

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

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

5 Appellants,

6 vs.

7 HELIX ELECTRIC OF NEVADA,
8 LLC, A NEVADA LIMITED
 LIABILITY COMPANY,

9 Respondent.

Case No. 80177

D.C. Case No. A730091

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10 **APPELLANTS APCO CONSTRUCTION, INC. AND SAFECO**
11 **INSURANCE COMPANY OF AMERICA'S REPLY BRIEF**

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1 **NRAP 26.1 DISCLOSURE**

2 The undersigned counsel of record certifies that the following are persons
3 and entities as described in NRAP 26.1(a) and must be disclosed. These
4 representations are made in order that the Justices of this Court may evaluate
5 possible disqualification or recusal.

6 1. Appellants, APCO Construction, Inc. (APCO) and Safeco Corporation
7 (“Safeco”) are not owned by any parent corporation and no publicly traded
8 company owns more than 10% of either company’s stock.

9 2. Over the course of the litigation, APCO and Safeco were represented
10 in the district court by Gwen Rutar-Mullins, Esq. and Wade Gochnour, Esq. of
11 Howard & Howard; Micah Echols, Esq., Cody Munteer, Esq., and Jack Juan, Esq.
12 of Marquis Aurbach Coffing; and John Mowbray, Esq., John Randall Jefferies,
13 Esq., and Mary Bacon, Esq. of Spencer Fane LLP.

14 3. John Randall Jefferies, Esq. and Chris Byrd, Esq. of Fennemore Craig
15 represent APCO and Safeco in this Court.

16 Dated this 16th day of August, 2021.

17 **FENNEMORE CRAIG, P.C.**

18 /s/ Christopher H. Byrd

19 John Randall Jefferies, Esq.

20 Christopher H. Byrd, Esq.

21 *Attorneys for Appellants APCO
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1 **REPLY BRIEF**

2 **I. INTRODUCTION**

3 Helix concedes many of APCO's material issues on appeal by failing to
4 address them in its Answering Brief ("AB"). Specifically, Helix failed to point
5 this Court to any evidence in the record demonstrating that APCO or the City
6 were the cause of the delay, that the delay actually caused Helix's costs to
7 increase, and that Helix's claimed costs were not duplicative. Absent this
8 evidence, the District Court's finding that Helix is entitled to damages is an
9 abuse of discretion and warrants reversal.

10 The District Court also erred in determining that the Covenant was
11 breached and supported an award of damages to Helix. The law is clear that the
12 Covenant cannot be used to excuse a prior material breach. Helix concedes that
13 it failed to comply with the material notice requirements of the Subcontract,
14 thereby excusing APCO from performance, including any requirement to join
15 the two claims together. The law is also clear that the Covenant cannot be used
16 to imply additional contractual obligations, as its scope and application is
17 directly governed by the terms of the parties' agreements.

18 The District Court erred in refusing to enforce the "no damage for delay"
19 provision of the Subcontract despite finding that the provision was enforceable.

1 Contrary to Helix's argument, the "paid if paid" clause of the Helix Addendum
2 did not supersede the "no damage for delay" provision. Furthermore, there was
3 no evidence that the decisions by the City significantly increased the duration of
4 the project to render the "no damage for delay provision" void under NRS
5 338.485(2)(c)(4).

6 The District Court improperly relied upon inadmissible parol evidence,
7 hearsay and the contents of settlement negotiations to find that the Release was
8 unenforceable. The subjective intent of Helix cannot override the unambiguous
9 terms of the Release. Helix's argument that the Release was not a contract
10 because there was no consideration has been routinely rejected. The record is
11 clear that Helix made a deliberate choice to release its claim for extended
12 general condition in order to expedite retention payments and that the release
13 became unconditional by operation of law once Helix accepted payment and did
14 not return the funds. In addition, the District Court too narrowly interpreted
15 NRS 338.490 to void the Release. A release is enforceable under NRS 338.490
16 if it relates to the work in the invoice. Claimed overhead costs to administer
17 the work for which retention was withheld is related to the retention and makes
18 the Release enforceable.

19 The District Court further erred in refusing to find that Helix waived its

1 claims by not appealing the City's denial of its claim. Although Helix
2 speculates that an appeal would have been futile, Helix's speculation is
3 contradicted by its own version of the facts. Helix also confuses futility with
4 success on the merits, which is not the correct standard. Even the District Court
5 indicated an appeal could have resolved the matter. Moreover, an appeal would
6 have provided the district court with a fully developed record and permitted the
7 City to correct any errors that it made in the claim process.

8 Finally, there is no evidence that APCO acted deliberately with a bad
9 motive to benefit itself in processing Helix's claim. The findings Helix relies
10 upon to support its claim of bad faith fall into two categories either a
11 disagreement between Mr. Pelan and Mr. Llamado about the claim process and
12 scope of the settlement; or actions by APCO that had no bearing on Helix's
13 ability to document a claim, if it had one. But this evidence is not sufficient to
14 establish bad faith because there was no bad motive. Helix never demonstrated
15 that APCO would benefit from sabotaging Helix's claim. There is no evidence
16 that APCO mislead Helix about the City's reasons for rejecting the claim, and
17 APCO's failure to disclosure TIA #1 or its payment from the City did not
18 impact Helix's ability to submit its claim.

19 This appeal is about whether the Covenant can relieve a party from its

1 conduct, including material breaches, and make an invalid claim compensable
2 without any proof that the other party deliberately acted with any bad intent.
3 Clearly, this is not the purpose of the Covenant and the District Court's award
4 of delay damages should be reversed.

5 **II. LEGAL ARGUMENT**

6 **A. HELIX'S FAILURE TO ADDRESS MATERIAL ISSUES** 7 **RAISED BY APCO ON APPEAL IS A CONFESSION OF** 8 **ERROR.**

9 A party confesses error when that party's answering brief effectively
10 failed to address a significant issue raised in the appeal. See *Bates v. Chronister*,
11 100 Nev. 675, 681–82, 691 P.2d 865, 870 (1984) (treating the respondent's
12 failure to respond to the appellant's argument as a confession of error). Helix
13 failed to address the following issues raised by APCO in its Answering Brief:

- 14 1. Helix failed to prove the cause of delay, that any specific delay by
15 the City caused its costs to increase, and the costs claimed were not
16 duplicative.
- 17 2. Helix failed to comply with the Subcontract provisions for
18 documenting its claim basis and refused to turn over information to
19 support its claim thus waiving the claim.
- 20 3. Helix's failure to appeal the City's denial of the claim eliminated

1 any causal link between APCO's conduct and any claimed
2 damages.

3 Each of these issues and others identified below that Helix failed to address
4 should be considered a confession of error requiring reversal of the judgment on
5 Helix's claim for extended general conditions.

6 **B. THERE WAS NO EVIDENCE ESTABLISHING THAT**
7 **HELIX'S DAMAGES WERE DIRECTLY CAUSED OR**
8 **INCREASED BY THE DELAY.**

9 Helix's brief fails to identify evidence in the record demonstrating that
10 any delay directly caused Helix's costs, proof of which is required for Helix to
11 be entitled to damages. *See* AB; *see also* *Wunderlich Contr. Co. v. U.S.*, 351
12 F.2d 956, 967 (Ct. Cl. 1965) (holding that, to be compensable, "delay must be
13 shown to have been proximately caused by defendant's actions"); *Thalle Constr.*
14 *Co. v. Whiting-Turner Contr. Co.*, 39 F.3d 412, 417-18 (2d Cir. 1994)
15 (explaining that a subcontractor must prove the extent to which the costs caused
16 the delay); (*A.G. Cullen Constr., Inc. v. State Sys. of Higher Educ.*, 898 A.2d
17 1145, 1160-61 (Pa. Commw. Ct. 2006) ("It is incumbent on a contractor not
18 only to quantify the damages but also to connect the alleged losses to the
19 particular incident of delay.")).

20 In fact, Helix concedes that expert testimony is required to establish that

1 the delay caused and impacted Helix's costs by citing to *TechDyn Sys. Corp. v.*
2 *Whittaker Corp.*, 427 S.E. 2d 334 (Va. 1993), in its brief. *See* AB 28. As
3 *TechDyn Sys. Corp.* discusses, expert testimony is generally required to
4 establish delays as the cause of costs. *Id.* at 337-339. *TechDyn Sys. Corp.* is
5 consistent with Mr. Pelan's unrefuted testimony that it is impossible to ascertain
6 Helix's harm from delay without a time impact analysis, and with Helix's
7 admission that a subcontractor's available mitigation measures are different than
8 a general contractor's. 7JA1134, 9JA1556.

9 Helix did not present any expert evidence that delay increased its costs,
10 however. Instead, both Helix and the District Court assumed, without proof,
11 that the nine month extension of the project past the completion date *per se*
12 damaged Helix. This finding is an abuse of discretion because the law is clear
13 that proof of delay alone is not sufficient to give rise to a damages claim. *See,*
14 *e.g. George Solitt Constr. Co. v. U.S.*, 64 Fed. Cl. 229, 238 (Ct. Cl. 2005)
15 (holding that in addition to having "the burden of proving the extent of the
16 delay," a subcontractor must also prove "that the delay harmed the
17 [sub]contractor" by increasing its costs). Costs incurred after scheduled
18 completion dates are not automatically additional costs resulting from a delay.
19 *Manshul Constr. Corp. v. Dormitory Auth. of N.Y.*, 436 N.Y.S.2d 724, 729 (N.Y.

1 App. Div. 1981).

2 In fact, Helix's own employees admitted they could not identify increased
3 costs associated with the delay. Helix's project manager and senior vice
4 president both testified that Helix never investigated whether the delay caused
5 increased costs or exceeded the original budget. 7JA1146 ("Q: . . . have you
6 ever analyzed whether Helix's project overhead costs overran the assumed
7 budget? A: No."); 8JA1392-93 ("Q: Have you done any analysis . . . how the
8 delay actually caused an increase in Helix's cost? A: ...No."). And, Helix's
9 senior vice president also admitted prior to trial that Helix's claim was not based
10 upon costs caused by the delay. 8JA1392. Helix does not identify any evidence
11 refuting this testimony. *See* AB.

12 Similarly, Helix omits that it never disclosed budget reports or separately
13 tracked delay costs. Despite admitting that these budget reports exist, 7JA1142-
14 43, Helix never produced them. 8JA1389. Helix also admitted that it could
15 have separately tracked its delay costs, but did not do so. 7JA1135. Helix's
16 failure to produce this evidence raises the inference that this evidence would be
17 adverse to Helix's position. *See* NRS 47.250(3)-(4).

18 Finally, Helix's brief is silent regarding whether the costs incurred after
19 the projected completion date were duplicative of the costs the City already paid

1 Helix under the Subcontract and change work order during the delay period. *See*
2 AB. Thus, absent evidence, expert or otherwise, that Helix's costs were directly
3 caused by the delay, the District Court's damage finding was clearly erroneous.¹

4 **C. HELIX CONCEDES THAT THE DISTRICT COURT**
5 **IMPROPERLY USED THE COVENANT TO EXCUSE**
6 **HELIX'S PRIOR MATERIAL BREACH OF THE**
7 **SUBCONTRACT.**

8 In its brief, Helix does not address or distinguish the authority APCO cites
9 which holds that contractual reporting requirements are material terms, and a
10 contractor's failure to abide by these requirements waives a delay claim and
11 excuses performance. *See* AB; *see also* OB 38-39; *Eagles Nest Ltd. P'ship v.*
12 *Brunzell*, 99 Nev. 710, 713, 669 P.2d 714, 715 (1983). Helix does not contest
13 that it did not follow the contractual reporting requirements, and it does not
14 argue that its failure was justified or excused. *See* AB.

15 Helix similarly does not point this Court to any authority that would allow
16 a court to use the implied covenant of good faith and fair dealing to excuse its
17 non-performance and award it damages on a waived claim. *See id.* While the
18 implied covenant creates an obligation of good faith, "[i]t is universally
19 recognized that the scope of conduct prohibited by the covenant of good faith is

¹ Helix's argument that APCO's demonstrative exhibit is a concession that Helix could recover delay damages is without merit. *See* AB 28. APCO's demonstrative exhibit contrasted the costs Helix included in its job reports to the costs in Helix's claim. 8JA1467-68. APCO consistently argued that it was impossible to determine whether Helix was damaged by the delay absent a time impact analysis.

1 circumscribed by the purposes and express terms of the contract.” *Moore v.*
2 *Wells Fargo Bank, N.A.*, 251 Cal. Rptr. 3d 779, 788 (Ct. App. 2019) (internal
3 quotations omitted). Helix’s material breaches of the Subcontract preclude it
4 from recovering damages.

5 **D. THE SUBCONTRACT PRECLUDED HELIX FROM**
6 **RECOVERING MONEY DAMAGES FOR DELAY.**

7 As set forth in APCO’s opening brief, Section 6.5 of the Subcontract
8 precludes Helix’s damages award. Contrary to Helix’s arguments, (1) Section 6
9 did not supersede Section 6.5, and (2) NRS 338.485(2)(c)(4) does not apply.²

10 **1. Section 6 of the Helix Addendum Did Not Supersede**
11 **Section 6.5.**

12 Section 6.5 of the Subcontract states that if any cause other than APCO’s
13 intentional interference delayed Helix’s performance, *Helix would only be*
14 *entitled to a time extension—not money damages*. 13JA2606. Although Helix
15 argues that Section 6 of the Helix Addendum “arguably superseded” Section
16 6.5, the District Court correctly found otherwise. 17JA3488-89. On its face,
17 the Helix Addendum is clear at it did not modify Section 6.5. *See* 13JA2636-37;
18 *see also Ringle v. Burton*, 120 Nev. 82, 93, 86 P.3d 1032, 1039 (2004) (contracts
19 are construed as written, with effect given to every provision). Instead, Section 6
was intended to protect APCO from Helix’s claims, and Helix admitted Section

² Helix concedes that the District Court properly found that Section 6.5 precluded Helix’s claim for extended general conditions, and that the delay on the project was not sufficient to constitute an abandonment under NRS 338.485(2)(c)(1). 17JA 3501-02; AB.

1 6 contemplated payment from the City as a precondition to payment from
2 APCO. 8JA1393-94.

3 **2. NRS 338.485(2)(c)(4) Does Not Apply.**

4 Under NRS 338.485(2)(c)(4), contractual provisions that require a
5 contractor to release a claim for damages arising from a delay “[c]aused by a
6 decision of a public body to significantly add to the scope or duration” of the
7 project are unenforceable. Helix does not, and cannot, point to any evidence
8 that the delay was caused by any decision of the City to significantly add to the
9 duration of the project.

10 Helix’s reliance on Mr. Llamado’s testimony is not helpful, because Mr.
11 Llamado did not testify about any City decisions that caused any delay or
12 increased the duration of the project by 180 days. In fact, there was no evidence
13 about the cause of any of the delays upon which Helix sought recovery.
14 Furthermore, Mr. Llamado admitted that any decision regarding extension of the
15 schedule was made by his boss, not him. 7JA1184.

16 Second, the 180 days of delay Mr. Llamado referenced included 119 days
17 of non-compensatory delay, which Mr. Llamado explained were caused by
18 things like rain delays, which are not a decision of the City. 7JA1183. There
19 was no evidence about the cause for the other 61 days of delay. NRS

1 338.485(2)(c)(4) does not apply. Because the District Court found Section 6.5
2 was enforceable, and no legal or factual basis exists to void the provision, the
3 judgment for money damages must be reversed.

4 **E. HELIX WAIVED ITS CLAIM FOR DELAY DAMAGES BY**
5 **FAILING TO APPEAL.**

6 Helix admits that it could have appealed the City's denial of its claim, but
7 argues that it chose not to because any appeal would have allegedly been
8 "futile" because APCO purportedly misrepresented the reason for denial and
9 settled with the City. AB 35. This argument contradicts Helix's assertion that it
10 was unaware of APCO's settlement and that the City rejected Helix's claim
11 because the City did not have a contract with Helix. AB10-11, 14, 36.

12 Furthermore, Helix confuses "futility" with "success on the merits."
13 Futility occurs when the appealing party would not be entitled to any remedy
14 from the party conducting the review, and the argument that a different result
15 could not occur does not render an appeal "futile." *Benson v. State Eng'r*, 131
16 Nev. 772, 777, 358 P.3d 221, 225 (Nev. 2015); *see also State, Dep't of Taxation*
17 *v. Scotsman Mfg. Co.*, 109 Nev. 252, 255, 849 P.2d 317, 230 (1993); *Engelmann*
18 *v. Westergard*, 98 Nev. 348, 353, 647 P.2d 385, 389 (1982). Helix, confusingly,
19 cites to two cases which explain this fact. *See Fortune v. Nat'l Cash Register*
Co., 364 N.E. 2d 1251 (Mass. 1977) (holding that an appeal is futile because the

1 appeal process did not apply to the claim being appealed); *New Design Constr.*
2 *Co. v. Hamon Contr., Inc.*, 215 P.2d 1172, 1180 (Colo. App. 2008) (same).

3 Here, Helix's claim for delay damages was covered by Subcontract's
4 appeal provisions. Helix admits it had time to appeal but elected to forego the
5 process. Most importantly, the City had the authority to alter its position,
6 regardless of the reason for the initial rejection, if only Helix appealed. Helix's
7 futility argument is really speculation about the outcome; but that is not a basis
8 for finding an appeal would have been futile.

9 Besides being inconsistent with its version of the facts, Helix's futility
10 argument fails for other reasons. As the District Court noted, APCO disagreed
11 with Mr. Llamado's interpretation of the settlement and suggested that an appeal
12 could have resolved the difference of opinion. 17JA3495-96. The District
13 Court apparently did not believe an appeal would have been futile—only that
14 one was never taken.

15 Finally, public policy supports barring Helix's claim for failing to appeal.
16 An appeal would have provided the District Court with a fully developed record
17 as to whether Helix had a valid claim for delay. *See Malecon Tobacco, LLC v.*
18 *State ex rel. Dep't of Taxation*, 118 Nev. 837, 840–41, 59 P.3d 474, 476 (2002)
19 (noting that administrative agencies are generally in the best position to make

1 factual determinations). The City would have been in the best position to
2 determine if Helix adequately documented its claim and proved that its costs
3 were caused by City delay and were not duplicative. Most importantly, it would
4 have given the City the opportunity to correct any mistakes and conserve
5 judicial resources. See *Mesagate Homeowners' Ass'n v. City of Fernley*, 124
6 Nev. 1092, 1099, 194 P.3d 1248, 1252–53 (2008) (explaining that the purpose
7 of the exhaustion requirement is to allow agencies to correct their mistakes and
8 conserve judicial resources because judicial involvement may not be required
9 after an appeal).

10 So the question remains, why didn't Helix appeal? There are only two
11 possible answers based upon the evidence: Helix did not have a viable claim it
12 could support on appeal or Helix gave up its claim so that it could get its
13 retention. It has to be one or the other. Either way, Helix forfeited the right to
14 proceed against APCO. Furthermore, Helix does not contest that without an
15 appeal there was no evidence that the City would have approved Helix's claim
16 as it existed, even if jointly presented with APCO's claim. The result is that
17 there is no evidence to link APCO's conduct to Helix's loss and therefore the
18 judgment for extended general conditions must be reversed.

19 ///

1 **F. HELIX MADE A DELIBERATE CHOICE TO RELEASE ITS**
2 **CLAIM FOR EXTENDED GENERAL CONDITIONS IN**
3 **ORDER TO EXPEDITE RETENTION PAYMENTS.**

4 Helix does not dispute that the terms of the Release were unambiguous,
5 but asserts that the Release was not enforceable because it (1) was not supported
6 by consideration and (2) there was no meeting of the minds. AB38.

7 Helix argues that there was no consideration because the Release was for
8 the retention, which was already earned and due and owing. AB40. Courts
9 repeatedly reject this argument. *Clark Mech. Contractors, Inc. v. United States*,
10 5 Cl. Ct. 84, 87–88 (1984). Decisions that reject the no consideration argument
11 are “legion.” *Inland Empire Builders, Inc. v. U. S.*, 424 F.2d 1370, 1376 (Ct.
12 Cl. 1970). In addition, the release was required by the Subcontract. 13JA2604.
13 Clearly, the Subcontract was supported by consideration.

14 Helix’s other argument about no meeting of the minds is based upon
15 Helix’s subjective intent and inadmissible evidence of discussions between the
16 parties surrounding the execution of the release and afterwards. First, the
17 subjective intent of a party cannot be used to contradict the contract’s terms.
18 *Galardi v. Naples Polaris*, 129 Nev. 306, 301 P.3d 364 (2013). A contractor’s
19 mere intention to preserve a claim is not sufficient to avoid the effect of a
general release. *Clark Mechanical Contrs., Inc. v. U.S.*, 5 Cl. Ct. 84, 87 n.3
(1984). In *Clark Mechanical*, the contractor made an argument similar to Helix

1 that it was misled into signing the release by the conduct of the other party. *See*
2 *id.* The Court held that it was necessary to show fraud, misrepresentation or
3 other inequitable conduct in order for the Court to disregard the plain terms of
4 the release. *Clark Mechanical Contractors, Inc.*, *supra.* at 88. The District
5 Court made no such findings; nor was there any evidence of fraud,
6 misrepresentation or inequitable conduct. Thus, Mr. Fuch's testimony that Helix
7 never intended to release its claim is not sufficient to change the terms of the
8 Release he signed. 8JA1349; 17JA3497.

9 Furthermore, the District Court abused its discretion when it admitted
10 portions of Mr. Fuch's testimony because it was both inadmissible double
11 hearsay, and in violation of the parol evidence rule. 8JA1349. Mr. Fuchs
12 testified that Helix employees informed him that APCO employees stated that
13 Helix had to put in zero in the Release as the amount of disputed claims because
14 it was the only way for Helix to get paid the final payment, but that Helix would
15 not forfeit the claim. 8JA1349. Without addressing the fact that the Helix
16 employees' statements to Mr. Fuchs constituted separate hearsay not covered by
17 the party opponent exception, the District Court admitted the testimony over
18 objection because APCO was a party opponent. 8JA1349. Thus, Mr. Fuch's
19 testimony should have been excluded. *See* NRS 51.065; NRS 51.067.

1 Mr. Fuch's testimony also violated the parol evidence rule. Helix
2 concedes that the release is unambiguous; therefore the District Court could not
3 consider the circumstances surrounding the execution of the Release and the
4 subsequent acts of the parties. *Sandy Valley Assoc. v. Sky Ranch Estates*
5 *Owners Ass'n*, 117 Nev. 948, 954 , 35 P.3d 964, 968 (2001). Although Helix
6 argues that APCO waived its right to assert the parol evidence rule by failing to
7 object, the parol evidence rule is a substantive rule of law and is not a rule of
8 evidence. *Tallman v. First Nat'l Bank*, 86 Nev. 248, 257, 208 P.2d 30, 306
9 (1969).³

10 Thus, because parol evidence is a rule of substantive law "it follows that
11 evidence which is inadmissible under the parol evidence rule does not acquire
12 probative force merely because no objection was made thereto; and any
13 evidence violative of the rule, even though admitted without objection, should
14 not be considered." *Carey v. Shellburne, Inc.*, 43 Del. Ch. 292, 295 (1966).
15 Parol evidence admitted without objection will still have its weight diminished
16 when the oral testimony is in conflict, "documentary evidence becomes of
17 paramount importance and must be accorded greater weight than testimonial
18 evidence." *Vallarta v. Lee Optical of Missouri, Inc.*, 298 N.E.2d 212, 215 (Ill.

19 ³ Neither of the cases relied upon by this Court in *Nev. State Bank v. Snowden*, 85 Nev. 19, 449 P.2d 254 (1969) require a prior objection. See *Humphries v. Haydon*, 179 S.W.2d 895 (Ky. 1944); *Anderson v. Owens*, 205 F.2d 940 (9th Cir. 1953).

1 App. 1973). Thus, the terms of the Release, which are clear and unambiguous,
2 should be given precedence over any testimony by Mr. Fuchs that the Release
3 meant something different.

4 Admissible evidence also contradicted Mr. Fuch's hearsay evidence.
5 Helix's senior vice president admitted that he had no discussions with anyone at
6 APCO that would allow Helix to reserve its claim and still get paid its retention.
7 7JA1191-93. In addition, Mr. Pelan testified that he never told Helix that it was
8 required to put zero in the Release for disputed claims. 8JA1440-41. When
9 Helix did not appeal the last rejection of its claim, and signed the Release with
10 no disputed claims, APCO believed that Helix had in fact decided not to pursue
11 its claim.⁴ 9JA1516.

12 The District Court also improperly admitted evidence concerning
13 settlement discussions in violation of NRS 48.105, over APCO's repeated
14 objections. *See* 8JA1302, 1305-1306, 1314, 1324, 1327-28. At trial, Helix
15 relied upon discussions and emails between Mssrs. Fuchs and Pelan about Helix

16 ⁴ Helix does not dispute that the Release did not become effective until payment was made.
17 *See* AB. Helix suggests that its acceptance of the final payment had no legal effect and did
18 not have to be returned to stop the Release from being effective. Helix points to the
19 discussions surrounding the receipt of the check, the lack of a contract and the fact that Helix
never intended to release its claim. However, by not giving back the money, the Release
became unconditional by operation of law. NRS 338.490(1) provides that upon receipt of the
money due to the subcontractor the Release becomes unconditional. Helix never explains
how it could keep the money when the waiver of its claim in the Release was the reason the
City paid Helix's retention. AB 40.

1 wanting to be paid for its claim. The District Court overruled the objections,
2 finding NRS 48.105 did not apply because Helix did not intend to settle its
3 claim. *See* 8JA1302-1303. The District Court applied the wrong standard to
4 evaluate the objection. All that is required is an offer by one party where an
5 actual dispute or difference of opinion exists when the offer is made. *Davis v.*
6 *Beling*, 128 Nev. 301, 278 P.3d 501 (2012). Here, there was clearly a difference
7 of opinion.

8 After the meeting in February of 2014, Helix's claim was denied for the
9 final time and Mr. Pelan advised Mr. Fuchs it was up to him whether to file an
10 appeal with the City or accept the retention because Helix was 'rattling' the
11 most about getting paid. JA1450. Helix did not appeal. 17JA3498-99.
12 However, after the appeal time ran out, Helix began to insist it wanted its claim
13 paid. Mr. Pelan told Mr. Fuchs to let it go we'll get some jobs together, and
14 we'll call it good. 8JA1450. It was an "olive branch" to solve the problem that
15 Helix let its claim go and still wanted to be paid. 8JA1451. However, Mr. Pelan
16 had made it clear to Mr. Fuchs that APCO did not owe Helix a dime. 8JA1451.
17 But when a potential project fell through, Mr. Fuchs became more persistent and
18 wanted a commitment from APCO. 8JA1450-1451. In April, Mr. Fuchs tried to
19 use the threat of the claim to speed up payment of the retention, although the

1 City would not pay for another 2 months. 17JA3499. Later, after Helix
2 accepted payment, Mr. Fuchs and his counsel, not APCO, proposed a
3 promissory note for the full amount of the claim. 8JA1449. APCO's offer to
4 work with Helix after Helix decided not to appeal and signed the Release does
5 not prove that Helix never intended to waive its claim. To the contrary, it
6 confirms Mr. Pelan's testimony that Helix made a choice to get its retention,
7 which was a certainty, instead of pursuing an overstated, unsubstantiated delay
8 claim. By listening to all of this inadmissible testimony and making findings
9 based upon it, the District Court confused evidence of a compromise with
10 evidence that Helix had a valid claim, which NRS 48.105 is designed to prevent.

11 The District Court also improperly applied NRS 338.490 to void the
12 Release, which is reversible error. Had the Release been enforced according to
13 its plain language, it waived all of Helix's claims for extended general
14 conditions and the outcome of the case would be materially different. *Wyeth v.*
15 *Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) (noting that an error is not
16 harmless if the movant shows "that the error affects the party's substantial rights
17 so that, but for the alleged error, a different result might reasonably have been
18 reached").

19 The District Court too narrowly construed NRS 338.490 when it

1 concluded that statute only permitted the Release for the work that is the subject
2 of the payment application. 17JA3531. However, to be enforceable, the
3 Release need only be “related to the invoiced amount.” As APCO
4 demonstrated, Helix’s claim was for costs to administer work that created the
5 retention and thus is clearly related to the invoiced amounts. If the District
6 Court’s interpretation is adopted, disputed amounts can never be released unless
7 they are billed. This is an absurd result which is disfavored when interpreting
8 statutes. *See, Young v. Nevada Gaming Control Bd.*, 136 Nev. Adv. Op. 66, 473
9 P.3d 1034, 1036 (2020). Accordingly, the District Court erred and this Court
10 should reverse the District Court’s judgment for delay damages.

11 **G. THERE WAS NO EVIDENCE THAT APCO**
12 **DELIBERATELY UNDERMINED HELIX’S CLAIM OR**
13 **ACTED WITH AN INTERESTED OR CORRUPT MOTIVE**
14 **TO PREVENT HELIX FROM GETTING ITS DELAY**
15 **CLAIM ACCEPTED AND PAID BY THE CITY.**

16 **1. It Was In APCO’s Best Interest For Helix To Properly**
17 **Document A Claim and Get Paid By the City.**

18 Even if Helix could prove that the City’s delay caused its costs to
19 increase, that money damages were not precluded by the Subcontract, and the
claim had not been waived, Helix must still prove that APCO improperly
intended to deliberately harm Helix and benefit itself. Absent this evidence,
there would be no breach of the Covenant. Helix concedes this point of law by

1 citing *Renown Health v. Holland & Hart, LLP*, No. 72039, 2019 WL153061 at
2 *2 (Nev. Apr. 5, 2019). In *Renown*, this Court made clear that mistakes, bad
3 judgment or negligence without an interested or corrupt motive did not
4 constitute bad faith or breach the Covenant. *See also, Hulse v. Sheriff, Clark*
5 *Cnty.*, 88 Nev. 393, 398, 498 P.2d 1317, 1320 (1972) (errors of judgment are not
6 evidence of bad faith).

7 Helix conveniently points this Court to the authority demonstrating the
8 type of conduct and motive required for bad faith. *Hilton Hotels Corp. v. Butch*
9 *Lewis Productions, Inc.*, 107 Nev. 226, 233, 808 P.2d 919, 923 (1991)
10 (allegations of bad faith in connection with a contract to unify the heavyweight
11 title through a series of matches at the Hilton Hotel); AB30. In *Hilton*, a
12 promoter deliberately and purposefully damaged the Hilton in order to make
13 more money:

14 Even though Dynamic Duo did not have a contractual
15 duty to furnish Spinks as a contestant in the Hilton
16 events..., [i]f, as charged by Hilton, Lewis [owner of
17 Dynamic Duo with Don King] **purposefully and**
intentionally had Spinks stripped of the IBF title **in**
order to undermine the Unification Series and permit
Lewis and Dynamic Duo **to make more money outside**
the series, this conduct could be seen as a breach of the
covenant of good faith and fair dealing.

18 *Id.* (Emphasis added.)

19 Helix points to no evidence that APCO deliberately undermined Helix's

1 claim in order to benefit itself. Instead, Helix cites to findings about the process,
2 the rejection of the claim and the settlement in which the District Court
3 disagreed with APCO's handling of the claim. However, those findings do not
4 supply the bad motive required, despite Helix's characterization of APCO's
5 conduct as misleading and disingenuous.

6 Also missing is any evidence that APCO would have benefited from
7 Helix's claim rejection. Under the terms of the Subcontract, APCO was not
8 liable to Helix for costs arising from extra work until or unless APCO was paid
9 by the City. 13JA2604-06. Helix acknowledged that payment by the City was a
10 condition to Helix receiving payment from APCO. 8JA1394-96. Thus, it was in
11 APCO's best interest to have Helix properly its document claim so the City
12 would pay it.

13 The findings Helix relied upon to support breach of the Covenant indicate
14 nothing more than a disagreement between Mr. Llamado and Mr. Pelan about
15 the claim process and the scope of the settlement. When APCO's conduct is
16 compared to the bad faith conduct described in *Hilton*, it is clear APCO's
17 handling of Helix's claim was not bad faith.

18 ///

19 ///

1 **2. APCO’s Internal Policy and Change Order for Helix’s**
2 **Delay Claim Was Not a Breach of the Subcontract or the**
3 **Covenant.**

4 The District Court erred in finding that APCO was required to join the
5 Helix claim or otherwise preserve it and that APCO’s policy to keep change
6 orders separate impaired Helix’s claim. AB 32; 17JA3503. These conclusions
7 are based solely upon the testimony of Mr. Llamado, and this Court reviews
8 them de novo. *Am. Sterling Bank v. Johnny Mgmt. LV, Inc.*, 126 Nev. 423, 428,
9 245 P.3d 535, 538 (2010) .

10 There was no Subcontract provision that required a joint claim and Helix
11 does cite to any such provision. APCO used the same change order request
12 (“COR”) process throughout the job to obtain City approval for extra costs,
13 including those from Helix. 8JA1432-33; 16JA3251-3364. In addition, Mr.
14 Llamado admitted it was standard practice for the City to approve CORs even
15 though the underlying work was done by a subcontractor, who subcontracted
16 with APCO, not the City. 7JA1198. Moreover, Mr. Llamdo admitted that
17 APCO used the correct form for the submission of Helix’s claim. 7JA1200.

18 Helix claims that the change order process was not the same because
19 APCO did not mark up the Helix delay claim for overhead and profit. AB 33.
20 However, a contractor is not entitled to profit on delay damages. *Laburnum*

1 *Const. Corp. v. U. S.*, 325 F.2d 451, 459 (Ct. Cl. 1963). APCO had already
2 submitted its own claim for overhead to the City for the same period of time so
3 there was no basis to mark-up Helix's claim. In addition, APCO did not mark
4 up its delay costs in its claim following the rule set forth above. 9JA1598.

5 Furthermore, the claim process could not have been materially flawed or
6 Helix would have objected. Helix knew APCO was proceeding separately with
7 its claim, but never asked for its claim to be joined. 14JA2675. Because Helix
8 relied upon counsel in the claims process, if APCO was intentionally damaging
9 Helix's claim rights by proceeding separately, one would have expected Helix or
10 its counsel to object. *See* 8JA1332-33.

11 The fact that APCO followed company policy, used the proper form,
12 processed the Helix claim the same way as other change orders and repeatedly
13 asked Helix for the correct backup is the antithesis of deliberate conduct
14 designed to undermine Helix's claim. Thus, the conclusion that APCO acted in
15 bad faith was erroneous.

16 **3. APCO Did Not Mislead Helix About the Reason for the**
17 **Claim Rejection.**

18 The evidence does not support Helix's argument that APCO misled or
19 misrepresented facts about the rejection of the claim. AB 4, 10-11, 32. On
October 3, 2013, APCO sent Helix the City's rejection form for Helix's delay

claim which stated: “This CO_r (sic) is rejected. The City of North Las Vegas does not have a contract with Helix Electric.” 14JA2691-2692. Additionally, Mr. Pelan interpreted the stated reason as shorthand for Mr. Llamado refusing to review a one line claim, which is all Helix had submitted at the time, in violation of Subcontract reporting requirements. 8JA1434 and 1441. As a result, Mr. Pelan requested more backup from Helix to undo the rejection. 14JA2691. Mr. Pelan’s interpretation of the rejection was confirmed because the City continued to meet with Mr. Pelan to discuss the merits of Helix’s delay claims, including the meeting between Pelan and Duvall, the account of which by Mr. Pelan the District Court found was credible. 12JA3499; 14JA2726-27, 2733 2740. In addition, Mr. Pelan testified that he told Mr. Fuchs the results from the Duvall meeting. 8JA1445-46. So APCO did advise Helix of both the stated reason (no contract) and the real reason (no backup) for the City’s rejection. Thus, APCO’s repeated efforts to have the City approve Helix’s claim were not disingenuous and the Court’s finding that APCO knew the claims would be rejected is clearly erroneous.

4. Pelan and Llamado Disagreed About the Scope of the Settlement.

There was no evidence regarding the official position of the City regarding the scope of the settlement with APCO. Thus, Helix cannot rely upon

1 the District Court's finding that the City took the position that APCO waived
2 Helix's claims in the settlement. AB 32; *see also State Emp't Sec Dep't v.*
3 *Hilton Hotels Corp.*, 102 Nev. 606, 608, 729 P2d 497, 498 (1986).

4 The only testimony on the scope of the settlement came from Mr.
5 Llamado and Mr. Pelan. *See* 7JA1182-89; 8JA1435-1438. Given his limited
6 knowledge of the terms of the settlement and lack of authority to make a
7 settlement with APCO, no testimony given by Mr. Llamado could be construed
8 to be the official position of the City regarding APCO's settlement of its claim.
9 Mr. Llamado did not make the final decision regarding the settlement of
10 APCO's claim, the City manager did. 7JA1184-1185. In addition, Mr. Llamado
11 did not draft the settlement letter. 7JA 1182, 1186-87. So, his interpretation is
12 meaningless.

13 Mr. Pelan testified that he negotiated the settlement with Mr. Llamado's
14 boss, DuVall. 8JA1436. Mr. Pelan testified that Helix's claim was not within
15 the scope of the settlement. 9JA1516-17. Helix assigns significance to APCO's
16 failure to disclose the settlement. However, if Mr. Pelan believed his
17 interpretation was correct there was no need to disclose it.

18 Furthermore, there was substantial evidence about APCO's efforts to
19 support its subcontractors in the claim process. Mr. Pelan testified about

1 APCO's history of fighting for its subcontractors to get paid spending \$800,000
2 to get money from the City on another public works project and over a
3 \$1,000,000 on Manhattan West to protect subcontractors. 8JA1450-52.

4 The District Court's comment that Mr. Pelan's and Mr. Llamdo's
5 interpretations of the settlement letter differed and could have been resolved if
6 there had been an appeal suggests that Mr. Pelan's interpretation could have
7 been correct. Thus, given Mr. Pelan's interpretation and the lack of an official
8 City position, APCO's settlement could not be the type of deliberate, bad motive
9 conduct required for bad faith even if APCO did not disclose the settlement.

10 **5. APCO's Alleged Failure to Disclose TIA#1 or Payment**
11 **From the City Did not Impact Helix's Ability to Submit**
12 **its Claim.**

13 APCO's failure to tell Helix about TIA#1 and the City's payment was not
14 evidence of bad faith. AB 8. There was no evidence about whether Helix knew
15 about TIA#1 or not. Regardless, APCO submitted TIA#1 January 9, 2013,
16 weeks before Helix gave any indication it even had a claim. 14JA2657-2665.
17 There was also no evidence about whether payment was disclosed to Helix. The
18 testimony on this issue from Mr. Fuchs was stricken. 8JA1336. Again, Mr.
19 Pelan believed the settlement did not include Helix's claim and the City's
decision to pay APCO for its delay has no bearing on whether Helix had a valid

1 claim for delay, because delay affects every contractor differently.

2 As a result, Helix's mischaracterization of APCO's conduct as
3 deceptive/misleading or to attach some ill motive to APCO's conduct fails for a
4 lack of evidence. At most, the evidence shows a difference of opinion between
5 Mr. Llamado and Mr. Pelan about the claim process and the scope of the
6 settlement, but such disagreement does not rise to the level of bad faith. Helix
7 presented no evidence or argument about why APCO would deliberately
8 sabotage Helix's claim or how APCO would benefit from such conduct.
9 Without such evidence, there is no bad faith.

10 **III. CONCLUSION**

11 This Court should reverse the judgment against APCO and Safeco for
12 Helix's extended general conditions and the case should be remanded for a
13 determination of fees and costs.

14 DATED this 16th day of August, 2021.

15 **FENNEMORE CRAIG, P.C.**

16 /s/ Christopher H. Byrd

17 John Randall Jefferies, Esq.

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1 Appellants in this matter, that I have read the foregoing Reply Brief and that to
2 the best of my knowledge, information and belief, it is not frivolous or imposed
3 for any improper purpose. I further certify that this Brief complies with all
4 applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P 28(e),
5 which requires every assertion in the Brief regarding matters in the record to be
6 supported by a reference to the page of the transcript or appendix where the
7 matter relied on is to be found. I understand that I may be subject to sanctions
8 in the event that the accompanying Brief is not in conformity with the
9 requirements of the Nevada Rules of Appellate Procedure.

10 DATED this 16th day of August, 2021.

11 **FENNEMORE CRAIG, P.C.**

12 /s/ Christopher H. Byrd

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ADDENDUM

1. NRS 47.250(3)-(4)
2. NRS 48.105
3. NRS 51.065
4. NRS 51.067
5. NRS 338.485(2)(c)(1) and (4)
6. NRS 338.490

NRS 47.250(3)-(4)

NRS 47.250 Disputable presumptions. All other presumptions are disputable. The following are of that kind:

1. That an unlawful act was done with an unlawful intent.
2. That a person intends the ordinary consequences of that person's voluntary act.
3. *That evidence willfully suppressed would be adverse if produced.*
4. *That higher evidence would be adverse from inferior being produced.*
5. That money paid by one to another was due to the latter.
6. That a thing delivered by one to another belonged to the latter.
7. That things which a person possesses are owned by that person.
8. That a person is the owner of property from exercising acts of ownership over it, or from common reputation of that ownership.
9. That official duty has been regularly performed.
10. That a court or judge, acting as such, whether in this State or any other state or country, was acting in the lawful exercise of the court's or judge's jurisdiction.
11. That a judicial record, when not conclusive, does still correctly determine or set forth the rights of the parties.
12. That a writing is truly dated.
13. That a letter duly directed and mailed was received in the regular course of the mail.
14. That a person not heard from in 3 years is dead.
15. That a child born in lawful wedlock is legitimate.
16. That the law has been obeyed.
17. That a trustee or other person, whose duty it was to convey real property to a particular person, has actually conveyed to that person, when such presumption is necessary to perfect the title of such person or a successor in interest.
18. In situations not governed by the Uniform Commercial Code:
 - (a) That an obligation delivered up to the debtor has been paid.
 - (b) That private transactions have been fair and regular.
 - (c) That the ordinary course of business has been followed.
 - (d) That there was good and sufficient consideration for a written contract.

NRS 48.105

NRS 48.105 Compromise; offers to compromise.

1. Evidence of:

(a) Furnishing or offering or promising to furnish; or

(b) Accepting or offering or promising to accept,

→ a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

2. This section does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

NRS 51.065

NRS 51.065 General rule.

1. Hearsay is inadmissible except as provided in this chapter, title 14 of NRS and the Nevada Rules of Civil Procedure.
2. This section constitutes the hearsay rule.

NRS 51.067

NRS 51.067 Hearsay within hearsay. Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms to an exception to the hearsay rule provided in this chapter.

NRS 338.485(2)(c)(1) and (4)

NRS 338.485 Waiver or modification of right, obligation or liability set forth in [NRS 338.400](#) to [338.645](#), inclusive, prohibited; certain conditions, stipulations or provisions of contract void and unenforceable.

1. A person may not waive or modify a right, obligation or liability set forth in the provisions of [NRS 338.400](#) to [338.645](#), inclusive.

2. A condition, stipulation or provision in a contract or other agreement that:

(a) Requires a person to waive a right set forth in the provisions of [NRS 338.400](#) to [338.645](#), inclusive;

(b) Relieves a person of an obligation or liability imposed by the provisions of [NRS 338.400](#) to [338.645](#), inclusive;

(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:

(1) So unreasonable in length as to amount to an abandonment of the public work;

(2) Caused by fraud, misrepresentation, concealment or other bad faith by the public body;

(3) Caused by active interference by the public body; or

(4) Caused by a decision by the public body to significantly add to the scope or duration of the public work; or

(d) Requires a contractor or public body to be responsible for any consequential damages suffered or incurred by the other party that arise from or relate to a contract for a public work, including, without limitation, rental expenses or other damages resulting from a loss of use or availability of the public work, lost income, lost profit, lost financing or opportunity, business or reputation, and loss of management or employee availability, productivity, opportunity or services,

↪ is against public policy and is void and unenforceable.

3. The provisions of subsection 2 do not prohibit the use of a liquidated damages clause which otherwise satisfies the requirements of law.

NRS 338.490 (1)

NRS 338.490 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.