead and Ten Percent (10%) profit. Pursuant to the uncontradicted testimony of DVC owner Dennis Zachary, the Contract was to be performed on a "10 and 10" basis, meaning that Desert Valley was entitled to (10%) profit and (10%) overhead based on the amount Desert Valley Contract, Inc. spent on the project.

The general goal of contract damages is to provide compensation for the injured party based on the injured party's expectation interest. 3 D. Dobbs, Law of Remedies § 12.2(1), at 22 (2d ed. 1993); Restatement (Second) of Contracts § 347cmt. a (2008). Although there are other remedies available for an injured party in a breach of contract situation, the general and traditional goals of awarding damages in a breach of contract case are aligned with the expectation/compensation remedy. Dobbs, § 12.2(1), at 22.

More specifically, "[c]ontract damages . . . are intended to give [the nonbreaching party] the benefit of his bargain by awarding him a sum of money that

will, to the extent possible, put him in as good a position as he would have been in had the contract been performed," and no better. Restatement (Second) of Contracts § 347 cmt. a; Dobbs, supra, § 12.2(1), at 23; Colorado Env't, Inc. v. Valley Grading Corp., 105 Nev. 464, 470, 779 P.2d 80, 84 (1989) ("It is fundamental that contract damages are prospective in nature and intended to place the nonbreaching party in as good a position as if the contract had been performed."); Dalton Properties, Inc. v. Jones, 100 Nev. 422, 424, 683 P.2d 30, 31 (1984) (stating that placing the nonbreaching party in as good a position as if the contract had been performed is the "object of compensatory damages").

In this matter, the Parties Contract states that if the Client terminates the contract before the work is completed, they shall be responsible for the profit the Contractor would have been made had the contract not been repudiated. The Appellant's cost for the project was One Million, Twelve Thousand, Four Hundred, Fifty One Dollars and Eight Cents ($1,012,451.08)(Appendix Volume VII Exhibit 14, JNT0001170). At a Twenty (20%) profit, the Appellant is entitled to a total of One Million, Two Hundred Fourteen Thousand, Nine Hundred Forty One Dollars and Thirty Cents ($1,214,941.30). The Appellant was paid approximately One Million, One Hundred, Twenty-Five Thousand, Seven Hundred Forty Three Dollars and Seventy-Two Cents, ($1,123,743.72). Therefore, Appellant has been damaged

in the amount of approximately Eighty-Nine Thousand, One Hundred Ninety Seven Dollars and Fifty Eight Cents ($89,197.58).

The final estimate sent to FIREMAN'S FUND has nothing to do with the Appellant's claim for damages. The claim for damages is based on the amount that Appellant paid. There is nothing inflated about the Job and Billing Detail (Appendix Volume VII, Exhibit 13, JNT0001139). At no point in the trial did opposing counsel argue that these amounts were not paid. These amounts reflect what DVC actually paid out for labor, vendors, subcontractors, and other costs. The fact that they received a portion of their profit and overhead does not mean they were not damaged. They paid out One Million, Twelve Thousand, Four Hundred, Fifty One Dollars and Eight Cents ($1,012,451.08). They received approximately One Million, One Hundred, Twenty-Five Thousand, Seven Hundred Forty Three Dollars and Seventy-Two Cents, ($1,123,743.72) in payments. They are still owed Eighty-Nine Thousand, One Hundred Ninety-Seven Dollars and Fifty Eight Cents ($89,197.58), it's really just as simple as that.

B. The Contract Should Be Interpreted Based on the Parties Intent

A contract should not be construed so as to lead to an absurd result. Reno Club v. Young Inv. Co., 64 Nev. 312, 182 P.2d 1011 (1947). The Doctrine of Scrivener's Error is well established Nevada Law. "It is undisputed that our courts will reform contracts and deeds in accordance with the true intention of the parties

thereto, when their intention has been frustrated by a mistake." Ruhling v. Hackett, 1 Nev. 360; Holman v. Vieira, 53 Nev. 337, 300 P. 946 (1931). The Doctrine of Scrivener's error is a legal principle which permits a typographical error in a written contract to be corrected by parol evidence if the evidence is clear, convincing, and precise. The contract law doctrine of scrivener's error or mutual mistake allows a court of equity to reform a contract if a written agreement does not reflect the clear intent of the parties due to a drafting error. 27 RICHARD A. LORD, WILLISTON ON CONTRACTS § 70:93 (4th ed.) The Court called upon to interpret contract is not limited to express terms of written contract, and may instead examine circumstances surrounding parties' agreement in order to determine true mutual intentions of parties. Hilton Hotels Corp. v. Butch Lewis Prod., Inc., 107 Nev. 226, 808 P.2d 919 (1991). In its interpretation of a contract, trial court may examine both words and actions of parties. Fox v. First W. Sav. & Loan Ass'n, 86 Nev. 469, 470 P.2d 424 (1970).

In this matter, the contract created between the Respondent and the Appellant in the form of the August 14, 2014 Work Authorization and Contract to Perform Scope of Work Outlined in Estimate contained an error (Appendix Volume VII, Exhibit 15, JNT001137). The document states that in the event the Client repudiated the contract after work has begun on the project that, "the Client shall be responsible for any and all fees and costs associated with the work performed, plus the profit

that the ***client*** (italics added) would have made on the job had Client not repudiated the contract." Here, clearly the document should state that, "the Client shall be responsible for any and all fees and costs associated with the work performed, plus the profit the Contractor would have made on the job had Client not repudiated the contract." Clients and/or homeowners do not make a profit off a contractor's rebuild of their property. Secondly, the Client would not be entitled to profit if they repudiated the contract, but also be responsible for fees and costs. The only sensible was to interpret that provision is that it is an error and that the word Contractor should be substituted for client where indicated above. Any other interpretation is non-sensical and is counter to the conduct and understanding of the parties.

C. Damage Calculation Was Provided to Respondent

The Respondent's argument regarding NRCP 16.1 disclosures is a non-issue. The Respondents have been aware of the Appellants damage calculation for over Two (2) years. Their belief that NRCP 37 calls for a self-executing sanction is misguided. NRCP 37 requires that a party must first move for an order compelling disclosure or discovery. Sanctions can apply if, after making attempt to resolve the issue, a party files a motion and brings it before the court of Discovery Commissioner. The self-executing automatic sanction language cited by the Respondent applies to the Federal Rules of Civil Procedure not Nevada.

> Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(a) Motion for an Order Compelling Disclosure or Discovery.

(1) In General. On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

(2) Appropriate Court. A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

(3) Specific Motions.

(A) To Compel Disclosure. If a party fails to make a disclosure required by Rule 16.1(a), 16.2(d), or 16.205(d), any other party may move to compel disclosure and for appropriate sanctions.

(B) To Compel a Discovery Response. A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under Rule 30 or 31;

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

(iii) a party fails to answer an interrogatory submitted under Rule 33; or

(iv) a party fails to produce documents or fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34.

(C) Related to a Deposition. When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(4) Evasive or Incomplete Disclosure, Answer, or Response. For purposes of Rule 37(a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond. A party's production of documents that is not in compliance with Rule 34(b)(2)(E)(i) may also be treated as a failure to produce documents.

The following calculation was disclosed to the Respondent on June 17, 2017 in response to their Interrogatory. They have had this information for almost Two (2) years. At no point did the Respondent ask for clarification, conduct an EDCR 2.34 hearing, or file a motion with the Discovery Commissioner.

"INTERROGATORY NO. 2:

Please specify in detail Your calculation of damages in this Action against Inose.

RESPONSE TO INTERROGATORY 2:

Please see PLT000685-706, Job Billing and Cost Detail. Appellant was paid approximately One Million, One Hundred, Twenty-Five Thousand, Seven Hundred Forty Three Dollars and Seventy-Two Cents, ($1,125,743.72). Appellant is entitled to One Million, Two Hundred Fourteen Thousand, Nine Hundred Forty One Dollars and Thirty Cents ($1,214,941.30). Therefore, Appellant has been damaged in the amount of approximately Eighty-Nine Thousand, One Hundred Ninety Seven Dollars and Fifty Eight cents ($89,197.58). Discovery is continuing. Responding party reserved the right to supplement this response."

This Interrogatory Response was e-filed and sent to the Respondent. The Respondent was provided the documents that the Appellant was relying upon to determine that amount. If the Respondent needed clarification, they should have sought it by motion over a year ago. The Respondents also had the opportunity to depose the President of DVC, Dennis Zachary, if they wanted clarification on damages and failed to do so.

The Respondent raised this same argument in their Trial Memorandum and the Court did not consider it in the Findings of Fact and Conclusions of Law (Appendix Volume VII Exhibit 14, JNT0001161). The Appellant disclosed its damage calculation and the Trial Court did not preclude them from arguing damages. The fact that it was disclosed in an Interrogatory instead of labeled as 16.1 disclosure does not alter the fact that it was disclosed to the Respondent. They were provided with a computation of damages and the documents that formed the basis of that

calculation as required by 16.1(a)(1)(A)(iv) on June 17, 2017. They knew full well what the damage allegations were and the amount.

The Amount owed has nothing to do with the final bid that was sent to FIREMAN'S FUND. The damages that are owed to the Appellant are strictly based on the profit and overhead DVC is owed based on the amount they spent. The fact that the Costs were paid does not render DVC whole again. DVC is entitled to their cost and overhead had Respondent not repudiated the contract.

D. The Respondent is Not an Unsophisticated Party and Was Aware of The Change Orders.

The Court has heard testimony from Rachelle Elliston and Daniel Merritt concerning the Respondent's interference with the Subcontractors. (Appendix VII Exhibit 14 JNT001166) The Court found that the Respondent's claim that he was unaware of the Change Orders was belied by the evidence presented at trial. (Appendix VII, Exhibit 14, JNT001166). The Respondent testified that he received emails from Appellants employees regarding Change Orders (Appendix Volume I, Exhibit 5, JNT0000157). The testimony shows that Respondent was aware of a Change Order on August 25, 2015. This testimony directly counters the Trial Court's Finding of Fact No. 39 that no written communications from Appellant were sent to Respondent prior to October 2015.

Additionally, the Respondents assertion that he is inexperienced in construction is not accurate. The Respondent oversaw original construction of the Subject Property (Appendix Volume I, Exhibit 5, JNT000007-JNT00008). Respondent is also familiar with construction litigation, having sued Ogden Drywall in Clark County District Court Case No. 09A585813. The allegation that the Respondent was taken advantage by the Appellants is preposterous. The Respondent was responsible for the cost overruns and should bear the burden for his excesses.

E. The Respondent is Solely Responsible for Closing Out the Insurance Claim With Fireman's Fund.

The Court found that the Respondent's testimony that Appellant advised him to close out the FIREMAN FUND insurance claim was not credible because it was in the best interest of Appellant to keep the claim open. (Appendix Volume VII, Exhibit 14, JNT001167). The Court is also found that the Respondent took no steps to reopen the insurance claim after it appeared that additional funds were needed. (Appendix Volume VII, Exhibit 14, JNT001168). The Respondent's claim that DVC employees advised him to close out the insurance claim is non-sensical and not supported by the evidence presented at trial.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed and remanded to the District Court, and DVC should be awarded Eighty-

Nine Thousand, One Hundred Ninety-Seven Dollars and Fifty-Eight cents ($89,197.58) in damages against INOSE.

Date: August 20, 2020.

HURTIK LAW & ASSOCIATES

By: _____

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CERTIFICATE OF COMPLIANCE

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 this opening brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14 point font size.

I FURTHER CERTIFY that this opening brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C) it is proportionally spaced, has a typeface of 14 points or more and contains 4276 words.

FINALLY, I CERTIFY that I have read this Appellant's Opening Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular 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 of the transcript or appendix where the matter relied on is to be Found.

///

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I understand that I may be subject to sanctions in the event that the accompanying answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 20th day of August 2020.

HURTIK LAW & ASSOCIATES

By: _____

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CERTIFICATE OF SERVICE

I JONATHON R. PATTERSON, HEREBY CERTIFY that I am an employee of HURTIK LAW AND ASSOCIATES, and that on the 20th day of August 2020, I caused to be served a true and correct copy of the foregoing APPELLANT'S REPLY by United States Mail by depositing a copy of the above-referenced document for mailing in the United States Mail, first class postage prepaid, at Las Vegas, Nevada, to the parties listed below at their last known mailing addresses, on the date above written:

Date: August 20, 2020

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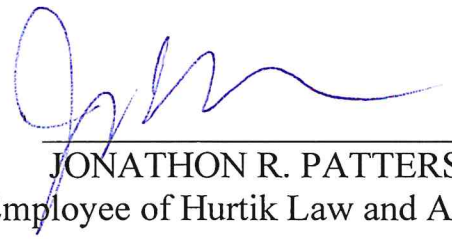

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