

Case No. 77320
Consolidated with 80508

In the Supreme Court of Nevada

HELIX ELECTRIC OF NEVADA, LLC,

Appellant/Cross-Respondent,

vs.

APCO CONSTRUCTION, INC., a Nevada
Corporation,

Respondent/Cross-Appellant.

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Elizabeth A. Brown
Clerk of Supreme Court

**MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF
APPELLANT’S PETITION FOR EN BANC RECONSIDERATION**

Appellant/Cross-Respondent, Helix Electric of Nevada, LLC
hereby requests leave to file a reply in support of its Petition for En
Banc Reconsideration. A reply is needed to address an issue raised in
Respondent/Cross-Appellant APCO Construction, Inc.’s response that
was not addressed in Helix’s petition and that misrepresents the
Panel’s opinion.¹

BACKGROUND

Helix filed its petition for reconsideration of the Panel’s opinion on
June 7, 2022. Thereafter, on June 23, 2022, the Court issued an order

¹ The citation to the Panel’s opinion is: *Helix Elec. of Nevada, LLC v. APCO Constr., Inc.*, 138 Nev. Adv. Op. 13, 506 P.3d 1046 (2022).

directing APCO to file a response, which APCO did on July 20, 2022. No order allowing a reply has been issued by the Court.²

APCO's response is divided into three arguments:

- (1) The Panel “did not need to consider” the assignment issue because its holding that conditions precedent to “APCO’s payment obligation” were not satisfied rendered any discussion relating to assignments “not material to the disposition of this appeal” (Resp. to Pet. at 2)³;
- (2) APCO believes there is no reason to cure the errors and confusion found in the opinion relating to assignments versus novations (*id.* at 3–13); and
- (3) the purported implied assignment does not violate NRS 624.628 (*id.* at 14–17).

APCO's second and third arguments were addressed in Helix's petition. Further, the parties' arguments and the need for reconsideration related to these two issues appear already transparent from the parties' briefing and established law. Indeed, APCO merely re-

² See generally NRAP 40A(e) (“No ... reply to an answer shall be filed unless requested by the court.”); NRAP 40A(h) (“The clerk shall return unfiled any answer or reply submitted for filing in the absence of an order requesting the same.”).

³ In other words, APCO faults the Panel for issuing an opinion on an unnecessary or immaterial issue. The discussion in the Panel's opinion was divided into three issues: (1) the conditions precedent issue, (2) the assignment issue, and (3) the NRCP 68 issue. *Helix*, 506 P.3d at 1050–54. Helix's petition focuses on the second issue—i.e., the assignment issue. However, according to APCO, the Panel's holding on the conditions precedent issue rendered the Panel's discussion on the assignment issue immaterial to the disposition of the appeal.

hashes the same fallacies and dangerous precedent already addressed in the petition—i.e., APCO downplays and confuses the distinctions between, and the laws concerning, assignments versus novations. Thus, unless the Court requests further briefing on these issues pursuant to NRAP 40A(e), Helix does not intend to brief them in a reply.

However, APCO’s first argument is less transparent, was not addressed in Helix’s petition, and misrepresents the Panel’s opinion. Therefore, Helix requests leave to file a reply to address this first argument. (Helix’s proposed reply is attached hereto).

ARGUMENT

For its first argument in its response, APCO states that the Panel’s holding on the conditions-precedent issue rendered the assignment issue “not material to the disposition of this appeal.” (Resp. to Pet. at 2). In other words, APCO states that the Panel “did not need to consider whether the assignment also transferred APCO’s payment obligation or the need for a novation, because the payment obligation never came to fruition.” (*Id.*)

This issue of whether the conditions-precedent issue rendered the assignment issue “not material to the disposition of this appeal” was not

addressed in Helix's petition. Thus, granting leave for Helix to be able to file a reply and address this issue is now necessary.

Moreover, this argument by APCO misrepresents the Panel's opinion. Indeed, contrary to APCO's insinuation, the Panel did not issue mere dicta or an improper advisory opinion by issuing a holding on an issue that it "did not need to consider."⁴ Rather, at the end of the discussion on the conditions-precedent issue, the Panel explained why the assignment issue was necessary. It stated:

To the extent Helix argues that APCO, by stopping work on the project or failing to terminate the subcontract, prevented it from completing the preconditions, such that those preconditions should be excused, the district court concluded that Helix's work under the subcontract continued after APCO left the project under assignment to Gemstone/Camco. Helix's arguments as to the assignment findings are discussed next.

Helix, 506 P.3d at 1052 (emphasis added).⁵

⁴ *Cf. Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1173 (9th Cir. 2004) ("A statement is dictum when it is 'made during the course of delivering a judicial opinion, but ... is unnecessary to the decision in the case and [is] therefore not precedential.'"); *Summit Water Distribution Co. v. Summit Cnty.*, 123 P.3d 437, 452 (Utah 2005) ("Our settled policy is to avoid giving advisory opinions in regard to issues unnecessary to the resolution of the claims before us.").

⁵ APCO even seemed to acknowledge why the assignment issue is material to this appeal by explaining in its response that,

This Court rejected Helix's argument that APCO prevented performance of those conditions by stopping work and/or failing to terminate Helix's Subcontract *because* it found that

In other words, the Panel indicated that the assignment issue is material because, if APCO prevented conditions from being satisfied, then those conditions “should be excused.” *Id.* This means that, in light of excused conditions, Helix could still collect from APCO. Nevertheless, the Panel next held (although erroneously, as explained in Helix’s petition) that an assignment between APCO and “Gemstone/Camco” automatically terminated Helix’s right to collect from APCO—meaning that, according to the Panel, Helix no longer had any ability to collect from APCO, even if conditions were excused. *Id.* at 1051–52.

Therefore, contrary to APCO’s position, the assignment issue (and, thus, the issues of assignments versus novations and assignments versus NRS 624.628) are material to this appeal.

CONCLUSION

For the foregoing reasons, Helix requests leave to file a reply in support of its Petition for En Banc Reconsideration. Helix’s proposed reply is attached hereto.

Helix continued working for Gemstone and Camco, after APCO left, *under the valid assignment of the Subcontract*. [citation omitted]. Because Helix continued to perform *under the assignment* but failed to satisfy the conditions to trigger payment of retention, neither APCO, nor anyone else, was obligated to pay retention to Helix.

(Resp. to Pet. at 2) (emphasis added).

Dated this 2nd day of August, 2022.

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CERTIFICATE OF SERVICE

I certify that on August 2, 2022, I submitted the foregoing
“Motion for Leave to File a Reply in Support of Appellant’s
Petition for En Banc Reconsideration” for filing *via* the Court’s eFlex
electronic filing system. Electronic notification will be sent to the
following:

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HELIX ELECTRIC OF NEVADA, LLC,

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Respondent/Cross-Appellant.

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable MARK R. DENTON, District Judge
District Court Case No. 08A571228

**REPLY IN SUPPORT OF
PETITION FOR EN BANC RECONSIDERATION**

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REPLY IN SUPPORT OF PETITION FOR EN BANC RECONSIDERATION

Appellant/Cross-Respondent, Helix Electric of Nevada, LLC
hereby files this reply in support of its Petition for En Banc
Reconsideration. This reply is meant to address an issue raised in
Respondent/Cross-Appellant APCO Construction, Inc.’s response that
was not addressed in Helix’s petition and that misrepresents the
Panel’s opinion.¹

BACKGROUND

APCO’s response to the Petition for En Banc Reconsideration is
divided into three arguments:

- (1) The Panel “did not need to consider” the assignment issue
because its holding that conditions precedent to “APCO’s
payment obligation” were not satisfied rendered any
discussion relating to assignments “not material to the
disposition of this appeal” (Resp. to Pet. at 2)²;

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² In other words, APCO faults the Panel for issuing an opinion on an unnecessary or immaterial issue. The discussion in the Panel’s opinion was divided into three issues: (1) the conditions precedent issue, (2) the assignment issue, and (3) the NRCP 68 issue. *Helix*, 506 P.3d at 1050–54. Helix’s petition focuses on the second issue—i.e., the assignment

- (2) APCO believes there is no reason to cure the errors and confusion found in the opinion relating to assignments versus novations (*id.* at 3–13); and
- (3) the purported implied assignment does not violate NRS 624.628 (*id.* at 14–17).³

APCO’s second and third arguments were addressed in Helix’s petition. Further, the parties’ arguments and the need for reconsideration related to these two issues appear already transparent from the parties’ briefing and established law. Indeed, APCO merely rehashes the same fallacies and dangerous precedent already addressed in the petition—i.e., APCO downplays and confuses the distinctions between, and the laws concerning, assignments versus novations.

Accordingly, this reply focuses on the issue of APCO’s first argument, which is less transparent, which was not addressed in Helix’s petition, and which misrepresents the Panel’s opinion.

issue. However, according to APCO, the Panel’s holding on the conditions precedent issue rendered the Panel’s discussion on the assignment issue immaterial to the disposition of the appeal.

³ As stated in the petition, this issue was raised and demonstrated in Helix’s appellate briefs. (See Reply Brief at 2 (note that Helix inadvertently switched the citations to NRS 624 and NRS 108 in sub-points (i) and (ii)), 5, 13; Opening Brief at 41, 52).

ARGUMENT

For its first argument in its response, APCO states that the Panel's holding on the conditions-precedent issue rendered the assignment issue "not material to the disposition of this appeal." (Resp. to Pet. at 2). In other words, APCO states that the Panel "did not need to consider whether the assignment also transferred APCO's payment obligation or the need for a novation, because the payment obligation never came to fruition." (*Id.*)

This argument is misleading. Indeed, contrary to APCO's insinuation, the Panel did not issue mere dicta or an improper advisory opinion by issuing a holding on an issue that it "did not need to consider."⁴ Rather, at the end of the discussion on the conditions-precedent issue, the Panel explained why the assignment issue was necessary. It stated:

To the extent Helix argues that APCO, by stopping work on the project or failing to terminate the subcontract, prevented it from completing the preconditions, such that those

⁴ *Cf. Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1173 (9th Cir. 2004) ("A statement is dictum when it is 'made during the course of delivering a judicial opinion, but ... is unnecessary to the decision in the case and [is] therefore not precedential.'"); *Summit Water Distribution Co. v. Summit Cnty.*, 123 P.3d 437, 452 (Utah 2005) ("Our settled policy is to avoid giving advisory opinions in regard to issues unnecessary to the resolution of the claims before us.").

preconditions should be excused, the district court concluded that Helix’s work under the subcontract continued after APCO left the project under assignment to Gemstone/Camco. Helix’s arguments as to the assignment findings are discussed next.

Helix, 506 P.3d at 1052 (emphasis added).⁵

In other words, the Panel indicated that the assignment issue is material because, if APCO prevented conditions from being satisfied, then those conditions “should be excused.” *Id.* This means that, in light of excused conditions, Helix could still collect from APCO. Nevertheless, the Panel next held (although erroneously, as explained in Helix’s petition) that an assignment between APCO and “Gemstone/Camco” automatically terminated Helix’s right to collect from APCO—meaning that, according to the Panel, Helix no longer had any ability to collect from APCO, even if conditions were excused. *Id.* at 1051–52.

⁵ APCO even seemed to acknowledge why the assignment issue is material to this appeal by explaining in its response that,

This Court rejected Helix’s argument that APCO prevented performance of those conditions by stopping work and/or failing to terminate Helix’s Subcontract *because* it found that Helix continued working for Gemstone and Camco, after APCO left, *under the valid assignment of the Subcontract*. [citation omitted]. Because Helix continued to perform *under the assignment* but failed to satisfy the conditions to trigger payment of retention, neither APCO, nor anyone else, was obligated to pay retention to Helix.

(Resp. to Pet. at 2) (emphasis added).

Therefore, contrary to APCO's position, the assignment issue (and, thus, the issues of assignments versus novations and assignments versus NRS 624.628) are material to this appeal.

CONCLUSION

For the foregoing reasons, and based also on the reasons stated in Helix's petition, Helix requests en banc reconsideration of the Panel's opinion and decision to deny rehearing.

DATED this 2nd day of August, 2022.

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CERTIFICATE OF COMPLIANCE

1. I certify that this petition complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)-(6) because it was prepared in Microsoft Word 2019 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 40A(d), because it contains 930 words.

3. I certify that I have read this petition, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

DATED this 2nd day of August, 2022.

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CERTIFICATE OF SERVICE

I certify that on August 2, 2022, I submitted the foregoing “Reply in Support of Petition for En Banc Reconsideration” for filing *via* the Court’s eFlex electronic filing system. Electronic notification will be sent to the following:

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