IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 80177

APCO CONSTRUCTION, INC., A NEVADA CORPORATION; AND SAFECO INSURANCE COMPANY OF AMERICA,

Appellants,

v.

HELIX ELECTIC OF NEVADA, LLC, A NEVADA LIMITED LIABILITY COMPANY,

Respondent.

Appeal from Judgment
Eighth Judicial District Court, Clark County
The Honorable Elizabeth Gonzalez, District Court Judge
District Court Case No. **A-16-730091-C**

RESPONDENT'S ANSWERING BRIEF

CARY B. DOMINA, ESQ.
Nevada Bar No. 10567
RONALD J. COX, ESQ.
Nevada Bar No. 12723
PEEL BRIMLEY LLP
3333 E. Serene Avenue, Suite 200
Henderson, NV 89074-6571
Telephone : (702) 990-7272
Facsimile : (702) 990-7273
Attorneys for Respondent

NRAP 26.1 DISCLOSURE STATEMENT

There exists no parent corporation for Respondent. Further, there is no publicly-held corporation or company which owns ten (10%) percent or more of Respondent's stock. Cary B. Domina, Esq. and Ronald J. Cox, Esq. of the law firm of Peel Brimley LLP are also expected to appear in this Court on behalf of Respondent. Finally, no Respondent in this matter uses a synonym.

ROUTING STATEMENT

Pursuant to NRAP 17(a)(9), this particular case falls under a category of cases presumptively assigned to the Nevada Supreme Court inasmuch as it involves an appeal from a district court Judgment originating in business court that does not involve questions of first impression.

JURISDICTIONAL STATEMENT

The district court filed its Findings of Fact and Conclusions of Law on July 8, 2019. This Court has appellate jurisdiction under NRAP 3A(b)(1)-(2) as the district court entered its Final Judgment on November 6, 2019. The Notice of Appeal was filed and served on December 6, 2019.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

I.

INTRODUCTION

Helix presented substantial evidence at trial both in the form of testimony and documents that it incurred damages because the Project schedule was extended nine months past its original completion date. Based on the evidence and testimony offered at Trial, the district court found that at the time APCO was submitting Helix's Claim to CNLV for extended overhead costs, APCO had already settled with CNLV to receive payment for its own extended overhead costs, and in doing so, waived and released any further claims against CNLV, including Helix's Claim. The district court found that APCO breached the Subcontract and the implied covenant of good faith and fair dealing by entering into the settlement agreement with CNLV on October 2, 2013, impairing Helix's ability to recover on its Claim.

APCO alleges that Helix should have been barred from recovering on its Claim because it did not follow the contractual appeal process to challenge CNLV's rejection of the Claim. However, any contract appeal process challenging CNLV's rejection of Helix's Claim became futile when APCO misrepresented to Helix the basis for CNLV's rejection of the Claim. It would have been improper for Helix to have instituted any appeal process because that "appeal" would have been premised on false and incorrect information. CNLV did not reject Helix's Claim based on lack of back up documents as APCO falsely represented to Helix—it rejected the

Claim because APCO (i) failed to include Helix's Claim as part of APCO's claim for general conditions; and (ii) previously settled any and all delay impact claims against CNLV, including Helix's Claim. Any appeal process based on the false narrative APCO told Helix would have constituted a futile effort since CNLV was never going to "reconsider" Helix's Claim once APCO settled all claims with CNLV.

In light of this evidence, the district court correctly found that APCO breached the Subcontract and breached the implied covenant of good faith and fair dealing since it failed to combine Helix's Claim with its own, or otherwise preserve Helix's Claim before settling all delay related claims with CNLV. The district court found that by its settlement with CNLV, APCO impaired Helix's ability to pursue the Claim.

II.

STATEMENT OF ISSUES

1. The district court properly awarded damages to Helix based on the substantial evidence Helix presented at trial establishing it incurred delay damages due to the Project delays.

2. Based on the Parties' testimony, conduct, correspondence and course of dealing, the district court properly found that APCO breached the Subcontract and breached the implied covenant of good faith and fair dealing, but to avoid duplicative

damages, awarded Helix damages based on APCO's breach of the covenant of good faith and fair dealing only for settling all delay claims with CNLV, cutting off Helix's ability to recover its own delay damages as a pass-through.

3. The district court correctly ignored the claims appeal process in the Prime Contract since any appeal would have been futile given APCO's misrepresentations to Helix regarding the reasons for CNLV's rejection of Helix's Claim.

4. The district court was correct in finding that Helix did not waive its Claim for extended overhead costs when it furnished APCO with the conditional waiver.

5. The "no damages for delay" clause does not bar Helix's Claim.

6. The district court did not abuse its discretion in awarding attorney's fees and costs to Helix.

III.

STATEMENT OF THE CASE

This Case arises from a payment dispute on public works project (the "Project") for the City of North Las Vegas ("CNLV"). Appellant, APCO Construction, Inc. ("APCO"), was the general contractor for the Project and Respondent, Helix Electric of Nevada, LLC, was APCO's electrical subcontractor on the Project.

The Project was originally scheduled to be completed within twelve (12) months, but encountered significant delays extending approximately 9-10 months past the completion date. Despite Helix advising APCO that it would be seeking a claim for extended overhead costs given the Project delays, APCO entered into a settlement agreement with CNLV whereby APCO was paid for its delay damages and waived and released any future delay damages on the Project, including the delay damages Helix was asserting. APCO did not advise Helix that it had settled with CNLV and instead continued submitting Helix's Claim to CNLV, knowing that it would be rejected since APCO had waived and released CNLV of all delay related claims.

Predictably, CNLV rejected Helix's Claim three times based on the fact that APCO did not include Helix's Claim as part of its own claim and on the last two rejections, APCO had already settled with CNLV. Instead of telling Helix the real reasons for CNLV's rejections of its Claim, APCO misrepresented to Helix on three separate occasions that CNLV rejected the Claim based on a lack of supporting documents. APCO also continued to deceive Helix by telling Helix that CNLV never paid APCO for its own claim.

The district court found that APCO's conduct amounted to a breach of the Subcontract and a breach of the implied covenant of good faith and fair dealing because APCO's settlement with CNLV impaired Helix's ability to recover on its

Claim. The district court awarded Helix $43,992.39 for its delay related damages, and another $1,960.85 in interest for APCO's wrongful withholding of Helix's retention payment. Because the district court found Helix to be the prevailing party, the district court awarded Helix $149,336.06 in attorney's fees and costs under the Subcontract.

IV.

APPLICABLE STANDARD OF REVIEW

The district court's finding that APCO breached the Subcontract and the implied covenant of good faith and fair dealing, must be reviewed by this Court under a clearly erroneous standard. This Court reviews the district court's findings of fact for an abuse of discretion. *NOLM, LLC v. County of Clark*, 120 Nev. 736, 739, 100 P.3d 658, 660 (2004). Further, this Court will not disturb a district court's findings of fact unless they are clearly erroneous or not supported by substantial evidence. *Dynamic Transit v. Trans Pac. Ventures*, 128 Nev. 755, 761, 291 P.3d 114, 118 (2012). "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion." *Id.* (*citing Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420 (1971)). In addition, where evidence is conflicting "the trial court can best evaluate the credibility of the parties offering different versions of the facts and such determination by the lower court will not be disturbed on appeal." *Kleeman v. Zigtema*, 95 Nev. 285, 287, 593 P.2d 468, 469 (1979).

V.

STATEMENT OF FACTS

A. The Subcontract and the Project

In July 2011, APCO submitted to the City of North Las Vegas ("CNLV") a bid for the Craig Ranch Reginal Park—Phase II project (the "Project").[1] At that time, the anticipated Project duration was approximately, 550 calendar days.[2] Helix submitted a bid to APCO of approximately $4,600,000 for the electrical scope of work on the Project.[3] Thereafter, CNLV reduced the duration of the Project from 18 months down to 12 months and resolicited bids.[4] APCO resubmitted a bid for the Project on or about October 26, 2011 and was awarded the Project.[5] CNLV issued APCO a notice to proceed on January 11, 2012,[6] and APCO commenced construction on approximately January 16, 2012,[7] though it did not enter into a formal contract agreement with CNLV until the spring of 2012 (the "Prime Contract").[8] Helix started performing work for the Project as early as January 23, 2012, but it did not mobilize its equipment and start working full-time on the Project

[1] Vol. XVII JA3487 at ¶ 1.
[2] Vol. XVII JA3487 at ¶ 1.
[3] Vol. XVII JA3487 at ¶ 2.
[4] Vol. XVII JA3487 at ¶ 3.
[5] Vol. XVII JA3487 at ¶ 4.
[6] Vol. XVII JA3487 at ¶ 5.
[7] Vol. XVII JA3487 at ¶ 5.
[8] Vol. XVII JA3487 at ¶ 7.

until February 20, 2012.[9] Despite commencing its Work on the Project by January 23, 2012, Helix did not sign a formal subcontract agreement with APCO until April 19, 2012 (the "Subcontract") which was in the amount of $2,356,520 and accounted for the reduced Project duration and certain electrical materials APCO agreed it would purchase directly.[10]

B. The Project Encountered Substantial Delays and Helix Notified APCO of its Intent to Pursue a Claim for Extended Overhead.

The Project was originally scheduled to be completed on January 9, 2013.[11] The Project encountered significant delays and was not substantially completed until October 25, 2013, thus resulting in Helix claiming approximately, $138,000 in additional extended overhead costs.[12]

Section 6.3.2 of the General Conditions of the Prime Contract which was incorporated into the Subcontract set forth the procedure for Helix to submit a claim to APCO for additional compensation.[13] Specifically, that Section states:

> [a]ll other claim notices for extra work shall be filed in writing to the Construction Manager prior to the commencement of such work. Written notices shall use the words "Notice of Potential Claim." Such Notice of Potential Claim shall state the circumstances and all reasons for the claim, **but need not state the amount**.[14]

[9] Vol. XVII JA3487 at ¶ 6; Vol. XIV JA2847; Vol. XII JA2173.
[10] Vol. XVII JA3487 at ¶ 11; Vol. XIII JA2600 – JA2640.
[11] Vol. XVII JA3491 at ¶ 33; Vol. XIII JA2641 – JA2642.
[12] Vol. XVII JA3518 at ¶ 31.
[13] Vol. XVII JA3487 at ¶ 8; Vol. XI JA1898.
[14] *Id.*

Hence, according to the Parties' agreement, notice of a potential claim was much more important than the actual amount of such claim. Helix first notified APCO in writing that it would be asserting a claim for extended overhead costs on January 28, 2013 and reserved its rights to submit a claim for "all additional costs incurred due to scheduled delays for this Project" the ("Claim").[15]

Without notifying Helix, on January 9, 2013, APCO submitted to CNLV its Time Impact Analysis #1 ("TIA#1") where it sought extended general conditions and home office overhead of $418,059 ($266,229 for general conditions and $151,830 for home office overhead).[16] On January 9, 2013, APCO submitted a change order request to CNLV for its extended general conditions and home office overhead.[17] As of May 9, 2013, CNLV had not made a decision on APCO's TIA #1 or Change Order Request.[18] Without notifying Helix, on May 9, 2013, APCO submitted a revised Time Impact Analysis ("TIA #2") to CNLV seeking an additional five (5) months of compensation for general conditions and home office overhead, among other claims, for a total delay claim of nine (9) months.[19] As part of TIA #2, APCO submitted Change Order Request No. 39.1 to CNLV seeking

[15] Vol. XVII JA3491 at ¶ 34; Vol. XIII JA2641 – JA2642.
[16] Vol. XVII JA3491 at ¶ 33; Vol. XVI JA3365 – JA3366; Vol. VII JA1081:4-8.
[17] Vol. XVII JA3491 at ¶ 33; Vol. XVI JA3365-3366.
[18] Vol. XVII JA3492 at ¶ 35.
[19] Vol. XVII JA3492 at ¶ 36; Vol. XIV JA2653-JA2665.

compensation of $752,499 for its extended general conditions and home office overhead ($479,205 for general conditions and $273,294 for home office overhead).[20] However, APCO's claim to CNLV did not include any amounts for its subcontractors, and APCO acknowledges that as a company policy, it does not include its subcontractors' claims with its own claims.[21]

In June 2013, Helix realized the Project was still several months away from being completed and notified APCO of its Claim by way of its June 19, 2013 letter which provided a specific breakdown of the daily overhead costs Helix was incurring.[22]

According to Helix's June 19 letter entitled "Extended overhead costs," Helix's cost for extended overhead was $640/day and was comprised of (1) $260 for the Project Manager; (2) $280 for the Superintendent; (3) $25 for the site trailer; (4) $5 for the Connex box; (5) $25 for the forklift; and (6) $45 for the truck.[23] The email that accompanied Helix's June 19, 2013 letter advised APCO that to date, Helix's Claim totaled $72,960, but that Helix's Claim would increase for each day the Project continued past the original completion date.[24]

Also on June 19, 2013, APCO informed Helix by way of an email that it "is

[20] Vol. XVII JA3492 at ¶ 37; Vol. XIV JA2655.
[21] Vol. XVII JA3492 at ¶ 39; Vol. VIII JA1428:23 – JA1429:1.
[22] Vol. XVII JA3493 at ¶ 44; Vol. XIV JA2674.
[23] Vol. XVII JA3493 at ¶ 45; Vol. XIV JA2674.
[24] Vol. XVII JA3493 at ¶ 46; Vol. XIV JA2680.

in the process of presenting CNLV with a Time Impact Analysis containing facts as to why the additional costs should be paid."[25] However, APCO had submitted TIA #2 to CNLV on May 9, 2013, six weeks prior to this email.

While APCO notified Helix that it would forward to CNLV any letter Helix provided regarding its claim for extended overhead costs, APCO did not inform Helix that it needed Helix's final Claim immediately so it could include it with APCO's claim to CNLV.[26] Indeed, according to APCO, it would first "fight the battle, and hopefully come out successfully…" which would only then "open the door for Helix…to present their case…"[27]

C. CNLV REJECTED HELIX'S CLAIM AND APCO MISREPRESENTED THE REASONS FOR CNLV'S REJECTION OF HELIX'S CLAIM.

On August 27, 2013, despite the fact that the Project was still ongoing, Helix furnished APCO with its first invoice for its Claim in the amount of $102,400, which constituted 32 weeks of extended overhead costs incurred between January 13, 2013 and August 30, 2013 (or 160 business days).[28] Helix's invoice identified an extended overhead cost of $640/day for 32 weeks, which had been provided to APCO in June 2013.[29]

---

[25] Vol. XVII JA3493 at ¶ 47; Vol. XIV JA2676.
[26] Vol. XVII JA3493 at ¶ 49; Vol. XIV JA2679.
[27] *Id*.
[28] Vol. XVII JA3493 at ¶ 50; Vol. XIV JA2689.
[29] Vol. XVII JA3493 at ¶ 51; Vol. XIV JA2689.

APCO submitted Change Order Request No. 68 ("COR 68") to CNLV on September 9, 2013, requesting compensation for Helix's Claim.[30] APCO did not include COR 68 as a supplement to its claim submitted to CNLV in May despite the fact that CNLV had still not made a determination as to that claim.[31]

On September 16, 2013, CNLV rejected COR 68 stating, "This COR is REJECTED.[32] The City of North Las Vegas does not have a contract with Helix Electric."[33] At trial, the Construction Manager for CNLV during the Project, Joemel Llamado, testified that the only reason he rejected Helix's Claim was because CNLV did not have a contract with Helix.[34] Mr. Llamado testified that he did not look at the merits of the Claim because the Claim should have been included with APCO's claim.[35] Based on this testimony, the district court found that APCO should have included Helix's Claim in its own claim to CNLV since Helix's Subcontract was with APCO, not CNLV.[36]

Despite CNLV's reasons for rejecting Helix's Claim, APCO misrepresented to Helix that CNLV rejected COR 68 because of lack of backup documentation.[37]

---

[30] Vol. XVII JA3494 at ¶ 54; Vol. XIV JA2687 – JA2697; Vol. VII JA1175:2 – JA1178:2.
[31] Vol. XVII JA3492 at ¶¶ 35 & 39.
[32] Vol. XVII JA3494 at ¶ 55; Vol. VII JA1178:8-9; Vol. XIV JA2691.
[33] *Id.*
[34] Vol. XVII JA3494 at ¶ 57; Vol. VII JA1178:24 – JA1179:2.
[35] Vol. XVII JA3494 at ¶ 58; Vol. VII JA1200:23 – JA1201:1.
[36] Vol. XVII JA3494 at ¶ 58.
[37] Vol. XVII JA3495 at ¶ 59; Vol. VII JA1180:19 – JA1181:3; Vol. XIV JA2691.

Specifically, on October 3, 2013, APCO sent Helix a letter requesting additional back-up documentation for the Claim so "it could resubmit the Claim to CNLV," despite the fact that CNLV did not reject the Claim for lack of backup documentation.[38] That letter states in relevant part:

> Attached is your invoice of August 27, 2013 in the amount of $102,400. At this time **APCO has not received any back-up documentation to undo the previous formal rejection made by the City of North Las Vegas**. If you want APCO to re-submit your request, please provide appropriate back-up for review.[39]

However, no amount of backup documentation would have changed CNLV's mind, because it did not reject Helix's Claim based on failure to provide backup documentation supporting the Claim. Rather, CNLV rejected Helix's Claim because Helix was APCO's subcontractor, and it was APCO's responsibility to assert a claim for extended overhead costs against CNLV which amounts should have included Helix's Claim.

When asked at trial whether he had rejected COR 68 because of lack of backup documentation, Mr. Llamado denied ever telling APCO he was rejecting COR 68 for lack of backup documentation and confirmed CNLV's position that COR 68 was rejected simply because Helix did not have a contract with CNLV.[40] Moreover,

[38] Vol. XVII JA3495 at ¶ 61; Vol XIV JA2691.
[39] Vol. XVII JA3495 at ¶ 62; Vol XIV JA2691.
[40] Vol. XVII JA3494 at ¶ 56; Vol. VII JA1181:10-17.

when asked at trial if Helix would have provided additional backup whether CNLV would have approved COR 68, Mr. Llamado stated that it would not have changed anything since COR 68 was rejected "because it still would be coming from a contractor that does not have a contract with the City."[41] Finally, Mr. Llamado also testified that he would have expected APCO to include any and all claims of its subcontractors for extended general conditions in its own claim for general conditions.[42]

D. APCO SETTLES ITS DELAY CLAIMS WITH APCO, IMPAIRING HELIX'S ABILITY TO PURSUE ITS OWN DELAY CLAIMS AGAINST CNLV.

On October 2, 2013, well after Helix submitted its Claim to APCO, CNLV issued its decision on APCO's request for additional time and compensation.[43] CNLV determined that the time period from January 11, 2013 to May 10, 2013 was an excusable delay, but not a compensable delay.[44] In other words, APCO was not assessed liquidated damages for delays between January and May 10, 2013, but was not provided any delay impact compensation for that time either. However, CNLV did agree that it would pay APCO $560,724.16 for the delay damages it incurred from May 10, 2013 to October 25, 2013.[45] On October 2, 2013, CNLV and APCO

[41] Vol. VII JA1181:4-9.
[42] Vol. VII JA1172:3-7.
[43] Vol. XVII JA3522 at ¶ 60; Vol. XIV JA2698 – JA2701
[44] Vol. XVII JA3522 at ¶ 60; Vol. XIV JA2699; Vol. VII JA1183:10-24.
[45] Vol. XVII JA3522 at ¶ 60; Vol. XIV JA2701.

entered into a settlement agreement through which CNLV agreed to pay APCO $560,724.16 for its claim submitted under TIA #2, including APCO's claim for added overhead and general conditions it incurred as a result of the nine-month delay to the Project.[46] According to that settlement agreement, APCO agreed to "forgo any claims for **delays, disruptions, general conditions** and overtime costs associated with the weekend work previously performed…**and for any other claim, present or future, that may occur on the project**."[47] APCO did not notify Helix that it had entered into the settlement agreement with CNLV.[48] In fact, APCO maintained for nearly two years after the Project ended that CNLV never paid it for its delay claim.[49] At trial, Mr. Llamado testified that the settlement agreement resolved any and all claims between CNLV and APCO for the nine-month delay to the Project, including any claims APCO's subcontractors might have.[50]

> Q. So if APCO had, subsequent to the date of this agreement, October 2nd, 2013, had submitted to you a change order request that included Helix's claim for the extended general conditions, extended overhead costs, and did it through the proper contract channels, would you have reviewed it or rejected it based on the settlement?

[46] Vol. XVII JA3522 at ¶ 63; Vol. XIV JA2701.
[47] Vol. XVII JA3522 at ¶ 64; Vol. XIV JA2699 – JA2700; Vol. VII JA1188:13 – JA1189:14.
[48] Vol. XVII JA3522 at ¶ 65; Vol. VII JA1111:15-18.
[49] Vol. VIII JA1335:23-25.
[50] Vol. XVII JA3522 at ¶ 66; Vol. VII JA1188:11 – JA1189:14.

> A. Based on the settlement, I would have rejected anything that APCO gave me after this date.[51]

Pursuant to this settlement agreement, CNLV issued Change Order No. 50 to APCO and agreed to pay APCO $560,724.16 for the added overhead and general conditions it incurred as a result of the extended project completion date.[52] Therefore, according to CNLV, once it signed the settlement agreement with APCO, it was never going to pay any additional delay related claims on the Project, including Helix's Claim.

E. HELIX PROVIDED APCO WITH ITS PAY APPLICATION FOR RETENTION ONLY AND DID NOT WAIVE ITS CLAIM.

In October 2013, Joe Pelan, the Contract Manager for APCO, advised Helix that it could not include its Claim in Helix's pay application for retention because CNLV would not release the retention on the Project if there were outstanding claims on the Project.[53] Pursuant to NRS 338.490, and in compliance with Mr. Pelan's instructions, on October 18, 2013, Helix submitted to APCO its Pay Application for Retention only in the amount of $105,677.01 (the "Retention Pay App").[54] Helix also provided to APCO a Conditional Waiver and Release Upon Final Payment (the "Conditional Waiver") for the Retention Pay App only.[55] Based on Mr. Pelan's

[51] Vol. VII JA1189:7-14.
[52] Vol. XVII JA3496 at ¶ 67; Vol. XIV JA2699 – JA2701.
[53] Vol. XVIII JA1348:24 – JA1349:14.
[54] Vol. XVII JA3496 at ¶ 72; Vol. XIV JA2708 – JA2713.
[55] Vol. XVII JA3496 at ¶ 73Vol. XIV JA2713.

instructions, and because the amount of retention was not in dispute, Helix indicated in the Conditional Waiver that the "Disputed Claim Amount" was "$0.00" relating to the Retention Pay App.[56] Helix never intended to waive its Claim by way of the Conditional Waiver.[57] It took APCO more than a year to pay Helix for its Retention Pay App, during which time, Helix made it clear to APCO that it would continue pursuing its Claim.[58] The district court found that the evidence presented at trial of the circumstances surrounding the execution of the Conditional Waiver did not support Helix's waiver of the Claim.[59]

The Project was finally substantially completed on October 25, 2013.[60] On October 31, 2013, approximately two weeks after receiving Helix's Retention Pay App and Conditional Waiver, in order to account for certain overhead items that were omitted from the original Claim, and because APCO misled Helix into believing CNLV rejected the Claim due to insufficient documentation, Helix (i) increased its Claim from $102,400 to $111,847; (ii) resubmitted its Invoice to APCO ("Revised Invoice"); and (iii) provided additional backup information and documents.[61] The Revised Invoice included a monthly break down of Helix's Claim

[56] Vol. XIV JA2713; Vol. XVIII JA1349:9-14.
[57] Vol. XVIII JA1349:22-25; Vol. XVII JA3497 at ¶¶ 75-76.
[58] Vol. XVII JA3497 at ¶ 77.
[59] Vol. XVII JA3497 at ¶ 76.
[60] Vol. XVII JA3497 at ¶ 79.
[61] Vol. XVII JA3497 at ¶ 80; Vol. XIV JA2716 – JA2718.

from January to August, which included the following categories of damages: (1) Project Manager; (2) Project Engineer; (3) Superintendent; (4) site trucks; (5) project fuel; (6) site trailer; (7) wire trailer, (8) office supplies; (9) storage connex boxes; (10) forklifts; (11) small tools; and (12) consumables.[62] Accompanying the revised Invoice and backup documentation was a cover letter wherein Helix stated:

> Attached **please find the requested back-up documentation requested to support our invoice**…In addition we will be submitting a separate invoice for extended overhead for the dates of September – October 25, 2013.[63] (emphasis added)

On or about November 5, 2013, three weeks after APCO received Helix's Retention Pay App and Conditional Waiver, and despite having settled all of its delay impact claims with CNLV, APCO disingenuously submitted a revised COR (68.1) to CNLV seeking a total of $111,847 for Helix's Claim, knowing full well that CNLV would reject the COR because APCO released CNLV from all claims, including Helix's Claim.[64] Notably, at trial, the district court found that had APCO believed Helix's Conditional Waiver for the Retention Pay App waived any and all claims Helix had on the Project, including Helix's Claim for extended overhead,

[62] Vol. XVII JA3497 at ¶ 80; Vol. XIV JA2718.
[63] Vol. XIV JA2716.
[64] Vol. XVII JA3497 at ¶ 81; Vol. XIV JA2715 – JA2719.

APCO would not have submitted revised COR 68.1 to CNLV three weeks after receiving Helix's Conditional Waiver.[65]

On November 18, 2013, CNLV again rejected the Change Order Request stating:

> This is the 2nd COR for Helix Electric's extended overhead submittal. The 1st one was submitted on Sept. 9, 2013 and Rejected on Sept. 16, 2013. This submittal dated Nov. 5, 2013 is REJECTED on Nov. 13, 2013.[66]

In rejecting COR 68.1, CNLV made absolutely no mention that the COR was being rejected because of lack of backup documentation.[67] Instead, CNLV referenced the fact that the first COR (68) had already been rejected on September 16, 2013 based on CNLV's position that it had no contractual privity with Helix.[68]

When asked at trial why this revised COR was rejected a second time, Mr. Llamado confirmed it had nothing to do with lack of backup documents or untimeliness and was rejected simply because CNLV did not have a contract with Helix and APCO should have included Helix's Claim under its own claim to CNLV.[69] Mr. Llamado also testified that the revised COR was rejected in part because it was submitted after APCO and CNLV had reached a settlement whereby

[65] Vol. XVII JA3498 at ¶ 82; Vol XIV JA2716 – JA2717.
[66] Vol. XVII JA3525 at ¶ 83; Vol. XIV JA2720.
[67] Vol. XIV JA2720.
[68] *Id.*
[69] Vol. XVII JA3525 at ¶ 84; Vol VII JA1193:20-25.

APCO agreed to release all claims for delay damages, including claims of its subcontractors.[70] Based on this evidence, the district court found that Mr. "Llamado's second rejection had nothing to do with lack of backup documents or untimeliness and was rejected simply because APCO should have included Helix's Claim under its own claim to CNLV."[71] The district court further found that "by this time, APCO had already settled with CNLV to receive payment for its own extended overhead costs, and in doing so, waived and released any further claims against CNLV, including Helix's Claim."[72]

As it had previously informed APCO it would, on or about November 13, 2013, Helix submitted to APCO another invoice including backup in the amount of $26,304.00 accounting for the extended overhead costs for September and October.[73] Having already settled all delay claims with CNLV, APCO disingenuously submitted Helix's Invoice as COR 93 to CNLV on or about November 20, 2013, again knowing full well that CNLV would reject the COR because APCO released CNLV from all delay claims, including Helix's Claim.[74] By submitting COR 93 to CNLV on November 13, 2013, APCO once again acknowledged that it knew Helix's Conditional Waiver submitted on October 18, 2013 related to the Retention Pay App

[70] Vol. VII JA1189:7-14; Vol. VII JA1194:1-5.
[71] Vol. XVII JA3494 at ¶¶ 56-58.
[72] Vol. XVII JA3525 at ¶¶ 84-85.
[73] Vol. XVII JA3498 at ¶ 86; Vol. XIV JA2729.
[74] Vol. XIV JA2729 – JA2733.

only, and did not waive Helix's Claim for extended overhead.[75] If APCO believed the Conditional Waiver released Helix's Claim, APCO would not have continued to submit Helix's Claim to CNLV.

Predictably, on December 4, 2013, CNLV rejected COR 93, but again made no reference to lack of supporting documentation.[76] CNLV rejected COR 93 for the same reason it had rejected all of the CORs APCO submitted on behalf of Helix's Claim—CNLV had no contract with Helix and now APCO had released CNLV from all delay claims, including Helix's Claim.[77] At trial Mr. Llamado again confirmed that COR 93 was rejected, not because of lack of backup, but simply because APCO did not include Helix's Claim with APCO's own claim for delay damages.[78] By this time, APCO had already struck its deal with CNLV to receive payment for its own extended overhead costs, and in doing so, waived and released any further delay claims against CNLV, including Helix's Claim.

F. HELIX CONTINUED TO NOTIFY APCO THAT IT INTENDED TO PURSUE ITS CLAIM FOR EXTENDED OVERHEAD, AND APCO, THROUGH ITS CORRESPONDENCE AND CONDUCT, UNDERSTOOD HELIX HAD NOT WAIVED THOSE CLAIMS.

On January 28, 2014, Joe Pelan of APCO sent Victor Fuchs and Bob Johnson of Helix an email confirming that he was meeting with CNLV to discuss the

[75] Vol. XVII JA3498 at ¶ 89.
[76] Vol. XIV JA2734.
[77] *Id.;* Vol. VII JA1193:15-25.
[78] Vol. VII JA 1193:15 – JA1194:5.

remaining change order issues on February 4, 2014.[79] The only change order issue at that time was the Change Orders for Helix's Claim for extended overhead.[80] Again, had Mr. Pelan believed Helix had waived its Claim, there would be no reason to meet with CNLV regarding Helix's outstanding Change Orders associated with the Claim.

On April 16, 2014, Kurt Williams of Helix sent an email to Joe Palen asking for a status on the retention payment.[81] That same day, Joe Pelan responded and advised Helix that (i) "Helix is the only firm holding up the release of retention…", and (ii) he "can't sign the final release **with a pending claim**."[82] Also in response to Mr. Williams' email, Mr. Fuchs replied and advised Mr. Pelan that he needs "to know by Friday what's the plan otherwise [Helix] will have to proceed w[ith] the claim!"[83] Mr. Pelan's response was "I will call you in the am."[84]

Over the course of the next several months, Mr. Fuchs and Mr. Pelan had numerous conversations and meetings wherein Mr. Pelan advised Mr. Fuchs that APCO had financial issues and could not pay Helix but they were trying to figure out a way for APCO to pay Helix.[85] One of the ways Mr. Pelan proposed to pay

[79] Vol. XVII JA3499 at ¶ 91; Vol XVII JA3400.
[80] Vol. XVIII JA 1307:11-18.
[81] Vol XVII JA3397.
[82] *Id*. (emphasis added)
[83] *Id*.
[84] *Id*.
[85] Vol. VIII JA1301:20 – JA1302:19; Vol. VIII JA1311:2-11.

Helix was by awarding Helix a project and paying Helix through the work on that project.[86]

APCO admitted that on June 10, 2014, it received final retention from CNLV.[87] After months of promises with no results and because APCO had not paid Helix its Retention or its Claim, Helix sent APCO another demand for payment on September 26, 2014, seeking payment for both its Retention and the Claim.[88] Specifically, the demand stated "[p]lease accept this letter as a formal demand for a final payment **including claim for general conditions** in the amount of $243,828."[89] On September 30, 2014, Mr. Pelan sent an email to Mr. Fuchs stating "I am in receipt of your letter dated 9-26-2014 and will respond accordingly by end of day Thursday, October 2nd."[90] On October 3, 2014, Mr. Pelan sent an email to Mr. Fuchs apologizing for "not getting it done" and advising him they "will know what direction to go on Monday."[91]

/ / /

/ / /

[86] Vol. VIII JA1313:24 – JA1314:20; Vol. XVI JA3386 – JA3390.
[87] VOL XVII JA3499 at ¶ 95.
[88] Vol. XVII JA3499 at ¶ 96; Vol. VIII JA1317:23 – JA1318:23; Vol. XIV JA2781.
[89] Vol. XIV JA2781 (emphasis added).
[90] Vol. XVI JA3383.
[91] Vol. XVI JA 3382.

G. A YEAR AFTER RECEIVING HELIX'S RETENTION PAY APP AND CONDITIONAL WAIVER, APCO EXCHANGED THE RETENTION CHECK FOR HELIX'S UNCONDITIONAL WAIVER AND RELEASE WHEREIN HELIX RESERVED ITS CLAIM FOR EXTENDED OVERHEAD.

On October 29, 2014, APCO sent Helix an email (i) attaching a copy of the check for Retention which Helix could pick up, and (ii) requesting that Helix sign a new Conditional Waiver and Release Upon Final Payment which included Helix's Retention only, but did not include any disputed amount for the Claim.[92] Upon receiving the new Conditional Waiver and before picking up the Retention Check, Helix notified APCO that it was not going to sign the new Conditional Waiver without reserving a right to its Claim.[93] Specifically, Mr. Fuchs sent an email to Mr. Palen stating "**THIS ISNT GOING TO WORK!!!!!**"[94] Mr. Pelan responded stating, "make change for me to approve."[95] As a result of APCO's invitation to revise the Conditional Waiver, Helix provided an unsigned copy of it seeking full payment of the Claim and the Retention for a total amount of $242,830.[96]

APCO did not pay Helix the Claim, and after additional discussions between Helix and APCO on October 29, 2014, it was decided that Helix would exchange for the Retention Check an Unconditional Waiver and Release Upon Final Payment

[92] Vol. XVII JA 3500 at ¶ 99; Vol. XIV JA2790 – JA2794.
[93] Vol. XVII JA 3500 at ¶ 101; Vol. XIV JA2796.
[94] Vol. XVII JA 3501 at ¶ 109; Vol. XIV JA2797 (emphasis added).
[95] Vol. XVII JA 3501 at ¶ 109; Vol. XIV JA2797.
[96] Vol. XVII JA3500 at ¶ 102; Vol. XIV JA2795 – JA2799.

seeking payment of $105,679.00 for Retention, and reserving as its Disputed Claim, $138,151.00.[97] As part of the "Disputed Claim" field, Helix referenced additional correspondence which it had incorporated into the Unconditional Waiver and Release.[98] Specifically, Helix included a letter dated October 30, 2014 clarifying that while it was demanding its retention payment, it was also seeking payment for its Claim in the amount of $138,151.00 for which it also provided a final invoice.[99] The purpose of this correspondence was to memorialize what had already been agreed to the prior day.[100] Helix received the payment for Retention on October 29, 2014.[101]

Sometime after retention was paid to Helix, Joe Pelan and Victor Fuchs met and Joe Pelan (i) advised Victor Fuchs that APCO did not have the money to pay the Claim due to tough times in 2014, and (ii) asked Victor Fuchs to prepare a promissory note for the payment of the Claim.[102] Helix had a Promissory Note prepared and sent the same to Joe Pelan on December 10, 2014.[103] The Court specifically asked Mr. Fuchs if the Promissory Note was a "compromise of your claim, or is that your intention to be paid for the full amount."[104] Mr. Fuchs

[97] Vol. XVII JA3500 at ¶ 103; Vol. VIII JA1363:13-23; Vol. VIII JA1364:4-16.
[98] Vol. XVII JA3500 at ¶ 104; Vol. XIV JA2805.
[99] Vol. XVII JA3500 at ¶ 105; Vol. XIV JA2812 – JA2815.
[100] Vol. VIII JA1366:24 – JA1367:1.
[101] Vol. XVII JA 3501 at ¶ 111.
[102] Vol. VIII JA1325:3-11.
[103] Vol. XVI JA3370 – JA3372.
[104] Vol. VIII JA1328:2-4.

confirmed it was his intention to be paid the full amount of his Claim.[105] Sometime thereafter, Mr. Pelan requested a 30 day extension to executed the Promissory Note because he needed to talk to Las Vegas Paving Company (APCO's parent company).[106] On January 13, 2015, Mr. Fuchs confirmed the extension via email and specifically stated "[i]n good faith we are extending this time **per your request**, so you can come up with an arrangements to repay the outstanding amount that is past due."[107] Mr. Fuchs also advised Mr. Pelan that he had 30 days to sign the Promissory Note or have a plan of repayment that was acceptable to Helix.[108] On January 16, 2015, Mr. Pelan responded and stated "I received your email and understand your position."[109] Mr. Pelan never signed the Promissory Note[110] and APCO never paid Helix for its Claim, despite having been paid a portion of its own claim from CNLV and settling with CNLV which impaired Helix from asserting its Claim as a pass-through to CNLV.

/ / /

/ / /

[105] Vol. VIII JA1328:5.
[106] Vol. VIII JA1330:6-25.
[107] Vol. XVI JA3368 – JA3369 (emphasis added).
[108] *Id*.
[109] Vol. XVI JA3368.
[110] Vol. VIII JA1328:19-22.

VI.

ARGUMENT

A. THE DISTRICT COURT PROPERLY AWARDED DAMAGES TO HELIX BASED ON THE SUBSTANTIAL EVIDENCE HELIX PRESENTED AT TRIAL ESTABLISING DELAY DAMAGES DUE TO THE PROJECT DELAYS.

Much of APCO's Appeal is premised on the faulty notion that Helix did not present substantial evidence of its delay damages at trial—this is plain wrong. In fact, the district court used APCO's own calculations presented at trial when it determined Helix's damages.

Helix's damages against APCO consisted of extended general conditions as the Project duration was extended 9-months longer than the original completion date. Extended general conditions are "additional indirect costs associated with a specific project as a result of the extension of the project completion date for reasons other than the fault of the contract." MARILYN KLINGER & MARIANNE SUSONG, THE CONSTRUCTION PROJECT: PHASES, PEOPLE, TERMS, PAPERWORK, PROCESSES § 3.IV.H (2006). Courts have recognized that contractors are entitled to compensation for maintaining required personnel, equipment and services at the project site after the originally scheduled completion date. BARRY B. BRAMBLE & MICHAEL T. CALLAHAN, CONSTRUCTION DELAY CLAIMS § 12.05 (7th ed. 2021). Most of the equipment costs included in general conditions are indirect costs which typically do not show up in a project's job cost report but are nonetheless true costs incurred. For

this reason, courts have allowed extended general conditions to be paid on a daily rate basis. *See Techdyne Systems Corp. v. Whittaker Corp.*, 427 S.E.2d 334 (Va. 1993).

Helix presented testimony and evidence at trial that as a result of the Project lasting 9 months longer than it should have, Helix incurred additional daily costs for the following project equipment: (1) Site construction trailer; (2) Connex box; (3) forklift; (4) truck; (5) Project fuel; (6) wire trailer; (7) small tools; and (8) consumables. At trial, Kurk Williams, Helix's Project Manager on the Project, testified that all of these items were in use during the 9-month delay and that these daily charges were reasonable and accurately represent the direct cost that Helix was incurring on the project.[111] Helix's Daily Reports confirmed that Helix had a project trailer on site until September 3, 2013,[112] a Conex box onsite until July 31, 2013,[113] and a Project truck onsite until October 10, 2013.[114] APCO never disputed this evidence[115] and instead argues that because these items were not specifically included in Helix's Job Cost Report, Helix should not be paid for them.

Moreover, Helix presented evidence that it incurred between $5,200 and $6,500/month for the work its Project Manager furnished to the Project and

[111] Vol. VII JA1122:21—JA1123:7.
[112] Vol. VIII JA1278:9—JA1279:14; Vol. XIII JA2536.
[113] Vol. VIII JA1276:17—JA1277:9; Vol. XIII JA2513.
[114] Vol. VIII JA1279:15—JA1280:19; Vol. XIII JA2564.
[115] Vol. IX JA1587:20—JA1592:25.

$901.90/month for the Project Engineer.[116] Specifically, Mr. Williams testified that Helix requires its salaried project managers to work 55 to 60 hours in a week and do three to four times the amount of work that a project manager would normally do for a competitor.[117] He further testified, "as long as…that job is open, you are required to do certain daily, weekly, and monthly tasks that require certain amount of time for you to do them in…"[118] Mr. Williams testified that while he did not regularly enter his time spent on the Project into Helix's accounting software, on average, he spent more than four hours a day performing his project management functions on the Project during the delay period.[119] Mr. Williams further testified that Helix had a project engineer assigned to the Project who increased Helix's costs during the 9-month extension.[120]

While Helix was seeking damages against APCO for $138,151, the district court only awarded Helix $43,992.39, as it agreed with APCO that Helix should not be paid for (i) any extended general conditions for the time period APCO was not paid for its extended general conditions (i.e., between January 11, 2013 and May 10, 2013); and (ii) any superintendent time which accounted for approximately, $57,400 of Helix's Claim for damages. Specifically, the district court confirmed in its

[116] Vol. XIV JA2717 – JA2718; JA2731 – JA2732.
[117] Vol. VII JA1119:2-23.
[118] Vol. VII JA1120:5-25.
[119] Vol. VII JA1109:22—JA1110:9.
[120] Vol. VII JA1121:22—JA1122:20.

Findings of Fact and Conclusions of Law that it utilized APCO's Demonstrative Exhibit 5 when calculating Helix Damages and removed the $57,400 charge for Helix's Project Superintendent and only awarded Helix damages from May 2013 to October 2013.[121]

Based on this evidence and testimony, the district court found that "Helix provided sufficient evidence establishing that it incurred damages as a result of the Project schedule extending nine months past its original completion date."[122] The district court further found, "after weighing the testimony of the witnesses and a review of the admitted documents…Helix has established that it suffered damages as a result of the delay in project completion in the amount of $43,992.39."[123] In other words, Helix's costs to complete the Project increased due to the extended time on the Project.

B. THE DISTRICT COURT PROPERLY FOUND THAT APCO BREACHED THE SUBCONTRACT, BUT IT AWARDED DAMAGES TO HELIX BASED ON APCO'S BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING WHEN IT SETTLED ALL DELAY CLAIMS WITH CNLV, CUTTING OFF HELIX'S ABILITY TO RECOVER ITS OWN DELAY DAMAGES AS A PASS-THROUGH.

Importantly, the district court found in favor of Helix on its Claim for Breach of Contract against APCO, but because APCO impaired Helix's Claim by settling

[121] Vol. XVII JA3502 at ¶ 115, Footnote 5.
[122] Vol. XVII, JA3501 at ¶ 113, JA3502 at ¶ 4.
[123] Vol. XVII, JA3502 at ¶ 117.

with CNLV, the district court awarded damages to Helix under the Breach of the Implied Covenant of Good Faith and Fair Dealing, rather than awarding duplicative damages.[124]

Specifically, the district court found that APCO breached the covenant of good faith and fair dealing when it settled all of its delay related claims with CNLV, which essentially cut off Helix's ability to recover any of its own delay damages against CNLV.

A determination by the finder of fact that the implied covenant of good faith and fair dealing was breached will give rise to an award of contract damages. *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 109 Nev. 1043, 1047, 862 P.2d 1207, 1209 (1993) In every contract, there is an implied covenant of good faith and fair dealing. *Id.* 107 Nev. at 232, 808 P.2d at 922). "When one party performs a contract in a manner that is unfaithful to the purpose of the contract and the justified expectations of the other party are thus denied, damages may be awarded against the party who does not act in good faith." *Id.* at 232, 808 P.2d at 923. "Reasonable expectations are determined by the various factors and special circumstances that shape these expectations." *Id.* "In situations where the terms of a contract are literally complied with, the covenant is breached when 'one party to the contract deliberately countervenes the intention and spirit of the contract.'" *Renown Health v. Holland &*

[124] Vol. XVII JA3506 at ¶ 28, JA3507 at ¶¶ 1 & 2

Hart, LLP, 437 P.3d 1059, 2019 WL 1530161 at *2 (Nev. 2019) (citing *Hilton*, 107 Nev. at 232, 808 P.2d at 922-23). "Ultimately, however, the central question in determining whether the covenant was breached is whether the party acted in bad faith." *Renown Health*, 437 P.3d at *2. "Whether a party did not act in good faith is typically a factual question for the jury." *Id.* (citing *Consol. Generator-Nev., Inc. v. Cummins Engine Co., Inc.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998); *see also, Hilton Hotels Corp.*, 107 Nev. at 234, 808 P.2d at 923–24 (The breach of the covenant of good faith and fair dealing is a question of fact to be determined by the jury after presentation of all relevant evidence).

"Examples of bad faith include 'evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of power to specify terms, and interference with or failure to cooperate in the other party's performance.'" *Renown Health*, 2019 WL 1530161 at *2 (Nev. 2019)(citing Restatement (Second) of Contracts § 205 cmt. d (Am. Law Inst. 1981)).

The district court found that Helix was entitled to Judgement against APCO under its claim for Breach of Implied Covenant of Good Faith and Fair Dealing. This is a factual finding supported by substantial evidence that must not be disturbed. Specifically, the district court found that APCO had a duty to include Helix's Claim in its own claim to CNLV or otherwise preserve Helix's Claim when it settled with

CNLV, which it failed to do.[125] The district court further found that APCO's internal policy and decision to keep Helix's Claim separate from its own claim impaired Helix's ability to pursue the Claim.[126] The district court found that when APCO entered into the settlement agreement with CNLV on October 3, 2013 without Helix's knowledge, CNLV took the position that APCO waived and released any and all claims arising from the nine month Project delay, including Helix's Claim.[127] APCO's impairment of Helix's Claim constitutes a breach of the covenant of good faith and fair dealing implied in the Subcontract.[128]

Helix also presented substantial evidence at trial that APCO breached the covenant of good faith and fair dealing when it misrepresented to Helix the reasons for CNLV's rejection of Helix's Claim. Furthermore, the district court found that APCO breached the covenant of good faith and fair dealing when it, without notifying Helix, settled its claim with CNLV, but continued to submit Helix's Claim to CNLV knowing that CNLV rejected it because it had no contractual privity with Helix, and now APCO had released any and all claims against CNLV.[129]

These rulings are factual findings supported by substantial evidence and cannot be overturned.

---

[125] Vol. XVII JA3503 at ¶ 5.
[126] Vol. XVII JA3503 at ¶ 6.
[127] Vol. XVII JA3503 at ¶ 7.
[128] Vol. XVII JA3503 at ¶ 9.
[129] Vol. XVII JA3503 at ¶ 10.

1. APCO treated Helix's Claim different than all other Change Orders it submitted to CNLV on behalf of Helix.

APCO argues that by submitting Helix's Claim to CNLV separately from its own claim, APCO treated Helix's Claim no different than it had treated all change orders it submitted to CNLV on behalf of Helix—this is not correct. With the exception of Helix's Claim, in every other instance when APCO submitted a change order to CNLV for Helix's work, APCO submitted a change order to its own contract increasing the Prime Contract value by the amount of Helix's change order, plus a markup for APCO.[130] In other words, each time APCO submitted a change order to CNLV for Helix's work, it too sought an increase to its Contract Value. Joe Pelan testified at trial that it was typical for APCO to markup Helix's work by 5 percent when submitting a change order request to CLNV.[131] However, when APCO submitted CORs 68,[132] 68.1,[133] and 93[134] to CNLV for Helix's Claim, it did not seek an increase to its own Contract Value[135] and instead apparently expected CNLV to pay Helix directly, with no change to APCO's contract value. In other words, APCO did not treat Helix's Claim the same as all other change orders it submitted to CNLV for Helix's work.

---

[130] Vol. XVI JA3250-JA3366.
[131] Vol. IX JA1523:13—JA1527:18.
[132] Vol. XIV JA2692-JA2694.
[133] Vol. XIV JA2715-JA2718.
[134] Vol. XIV JA2730-JA2732.
[135] Vol. IX JAI533:5-13.

2. In finding that APCO breached the Covenant of Good Faith and Fair Dealing, the district court did not expand APCO's obligations under the Subcontract or override terms of the Subcontract.

The district court found that "APCO had a duty to include Helix's Claim in its own claim to CNLV or otherwise preserve the Claim when it settled, which it failed to do."[136] By reaching this conclusion of law, the district court did not expand APCO's obligations under the Subcontract—rather, the district court merely stated that APCO had a duty to ensure that it did nothing to harm Helix's Claim when it settled with CNLV. Whether APCO consolidated Helix's Claim with its own claim, or included express reservation language in the settlement agreement with CNLV carving out Helix's Claim, it was up to APCO to ensure that Helix's Claim was preserved. APCO did nothing to preserve Helix's Claim and in fact, by settling all delay claims with CNLV, it forever barred Helix from asserting a pass-through claim to CNLV. The district court correctly found APCO impaired Helix's ability to pursue its Claim and that this amounted to a breach of the implied covenant of good faith and fair dealing.

/ / /

/ / /

[136] Vol. XVII JA3503 at ¶ 5.

C. THE COURT CORRECTLY IGNORED THE CLAIMS APPEAL PROCESS IN THE PRIME CONTRACT SINCE ANY APPEAL WOULD HAVE BEEN FUTILE GIVEN APCO'S MISREPRESENTATIONS TO HELIX REGARDING THE REASONS FOR CNLV'S REJECTION OF HELIX'S CLAIM.

APCO argues that because Helix did not instruct APCO to exercise the appeal process set forth in the Prime Contract to challenge CNLV's denials of Helix's Claim, Helix is barred from recovering against APCO. However, even if Helix had instructed APCO to lodge an appeal to CNLV, such an effort would have been futile because APCO misrepresented to Helix the real reasons why CNLV rejected Helix's Claim. Hence, Helix would have based its entire appeal to CNLV on a faulty premise—the need for additional back up documents—when in fact, CNLV simply rejected the Claim because it was not made a part of APCO's Claim for delay damages, and later, because APCO settled all delay claims with CNLV, including Helix's Claim. APCO cannot use as a shield Helix's failure to follow the appellate process in the Prime Contract when CNLV would have continued rejecting the Claim given that Helix's appeal would have been baseless and premised upon false information it received from APCO.

Under the doctrine of futility, a party may be excused from performing a condition precedent to enforcement of the contract, if performance of the condition would be futile. *Alvarez v. Rendon*, 953 So. 2d 702, 708–09 (Fla. Dist. Ct. App. 2007); *See also Waksman Enters., Inc. v. Oregon Props., Inc.*, 862 So.2d 35,

43 (Fla. 2d DCA 2003) ("[T]he law does not require that a party to a contract take action that would clearly be futile"); *Cheschi v. Bos. Edison Co.*, 39 Mass. App. Ct. 133, 142, 654 N.E.2d 48, 54 (1995)("A party may be excused from complying with a condition precedent if it has proven that performance of the condition would be futile) "The law does not require useless acts." *see also*, *Fortune v. National Cash Register Co.*, 373 Mass. 96, 107–108, 364 N.E.2d. Finally, the law does not require a party to perform futile acts as a condition precedent to asserting its rights. *New Design Constr. Co. v. Hamon Contractors, Inc.*, 215 P.3d 1172, 1180 (Colo. App. 2008); *Bruce W. Higley Defined Benefit Annuity Plan v. Kidder, Peabody & Co.*, 920 P.2d 884, 890–91 (Colo.App.1996).

Here, even if Helix had gathered additional supporting documents, and had instructed APCO to invoke the appeal process set forth in the Prime Contract, the outcome would be no different since APCO falsely advised Helix that CNLV rejected the Claim because of lack of documentation. This was simply not true as the testimony and evidence is clear that CNLV never rejected the Claim for lack of supporting documentation. Hence, to the extent Helix was required to follow the appeal process of the Prime Contract as a condition precedent for receiving payment of its Claim, Helix is excused from doing so given APCO's misrepresentations to Helix about the reasons why CNLV rejected Helix's Claim.

D. The District Court Was Correct in Finding that Helix did not Waive its Claim for Extended Overhead Costs When it Furnished APCO with the Conditional Waiver.

APCO argues the district court erred by not enforcing the Release Helix signed for the Retention Payment. Specifically, APCO claims the district court erred by (i) not enforcing the Conditional Waiver even though it was a contract between Helix and APCO, (ii) relying on evidence that allegedly violated the parol evidence rule, (iii) misapplying NRS 338.490, and (iii) not concluding that Helix waived its Claim by keeping the Retention Payment and not appealing CNLV's denial of the Claim.

As will be shown, (i) the Conditional Release is a not contract between Helix and APCO, (ii) the parol evidence rule and its exceptions apply to waivers, (iii) APCO failed to preserve any objections to the evidence based on the parol evidence rule, (iv) the District Court correctly applied NRS 338.490, and (iv) Helix was not required to return the Retention Payment to preserve its Claim. Based on the evidence presented, the district court correctly found that neither the Conditional Release, nor Helix's actions, operated as a waiver of Helix's Claim.

1. The Conditional Waiver is not a contract between Helix and APCO.

APCO argues that the Conditional Waiver was an enforceable contract between Helix and APCO. However, APCO has not demonstrated that the Conditional Waiver is an enforceable contract.

"Basic contract principles require, for an enforceable contract, an offer and acceptance, meeting of the minds, and consideration." *May v. Anderson,* 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). The "question of whether a contract exists is one of fact, requiring this Court to defer to the district court's findings unless they are clearly erroneous or not based on substantial evidence." *Id*. at 672-673, 119 P.3d at 1257.

Here, even if there was an offer and acceptance, there was not a meeting of the minds or consideration. If anything, the meeting of the minds was such that the Conditional Release was executed for the sole purpose of CNLV releasing retention. Before Helix executed the Conditional Waiver, APCO advised Helix that it could not include its Claim in the Retention Pay App or CNLV would not release the retention.[137] APCO knew of Helix's Claim before Helix submitted the Conditional Waiver yet asked Helix not to include Helix's Claim in the Retention Pay App. Based on APCO's instructions, and because the amount of retention was not in dispute, Helix indicated in the Conditional Waiver that the "Disputed Claim Amount" was "0.00" relating to the Retention Pay App.[138] Helix never intended to waive its Claim by way of the Conditional Waiver.[139]

[137] Vol. VIII JA1349:9-14.
[138] Vol. XIV JA2713; Vol. VIII JA1349:9-14.
[139] Vol. VIII JA1349:22-25.

If there was a meeting of the minds that the executed Conditional Waiver would serve as a bar to Helix's Claim, then (i) Helix would not have subsequently submitted additional documentation to support its Claim, (ii) APCO would not have continued to submit Helix's Claim to CNLV or met with CNLV to discuss Helix's Claim, (iii) Helix would not have sent out correspondence demanding payment of the Retention and the Claim, (iii) Helix and APCO would not have had discussions about APCO's financial ability to pay the Claim and figure out other ways to pay Helix, (iv) APCO would not have asked Helix to sign another conditional waiver a year later, (v) Helix would not have advised Mr. Pelan the new conditional waiver showing $0.00 in disputed amounts was not acceptable, (vi) APCO would not have instructed Helix to revise the new conditional waiver, (vii) Helix would not have revised the new conditional waiver to show the Claim being a disputed amount, and (viii) Mr. Pelan would not have instructed Mr. Fuchs to prepare a Promissory Note for payment of Helix's entire Claim. Furthermore, even though Helix advised APCO the new conditional release would not work and APCO instructed Helix to revise the same, APCO still released the Retention Check to Helix knowing Helix was still seeking payment for its Claim. Not only was there no meeting of the minds that the executed Conditional Waiver did not operate as a release of Helix's Claim, Helix's and APCO's actions after the submission of the Conditional Waiver demonstrate

their mutual understanding that Helix was submitting the Conditional Waiver for purposes of receiving retention but not waiving its Claim.

Moreover, the Conditional Release could not be a contract as it also lacked consideration. The Conditional Release was for the payment of retention only which was already due and owing. Helix already earned the retention and APCO was obligated to pay Helix the same.

APCO argues that Helix was required to return the Retention Payment to rescind the Conditional Release. APCO cites to a few cases for the proposition that a "party cannot rescind a contract and at the same time retain possession of the consideration, in whole or in part, which he has received under it." *Bishop v. Stewart*, 13 Nev. 25, 41 (1878). As set forth above, the Conditional Release was not a contract. Additionally, the Retention Payment could not be consideration as APCO was already obligated to pay Helix the same. Therefore, Helix was not required to return the Retention Payment or be bound by the Conditional Release. Moreover, the district court found, based on the evidence presented at trial, that "APCO's own conduct establishes that it knew Helix was not waiving its Claim…"[140] This was another factual determinate which cannot be overturned since there was substantial evidence supporting it.

/ / /

[140] Vol. XVII JA3503 at ¶ 3.

2. The parol evidence rule and its exceptions apply to waivers.

APCO correctly points out that the parol evidence rule applies to waivers, and in so doing, cites to an unpublished decision. Notably, the case APCO cited is a case wherein the very Judge APCO is appealing did not enforce an executed Unconditional Waiver and Release Upon Final Payment and this Court affirmed the Judge's ruling. Specifically, this Court stated "[i]n light of the district court's findings, it properly declined to enforce that waiver." *Insulation Contracting & Supply, Inc. v. S3H, Inc.*, 131 Nev. 1302, 1 (2015)(unpublished disposition).

With respect to waivers, Nevada also applies the traditional exceptions to the parol evidence rule, like fraud and mistake. *Russ v. General Motors Corp.* 111 Nev. 1431, 1438-1439, 906 P.2d 718, 723 (1995). Furthermore, "parole evidence is admissible to show that, although the parties have executed a written contract, they did not, at the time of its execution, intend it to be a contract, and that it was not, therefore, a contract, and placed neither party under any legal obligation." *Schieve v. Warren,* 87 Nev. 42, 45, 482 P.2d 303, 305 (1971).

In this case, the district court was presented with ample evidence that demonstrated neither Helix nor APCO intended the Conditional Waiver to be a release of Helix's Claim. Mr. Pelan advised Helix that it could not include its Claim with its Retention Pay App because CNLV would not release retention on the Project

if there were outstanding claims.[141] As a result of Mr. Pelan's instructions, Helix executed the Conditional Waiver and indicated $0.00 in "Disputed Claim Amount."[142] As set forth in detail above, for an entire year after that, Helix and APCO continually discussed Helix's Claim and APCO's payment for the same. As the Court correctly found, the "evidence presented at trial of the circumstances surrounding the execution of the Conditional Waiver do not support Helix's waiver of the Claim."[143]

3. Because APCO failed to raise a parol evidence rule objection at trial, it is waived.

APCO argues the district Court relied on evidence that violated the parol evidence rule to determine the Conditional Waiver was not valid. Although Helix denies that the evidence considered should have been precluded by way of the parol evidence rule, APCO failed to raise this issue at trial and therefore waived the same.

It is well settled law that a "point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on Appeal." *Schuck v. Signature Flight Support of Nevada, Inc.*, 126 Nev. 434, 436, 245 P.3d 542, 544 (2010) (citing *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981)). Furthermore, "where an objection has been

[141] Vol. VIII JA1349:9-14.
[142] Vol. XIV JA2713; Vol. VIII JA1349:22-25.
[143] Vol. XVII JA3497 at ¶ 76.

fully briefed, the district court has thoroughly explored the objection during a hearing on a pretrial motion, and the district court has made a definitive ruling, then a motion in limine is sufficient to preserve an issue for appeal." *Richmond v. State*, 118 Nev. 924, 932, 59 P.3d 1249, 1254 (2002). This Court has previously stated a "rule of evidence not invoked is waived." *Whalen v. State*, 100 Nev. 192, 195, 679 P.2d 248, 250 (1984) (citing *I Wigmore on Evidence* 790 (Tiller's Rev. 1983)).

Here, APCO (i) failed to file a motion in limine to preclude the introduction of evidence based on the parol evidence rule, and (ii) failed to object at trial to the admission of evidence based on the parol evidence rule. Having not previously invoked that rule of evidence, it is waived and this Court should not consider APCO's argument regarding the parol evidence rule.

4. The district court did not misapply NRS 338.490.

APCO claims the district court erred in its application of NRS 338.490. To be certain, Helix believes the district court properly applied NRS 338.490; however, even if the district court did misapply that statute, it was a harmless error that did not affect APCO's substantial rights. NRCP 61. Additionally, because the district court already found the Conditional Waiver was not enforceable and "APCO's own conduct establishes that it knew Helix was not waiving its Claim,"[144] any error in the application of NRS 338.490, if any, is harmless.

[144] Vol. XVII JA3503 at ¶ 3.

NRS 338.490 provides:

> **Limitations on requiring release or waiver of right to receive progress payment or retainage payment.** Any release or waiver required to be provided by a contractor, subcontractor or supplier to receive a progress payment or retainage payment must be:
> 1. Conditional for the purpose of receiving payment and shall be deemed to become unconditional upon the receipt of the money due to the contractor, subcontractor or supplier; and
> 2. Limited to claims **related to the invoiced amount** of the labor, materials, equipment or supplies **that are the subject of** the progress bill or **retainage bill**. (emphasis added).

If a statute's language is clear and unambiguous, courts must enforce the statute as written. *Hobbs v. Nevada*, 127 Nev. Adv. Op. 18, 251 P.3d 177, 179 (2011). Where the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself. *Pro-Max Corp. v. Feenstra*, 117 Nev. 90, 95, 16 P.3d 1074, 1078 (2001).

The Conditional Release signed by Helix is a release pursuant to NRS 108 and the language required by NRS 108.2457(5)(c)) is much broader than a release that is authorized by NRS 338.490. An NRS 108 release is not limited to claims related to the invoiced amount or claims that are the subject of the retainage bill (as required by NRS 338.490). Instead, an NRS 108 release covers all work furnished to a project. Interestingly, NRS 338.490 does not reference NRS 108, even though another section of NRS 338 does reference NRS 108. Had the legislature intended

the releases authorized by NRS 338 to be as broad as the releases authorized in NRS 108, it could have either (i) referenced the releases in NRS 108, or (ii) included the language of the NRS 108 release. "When [the Legislature] includes particular language in one section of a statute but omits it in another … this Court presumes that [the Legislature] intended a difference in meaning." *Williams v. State Department of Corrections*, 133 Nev. 594, 598, 402 P.3d 1260, 1264 (2017).

The district court correctly found that, because the Project was governed by NRS 338, pursuant to NRS 338.490, a "conditional waiver and release can only release payments for work which is the subject of the payment application to which the waiver and release corresponds."[145] The district court further found the Conditional Waiver was for retention only and expressly referred to the Retention Pay App, which did not include Helix's Claim.[146] As an alternative basis for finding that Helix did not waive its Claim, the district court correctly concluded that "because by statute, the Conditional Waiver can only release work that is the subject of the Retention Pay App, it did not constitute a waiver and release of Helix's Claim."[147]

/ / /

/ / /

[145] Vol. XVII JA3504 at ¶¶ 12-13.
[146] Vol. XVII JA3504 at ¶¶ 14-15.
[147] Vol. XVII JA3504 at ¶ 16.

5. Because APCO violated NRS 338 when it wrongfully withheld Helix's Retention, the Conditional Waiver could not have released Helix's Claim against APCO.

The district court found that APCO violated NRS 338.565(1) when it failed to pay Helix its retention payment within 10 days of APCO receiving its retention payment from CNLV.[148] APCO received its final retention payment from CNLV on June 10, 2014, and was required to pay to Helix its retention payment no later than June 21, 2014. Instead, APCO did not pay Helix its retention in the amount of $105,679 until October 29, 2014. The district court found that as a result of APCO's violation of NRS 338.565(1), "APCO [was] required to pay Helix interest on $105,677.01 from June 22, 2014 through October 28, 2014, at a rate of 5.25% for a total of $1,960.85."[149] Hence, because this violation did not arise until June 22, 2014, the Conditional Waiver which Helix provided on October 18, 2013, could not have waived all of Helix's claims, since some of Helix's claims did not exist at the time the Conditional Waiver was provided. The district court properly found "after providing APCO with the Conditional Waiver, Helix incurred additional damages that could not be waived by way of the Conditional Waiver (i.e. the interest on its wrongfully withheld retention).[150]

[148] Vol. XVII JA3505 at ¶¶ 23-25.
[149] Vol. XVII JA3505 at ¶ 25.
[150] Vol. XVII JA3505 at ¶ 21.

In other words, the Conditional Waiver is inoperative because Helix cannot be forced to waive claims which had not yet ripened, and the Conditional Waiver could not have covered Helix claims for APCO's violations of NRS 338.565(1).

E. The "No Damages for Delay Clause" Does Not Bar Helix's Claim.

Section 6.5 of the Subcontract contains a "no damage for delay" provision which states, in relevant part:

> If Subcontractor shall be delayed in the performance of the Work by any act or neglect of the Owner or Architect…, Subcontractor shall be entitled, as Subcontractor's exclusive remedy, to an extension of time reasonably necessary to compensate for the time lost due to the delay, but only if Subcontractor shall notify Contractor in writing within twenty-four (24) hours after such occurrences, and only if Contractor shall be granted such time extension by Owner.

However, the Parties negotiated additional language which was included in an Addendum to the Subcontract and arguably superseded the "No Damages for Delay" Clause found in Section 6.5. That superseding language states in relevant part:

> In the event the schedule as set forth above is changed by Contractor for whatever reason so that Subcontractor is precluded from performing the work in accordance with said schedule and thereby suffers delay…then Subcontractor shall be entitled to receive from Contractor payment representing the costs and damages sustained by Subcontractor for such delay…, providing said costs and damages are first paid to Contractor.

APCO argued at trial that this language constituted a pay-if-paid clause and barred Helix from recovering against APCO because, as APCO argued, CNLV did not pay APCO for Helix's Claim. However, the district court rejected this argument and found that "even if the pay-if-paid clause was enforceable, APCO cannot rely upon it to shield itself from liability to Helix when its decision to submit Helix's Claim separately from its claim led to CNLV rejecting Helix's Claim, and APCO's settlement with CNLV forever barred ACPO from receiving payment from CNLV for Helix's Claim."[151]

In other words, the pay-if-paid clause, if enforceable, was a condition precedent that could never be met since APCO settled all delays claims with CNLV and by so doing, barred APCO from recovering against CNLV additional delay damages relating to Helix's Claim.

In addition, even if Section 6.5 is enforceable and is not superseded by the parties' negotiated language, NRS 338.485(2) renders Section 6.5 unenforceable. That statute states in relevant part:

> A condition, stipulation or provision in a contract or other agreement that: (c) requires a contractor to waive, release or extinguish a claim or right for damages or an extension of time that the contractor may otherwise possess or acquire as a result of a delay that is: (4) caused by a decision by the public body to significantly add to the scope or duration of the public work…is against public

[151] Vol. XVII JA3505 at ¶ 26.

policy and is void and unenforceable."

At trial Mr. Llamado testified that it was CNLV's decision to extend the duration of the Project and he agreed that a 9-month extension to a 12-month project was significant.[152] Hence, the district court heard evidence sufficient to find that NRS 338.485(2) rendered Section 6.5 of the Subcontract void and unenforceable even though there may not have been a specific finding of the same in the district court's Findings of Fact and Conclusions of Law.

F. The District Court did not Abuse its Discretion in Awarding Attorney's Fees and Costs to Helix

Finally, APCO contends that the district court abused its discretion in awarding Helix attorney's fees and costs, even though Section 20.5 of the Subcontract mandates that attorney's fees be awarded to the prevailing party, which the district court correctly determined was Helix.

The decision to award attorney's fees is within the sound discretion of the trial court. *Bergmann v. Boyce*, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993). "A district court's award of attorney's fees will not be disturbed on appeal absent manifest abuse of discretion." *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1353-54, 971 P.2d 383, 386 (1998)(citing *Nelson v. Peckham Plaza Partnerships*, 110 Nev. 23, 26, 866 P.2d 1138, 1139-40 (1994)).

[152] Vol. VII JA1185:16-19.

The district court awarded Helix $43,992.39 for its extended overhead costs and another $1,960.85 in interest for the retention payment APCO improperly withheld from June 21, 2014 to October 30, 2014. As such, the district court found that "Helix is the prevailing party and is entitled to an award of its attorneys' fees and costs" under Section 20.5 of the Subcontract.[153]

The district court did not abuse its discretion in awarding attorney's fees and therefore, APCO's appeal on this point must be denied.

VII.

CONCLUSION

Therefore, the Court should affirm the district court's ruling and reject the Appeal.

Dated this 15th day of June 2021.

PEEL BRIMLEY LLP

/s/ Cary Domina

CARY DOMINA, ESQ.
Nevada Bar No. 10567
RONNIE J. COX, ESQ.
Nevada Bar No. 12723
3333 E. Serene Avenue, Suite 200
Henderson, Nevada 89074
Attorneys for Respondent

[153] Vol. XVII JA3507 ¶ 36.

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 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 contains **13482** words; or

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

[ ] Does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate 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 15th day of June, 2021.

PEEL BRIMLEY LLP

/s/ Cary Domina

CARY DOMINA, ESQ.
Nevada Bar No. 10567
RONNIE J. COX, ESQ.
Nevada Bar No. 12723
3333 E. Serene Avenue, Suite 200
Henderson, Nevada 89074
Attorneys for Respondent

CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of **PEEL BRIMLEY, LLP**, and that on this 15th day of June, 2021, I caused the above and foregoing document, **RESPONDENT'S ANSWERING BRIEF**, 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
- ☒ pursuant to NEFCR 9, upon all registered parties via the Court's electronic filing system;
- ☐ 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:

Christopher H. Byrd, Esq. (NV Bar No. 1633)
John Randall Jeffries, Esq. (NV Bar No. 3512)
FENNEMORE CRAIG, P.C.
400 S. Fourth Street, 14th Floor
Las Vegas, NV 89101
Telephone: (702) 408-3411

Attorneys for Appellant APCO Construction, Inc

/s/ Amanda Armstrong

An employee of **PEEL BRIMLEY, LLP**