

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

2   HELIX ELECTRIC OF NEVADA, LLC

3                   Appellant/Cross-Respondent

4                   vs.

5   APCO CONSTRUCTION, INC., A  
6   NEVADA CORPORATION,

7                   Respondent/Cross-Appellant.

**Case No. 80508**

District Court Case No. A606429

Electronically Filed  
Mar 04 2020 06:23 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**RESPONDENT/CROSS-  
APPELLANT'S DOCKETING  
STATEMENT**

8   **1.     Judicial District:** Eighth

**Department:** 13

9                   **County:** Clark

**Judge:** Honorable Mark Denton

10                  **District Ct. Case No.:** A571228

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

12                  John Randall Jefferies, Esq., Nevada Bar No. 3512  
13                  Christopher H. Byrd, Esq., Nevada Bar No. 1633  
14                  FENNEMORE CRAIG, P.C.  
15                  300 South 4th Street, 14<sup>th</sup> Floor  
16                  Las Vegas, Nevada 89101  
17                  Telephone: (702) 692-8000

-and-

15                  Jack Chen Min Juan, Esq., Nevada Bar No. 6367  
16                  Cody S. Mounteer, Esq., Nevada Bar No. 11220  
17                  Tom W. Steward, Esq., Nevada Bar No. 14280  
18                  MARQUIS AURBACH COFFING  
19                  10001 Park Run Drive  
                    Las Vegas, NV 89145  
                    Telephone: (702) 382-0711

*Attorneys for Respondent/Cross-Appellant APCO Construction, Inc.*

1 **3. Attorney(s) Representing Appellant/Cross-Respondent:**

2 Eric B. Zimbelman, Esq., Nevada Bar No. 9407

3 PEEL BRIMLEY LLP

3333 E. Serene Ave., Suite 200

Henderson, NV 89074

Telephone: (702) 990-7272

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

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

☐ Judgment after bench trial

☐ Dismissal:

☐ Judgment after jury verdict

☐ Lack of jurisdiction

☐ Summary judgment

☐ Failure to state a claim

☐ Default judgment

☐ Failure to prosecute

☐ Grant/Denial of NRCP 60(b) relief

☐ Other (specify):

☐ Grant/Denial of injunction

☐ Divorce Decree:

☐ Grant/Denial of declaratory relief

☐ Original ☐ Modification

☐ Review of Agency determination

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

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

☐ Child Custody

☐ Venue

☐ Termination of parental rights

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

Case No.	Short Caption
57784	Club Vista Financial Services v. Dist. Ct. (Scott Finical)
57641	Club Vista Financial Services vs. Dist. Ct. (Scott Finical Corp.).
61131	APCO Construction, Inc. v. Dist. Ct. (Scott Finical)
75197	APCO Construction, Inc. v. Zitting Bros. Constr., Inc.
76276	Helix Electric of Nevada, LLC v. APCO Construction, Inc.
77320	Helix Elec. of Nev., LLC v. APCO Constr., Inc.
79301	Zitting Bros. Constr., Inc. v. Fennemore Craig, P.C.
80177	APCO Constr., Inc. v. Helix Elec. of Nev., LLC

- 10  
11 **7. Pending and prior proceedings in other courts:** List the case name,  
12 number and court of all pending and prior proceedings in other courts  
which are related to this appeal (*e.g.*, bankruptcy, consolidated or  
bifurcated proceedings) and their dates of disposition:

13 This case, A587168, was consolidated by the district court with  
the following cases: A571228, A 574391, A571228, A574391,  
14 A574792, A577623, A579963, A580889, A583289, A584730,  
A587168, A589195, A589677, A590319, A592826, A596924,  
A597089, A606730, A608717, A608718.

15 See Eighth Judicial District Court Docket, attached as **Exhibit 1.**

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

18 This action arises out of a failed construction project that closed,  
incomplete, in 2008. A trial was held in February 2018 on  
19 subcontractors claims against the project's general contractors,  
including Appellant/Cross Respondent Helix Electric's claims

1 against Cross Appellant/Respondent APCO. The district court  
2 entered a judgment denying relief to Helix Electric as to its  
3 claims against APCO, and that judgment was appealed by Helix  
4 Electric to this Court in Case No. **76276**. The appeal in Case No.  
5 76276 was subsequently dismissed by this Court.

6 In this appeal, Helix Electric and APCO both challenge the  
7 district court's orders granting (1) APCO's Motion for Attorneys'  
8 Fees and Costs, (2) APCO's Memorandum of Costs in part, and  
9 (3) Helix Electric's Motion to Retax in Part.

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

- 12 1. Whether the District Court erred in failing to determine APCO  
13 was entitled to attorneys' fees under relevant subcontract  
14 provisions governing the award of attorneys' fees?
- 15 2. Whether the District Court erred in failing to award APCO all of  
16 its recoverable costs?
- 17 3. Whether the District Court's NRCP 54(b) certification order was  
18 improper because there was already a final judgment in the  
19 district court?

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

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

27 **11. Constitutional issues:** If this appeal challenges the constitutionality  
28 of a statute, and the state, any state agency, or any officer or employee  
29 thereof is not a party to this appeal, have you notified the clerk of this  
30 court and the attorney general in accordance with NRAP 44 and NRS  
31 30.130?

32 ☒ N/A

33 ☐ Yes

☐ No

If not, explain:

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

- ☐ Reversal of well-settled Nevada precedent (identify the case(s))
- ☐ An issue arising under the United States and/or Nevada Constitutions
- ☐ A substantial issue of first-impression
- ☒ An issue of public policy
- ☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions
- ☐ A ballot question

If so, explain:

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

**13. Assignment to the Court of Appeals or retention in the Supreme Court.** Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17 and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals,

1 identify the specific issue(s) or circumstance(s) that warrant retaining  
2 the case, and include an explanation of their importance or  
significance:

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

8 **14. Trial.** If this action proceeded to trial, how many days did the trial  
last? Was it a bench or jury trial?

9 This case proceeded to a six day bench trial.

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

12 No.

### 13 **TIMELINESS OF NOTICE OF APPEAL**

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

15 The post-judgment special order denying attorneys’ fees and  
16 costs from which APCO appeals was entered on September 27,  
2018. APCO’s appeal from this order is currently pending  
before this Court in Docket No. 77320. The NCRP 54(b)  
certification order from which appellant filed its notice of appeal  
in this matter was entered on January 3, 2020.

17 APCO asserts and maintains that its appeal in Docket No. 77320  
18 was proper and timely and that a final judgment had been entered  
in the district court at the time APCO’s notice of appeal was  
19 filed. A motion is currently pending in Docket No. 77320 on  
this issue. The NRCP 54(b) Certification Order was sought and  
obtained by Helix after this Court dismissed its appeal in Docket

No. 76276 due to Helix's failure to prove that this Court had jurisdiction over its appeal. APCO's pending motion in Docket No. 77320 shows that this Court did in fact have proper jurisdiction over Helix's appeal but failed to meet its burden to show such jurisdiction. Helix should not be allowed to circumvent this Court's rules regarding an appellant's burden to timely show jurisdiction by being permitted to seek NRC 54(b) certification in order to file a second, procedurally improper Notice of Appeal.

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

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

See Order Granting Helix Electric of Nevada's Motion for Rule 54(b) Certification, attached hereto as **Exhibit 35**.

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

N/A

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

Notice of entry of the post-judgment special order denying attorneys' fees and costs from which APCO appeals was served on September 28, 2018. APCO's appeal from this order is currently pending before this Court in Docket No. 77320.

Notice of entry of the NCRP 54(b) certification order from which appellant filed its notice of appeal in this matter was served on January 3, 2020.

Was service by:

☐ Delivery    ☐ Unknown    ☒ Mail/Electronic/Fax

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

N/A

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

☐ NRCP 50(b)      Date of filing \_\_\_\_\_  
☐ NRCP 52(b)      Date of filing \_\_\_\_\_  
☐ NRCP 59          Date of filing \_\_\_\_\_

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

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

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

☐ Delivery  
☐ Mail

**19. Date notice of appeal was filed**

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

Appellant/Cross Respondent Helix Electric of Nevada, LLC filed its Notice of Appeal from the Order Granting Helix Electric of Nevada's Motion for Rule 54(b) Certification on January 29, 2020. Respondent/Cross-Appellant APCO Construction, Inc. filed its Notice of Cross-Appeal in response to Helix's Notice of Appeal in this matter on February 11, 2020.



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

3 NRAP 4(a)(2). APCO's cross-appeal was filed within 14 days  
4 after Helix Electric of Nevada LLC's Notice of Appeal.

#### 5 **SUBSTANTIVE APPEALABILITY**

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

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

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

15 Post judgment orders involving attorneys' fees and costs are  
16 appealable special orders made after final judgment. *Smith v.*  
17 *Crown Financial Services*, 111 Nev. 277, 280 n. 2, 890 P.2d  
18 769, 771 n.2 (1995).

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

- 21 (a) Parties:

- 22 • Accuracy Glass & Mirror Co.
- 23 • APCO Construction, Inc.
- 24 • Bruin Painting Corp.
- 25 • Cactus Rose Construction, Inc.
- 26 • Camco Pacific Construction Co.
- 27 • HD Supply Waterworks, LP
- 28 • Helix Electric of Nevada, LLC
- 29 • Heinaman Contract Glazing
- 30 • Interstate Plumbing and Air Conditioning, Inc.
- 31 • WRG Design, Inc.

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

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

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

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

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

☒ Yes

☐ No

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

(a) Specify the claims remaining pending below: None

(b) Specify the parties remaining below: None

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

☒ Yes

☐ No

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

☒ Yes

☐ No

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

3 The order appealed from in APCO’s cross appeal in Docket No.  
4 77320 is appealable as a special order after final judgment.  
5 NRAP 3A(b)(8). The judgment resolving Helix Electric’s  
6 claims against APCO was entered on April 25, 2018, and the  
7 final order resolving all the remaining claims in Eighth Judicial  
8 District Court Case No. A587168 was entered on July 19, 2018.  
9 The order at issue in this cross appeal was thereafter entered as a  
10 special order after final judgment on September 27, 2018. A  
11 chart outlining each the claims brought by and against the  
12 parties to Eighth Judicial District Court Case No. A587168 and  
13 how each claim was resolved is attached hereto as **Exhibit 3**.

8 The NRCP 54(b) Certification Order was sought and obtained by  
9 Helix after this Court dismissed its appeal in Docket No. 76276  
10 due to Helix’s failure to prove that this Court had jurisdiction  
11 over its appeal. APCO’s pending motion in Docket No. 77320  
12 shows that this Court did in fact have proper jurisdiction over  
13 Helix’s appeal but failed to meet its burden to show such  
14 jurisdiction. Helix should not be allowed to circumvent this  
15 Court’s rules regarding an appellant’s burden to timely show  
16 jurisdiction by being permitted to seek NRCP 54(b) certification  
17 in order to file a second, procedurally improper Notice of  
18 Appeal.

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

15 The exhibits filed herewith are as follows:

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

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

<b>Exhibit No.</b>	<b><u>Pleading</u></b>
	<u>Counterclaims and Entering Default</u>
23	May 7, 2012 Order and Judgement on Scott Financial's Motion for Summary Judgment as to Priority of Liens
24	April 4, 2013 Stipulation and Order to Dismiss
25	October 7, 2016 Special Master Report Regarding Remaining Parties to the Litigation, Special Master Recommendation, and District Court Order
26	September 20, 2017 Order Granting Plaintiff's Motion to Dismiss
27	September 20, 2017 Stipulation and Order of Dismissal of All Claims Relating to Cardno WRG, Inc.
28	February 5, 2018 Stipulation and Order to Dismiss Third Party Complaint of Interstate Plumbing & Air Conditioning, LLC Against APCO Construction With Prejudice
29	April 25, 2018 4.25.18 Findings of Fact and Conclusions of Law as to the Claims of Helix Electric and Cabenetec Against APCO
30	April 26, 2018 Findings of Fact and Conclusions of Law as to the Claims of Cactus Rose Construction Co., Inc.
31	April 26, 2018 Findings of Fact and Conclusions of Law as to the Claims of Heinaman Contract Glazing
32	April 26, 2018 Findings of Fact and Conclusions of Law as to the Claims of Helix Electric of Nevada, LLC Against Camco Pacific Construction, Inc.
33	July 19, 2018 Order Granting Motion to Deposit Bond Penal Sum With Court, Exoneration of Bond, and Dismissal
34	July 26, 2018 Order Approving Distribution of Fidelity and Deposit Company of Maryland's Bond
35	Order Granting Helix Electric of Nevada's Motion for Rule 54(b) Certification

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Eric B. Zimbelman, Esq.  
PEEL BRIMLEY LLP  
3333 E. Serene Ave., Suite 200  
Henderson, NV 89074  
Telephone: (702) 990-7272  
*Attorneys for Appellant/Cross  
Respondent Helix Electric of  
Nevada, LLC*

/s/ Elizabeth J. Bassett  
An employee of Fennemore Craig P.C.