IN THE SUPREME COURT OF THE STATE OF NEVADA

HELIX ELECTRIC OF NEVADA, LLC, Appellant/Cross-Respondent, vs. APCO CONSTRUCTION, INC., A NEVADA CORPORATION, Respondent/Cross-Appellant.	No. 77320
HELIX ELECTRIC OF NEVADA, LLC, Appellant/Cross-Respondent, vs. APCO CONSTRUCTION, INC., A NEVADA CORPORATION, Respondent/Cross-Appellant.	No. 80508

ORDER OF AFFIRMANCE

These are consolidated appeals and cross-appeals from a district court judgment, certified as final pursuant to NRCP 54, and an award of attorney fees and costs in a contract action. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

These appeals have a lengthy history, which we do not fully recount here. Pertinent to this order are the following essentials: nonparty Gemstone Development West contracted with respondent/cross-appellant APCO Construction to be Gemstone's general contractor on a development project. APCO in turn subcontracted with appellant/cross-respondent Helix Electric of Nevada for the electrical work. Midway through the project, Gemstone and APCO became mired in a payment dispute, and APCO left the project. Gemstone replaced APCO with Camco Pacific Construction Company, but the project lost funding and failed soon after. Substantial

litigation (later consolidated) ensued between and among Gemstone, the contractors, and the subcontractors, with Helix asserting various claims against APCO, including for breach of contract.

At the core of Helix's complaint lies retention, a contractual provision by which a project owner withholds a percent of each progress payment to contractors until the project's end to protect itself and ensure the contractors' work's completion and quality. *See* 3 Philip L. Bruner & Patrick J. O'Connor, Jr., *Bruner & O'Connor on Construction Law* § 8:19 (2022) (discussing retainage); C. Kelly Skrabak & Heather A. Jones, *The State of Retainage*, Construction Briefings No. 2005-4 (April 2005); *see also Cates Constr., Inc. v. Talbot Partners*, 980 P.2d 407, 423-24 (Cal. 1999) (calling retention "common" and explaining it is intended to reduce the risk of nonperformance, ensure completion of the work, and provide the owner with project funds in the event the contractor defaults); *Pittsburg Unified Sch. Dist. v. S.J. Amoroso Constr. Co.*, 181 Cal. Rptr. 3d 694, 698-99 (Ct. App. 2014) (explaining the retention is withheld until the project's completion so that the owner may use those funds to complete the project if the contractor defaults). The record shows Gemstone and APCO, and in turn APCO and Helix, contracted for the retention here, which Gemstone withheld. Following nearly a decade of litigation and a 2018 bench trial on Helix's claims against APCO, the district court determined that APCO does not owe Helix the monies kept as retention, or any additional monies, and awarded APCO part of its requested attorney fees pursuant to NRCP 68. Helix challenges the underlying judgment and the attorney fees award, and APCO also challenges the attorney fees award via its cross-appeal. Having

carefully reviewed the arguments, the law, and the record, we affirm for the reasons that follow.[1]

The district court did not err by enforcing the APCO-Helix subcontract as the operative agreement

We first reject Helix's argument that the APCO-Helix subcontract is generally unenforceable because the parties never finalized their agreement and had no meeting of the minds. A contract may be formed if the parties have agreed to the material terms, even if the contract's language is not yet finalized. *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). Here, the record shows the parties had a meeting of the minds on the subcontract's material terms. Notably, the record shows Helix negotiated the subcontract, did not attempt to revise the terms at issue here, and worked under the subcontract and according to its terms until APCO left the project.[2] *See* Restatement (Second) of Contracts §§ 18, 19 (Am. Law Inst. 1981) (explaining a party's conduct may demonstrate consent to a contract). Accordingly, the district court did not clearly err by enforcing the subcontract as the operative agreement. *See May*, 121 Nev. at 672-73, 119 P.3d at 1257 (explaining we will defer to the district court's finding of fact on whether a contract exists so long as there is no clear error and the finding is supported by substantial evidence).

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[1]We have addressed the primary arguments in this order. As to the remaining arguments, we have carefully considered them in view of the record and the law, and we conclude they are without merit or do not affect the result.

[2]Nor was the district court remiss in finding that Helix admitted to entering into the subcontract where Helix relied on that document to support its complaint against APCO and its notice of lien. *See Kula v. Karat, Inc.*, 91 Nev. 100, 105, 531 P.2d 1353, 1356 (1975) (concluding an appellant was bound by an admission in the pleadings).

The district court did not err by applying section 3.8 of the subcontract

We next address Helix's arguments against section 3.8 of the subcontract, the retention provision. That section provides that the retention becomes payable only upon the occurrence of five preconditions to retention: (1) the project's completion; (2) the owner's approval and acceptance of the project work; (3) Gemstone's final payment to APCO; (4) Helix's delivery of the as-built drawings and other close-out documents; and (5) Helix's delivery of the release and waiver documents from its own workers, suppliers, and subcontractors. Leaning on our decision in *APCO Construction, Inc., v. Zitting Brothers Construction, Inc.*, 136 Nev. 569, 473 P.3d 1021 (2020), Helix contends the payment precondition is an impermissible pay-if-paid provision that invalidates section 3.8 and, alternatively, that the preconditions together constitute an impermissible pay-if-paid provision.[3]

Like the present case, *Zitting* grew out of Gemstone's failed development project and was largely rooted in that plaintiff subcontractor's agreement with APCO. 136 Nev. at 570-71, 473 P.3d at 1024. Therein, we addressed Nevada's prompt-pay requirement in NRS 624.624 and whether it invalidated subcontract provisions that conditioned the subcontractor's right to payment on APCO first receiving the payment from Gemstone. 136 Nev. at 573-75, 473 P.3d at 1026-27. That statute provides that if the parties' contract contains a payment schedule, the contractor must pay the

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[3]Relying on section 9.4 of the subcontract, Helix additionally argues section 3.8 does not apply because the Gemstone-APCO prime contract was terminated. But section 9.4 only applies to terminations for convenience, which did not occur here, and moreover, that section applies only to amounts *due* at the time of termination—which retention was not, for the reasons stated herein.

subcontractor either on the due date or within ten days after the contractor receives the payment, whichever is earlier.[4] NRS 624.624(1)(a). In *Zitting*, we clarified that pay-if-paid provisions are not *per se* unenforceable, so long as they do not violate rights or obligations under NRS 624.624-.630. 136 Nev. at 569, 473 P.3d at 1024. We concluded that because that subcontract's pay-if-paid provisions violated the subcontractor's right to payment for its work under NRS 624.624(1), they were void under NRS 624.628(3)(a) (invalidating conditions that require a subcontractor to waive any rights provided in NRS 624.624-.630). *Id.* at 574-75, 473 P.3d at 1027.

But in *Zitting* we did not address retention. Retention is fundamentally different from other payments owed under construction contracts in that retention is a portion of the contract balance that is withheld, typically until the project's completion, to motivate contractors, mitigate the risk of nonperformance or poor workmanship, and provide security against potential mechanics' liens. *See Yassin v. Solis*, 108 Cal. Rptr. 3d 854, 861 (Ct. App. 2010); 3 Bruner & O'Connor, *supra* at § 8:19 ; (Aspen Publishers 2022); Skrabak & Jones, *supra*; Kenneth C. Gibbs & Gordon Hunt, *California Construction Law* 103 (16th ed. 2000). And NRS Chapter 624 expressly allows retention: NRS 624.624(2)(a)(1) allows a higher-tiered contractor to withhold retention from a subcontractor pursuant to the parties' agreement, and NRS 624.609(2) similarly allows the owner to withhold retention from the prime contractor. Although neither statute places a time limit on the retention's withholding, because

[4]Because the APCO-Helix subcontract had a payment schedule for the retention, we are not persuaded by Helix's contention that NRS 624.624(1)(b) applies here, as that subsection governs prompt payment where the contract does not contain a payment schedule.

NRS 624.620 makes a final payment due to the prime contractor within 30 days after the project's occupancy or the availability of the project for its intended use, and NRS 624.624(1) in turn requires that the higher-tiered contractor pay the lower-tiered contractor when the payment comes due under the contract (or within 10 days after receiving the payment described in the payment request, whichever is earlier[5]), these statutes coordinate to generally ensure the retention's timely payment.[6] Accordingly, provisions that make retention due at the project's end do not facially violate a subcontractor's rights under NRS Chapter 624.

As we recognized in *Zitting*, whether a pay-if-paid provision is impermissible under Chapter 624 turns on the particular facts and law at play in each case. 136 Nev. at 574, 473 P.3d at 1027. Here, APCO and Helix contracted for the retention, which Nevada law allows. Nevada law did not bar APCO and Helix from agreeing that the retention would come due upon the project's completion, and thus the retention did not come due with each progress payment and was not due when APCO left the project. Moreover, our statutes expressly allow the retention's payment to be preconditioned

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[5]We note Helix never billed APCO for the retention.

[6]The legislative history demonstrates that the purpose of the retention statutes was to protect project owners by allowing them to withhold retention as leverage to ensure work quality and to address defects that may arise. *See* Hearing on S.B. 274 Before the S. Comm. on Commerce & Labor, 71st Leg. (Nev., Mar. 15, 2001) ("The purpose of retention payments is to ensure quality control by providing contractors with the incentive to return to a site and complete or improve certain aspects of the project which require fixing or completing."); Hearing on S.B. 274 Before the S. Comm. on Commerce & Labor, 71st Leg. (Nev., Apr. 12, 2001) ("An owner can withhold payment for retention that may be allowed by the contract.").

on the subcontractor's lien releases, *see* NRS 624.609(2)(b); NRS 624.624(2)(b), as was the case here. And because APCO left the project before any of the preconditions for retention were met (as Helix conceded at trial), and thus before the retention came due to Helix (and even before Helix finished its work), the district court correctly concluded APCO did not owe Helix the retention under the subcontract before APCO ceased acting as prime contractor on the project.[7]

Because the district court found that Helix admitted at trial it was only seeking from APCO the retention that had accrued by the time APCO left the project (approximately $505,000), and that finding is supported by the record, our conclusion here ends the discussion of APCO's potential liability as of its departure from the project. *See Jackson v. Groenendyke*, 132 Nev. 296, 303, 369 P.3d 362, 367 (2016) (explaining we do not reweigh the evidence on appeal and will not set aside a district court's factual findings unless they are not supported by substantial evidence); *see also Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co.*, 127 Nev. 331, 343, 255 P.3d 268, 276-77 (2011) (addressing admissions). Nevertheless, we need to analyze whether APCO had any continuing obligations thereafter, as Helix asserts any enforceable conditions for the

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[7]Even assuming, *arguendo*, that one or more of the other preconditions were impermissible under *Zitting* and these particular facts, that would not void the entire retention provision where the subcontract provided that should "any provision . . . conflict with any . . . law, ruling or regulation, then such provision shall continue in effect to the extent permissible. The illegality of any provisions, or parts thereof, shall not affect the enforceability of any other provisions of this Subcontract." *See Masto v. Second Judicial Dist. Court*, 125 Nev. 37, 44, 199 P.3d 828, 832 (2009) ("[W]e construe a contract that is clear on its face from the written language, and it should be enforced as written.").

retention were later excused by the project's failure and allow it to seek the retention from APCO.

The district court did not err by concluding Helix consented to Camco's assumption of APCO's obligations under the APCO-Helix subcontract and that Helix could no longer enforce the subcontract against APCO

Helix contends the district court wrongly concluded the subcontract was assigned, and moreover, Helix asserts that APCO's obligations to Helix were never novated to Camco or Gemstone. An assignment will divest the assignor of its rights under the contract, but the assignment may not relieve the assignor of its duties under the contract unless there has been a novation wherein the party to whom the duties are owed agrees. *See* 6A C.J.S. *Assignments* § 105 (2022 update) ("[F]ollowing an assignment of a contract the assignee stands in the shoes of the assignor and the assignor retains no rights to enforce the contract at all."); 58 Am. Jur. 2d *Novation* § 2 (2012) (explaining the differences between a novation and an assignment, including that a novation extinguishes the old obligation and creates a new one, whereas with an assignment the original obligation remains in place and the original obligor "may be compelled to respond in the event of the default of the assignee"). Thus, we consider both assignment and novation.

An assignor "may make an assignment by manifestation of intention without any particular formality." Restatement (Second) of Contracts § 324 cmt. a (Am. Law Inst. 1981). The assignee must manifest assent to the assignment. *Id.* at § 327. And the assignor must manifest an intent to transfer the right. *Id.* at § 324 ("The manifestation may be made to the other or to a third person on his behalf and, except as provided by statute or by contract, may be made either orally or by a writing."). Here the Gemstone-APCO prime contract (incorporated by reference into Helix's

subcontract) allowed Gemstone to terminate APCO with cause, in which case the subcontracts would be automatically assigned to Gemstone once Gemstone notified APCO and the subcontractor in writing. Although the district court later determined Gemstone did not have cause to terminate APCO, the record clearly shows that, at the relevant time, Gemstone believed it was terminating APCO for cause under the prime contract and communicated the termination to APCO and Helix, Gemstone reminded APCO of the prime contract's assignment provision, and Gemstone instructed Helix to execute Camco's "Ratification and Amendment of Subcontract Agreement" (the ratification agreement) if Helix wished to stay on the project. The record further shows that APCO cooperated with the assignment. Under these facts, we defer to the district court's findings and agree that the prime contractor's rights under the APCO-Helix subcontract were assigned to Camco pursuant to the prime contract. *See May*, 121 Nev. at 672-73, 119 P.3d at 1257 (explaining we review contract interpretation de novo but will review the district court's underlying factual findings for an abuse of discretion); *see also Jackson*, 132 Nev. at 303, 369 P.3d at 367 (explaining we do not substitute our judgment on conflicting evidence for the district court's).

"A 'novation' may be defined as a substitution of a new contract or obligation for an old one which is thereby extinguished." 66 C.J.S. *Novation* § 1 (2021). Novation can be express or "implied from the circumstances of the transaction and by the subsequent conduct of the parties," so long as the parties' intent to cause a novation is clear. *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 508, 780 P.2d 193, 195 (1989); *see also Jacobson v. Stern*, 96 Nev. 56, 61, 605 P.2d 198, 201 (1980). Where there is a novation, the obligee will release the original obligor of its

responsibilities in favor of a new obligor. *See, e.g., Cincinnati Ins. Co. v Leighton*, 403 F.3d 879, 887 (7th Cir. 2005) ("For there to be a novation, the obligee must assent to the substitution and agree to release the obligor. The obligee's assent need not be express, however, but may be implied from the circumstances of the transaction or the obligee's subsequent behavior." (citation omitted)); *Vetter v. Sec. Cont'l Ins. Co.*, 567 N.W.2d 516, 521 (Minn. 1997) (explaining the original obligor remains responsible for performance under the contract until the obligee consents to a delegation of the contractual duties and "agrees to release the original obligor from its responsibilities under the contract").

Although the district court did not make express findings on novation, it found that Helix waived its arguments and "legally admitted"—or, stated another way, judicially admitted—to entering the ratification agreement. A judicial admission is conclusive and binding on the parties. *See* 2 McCormick on Evidence § 254 (8th ed. 2022 update) ("Judicial admissions . . . have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact."). Factual allegations contained in the pleadings, where deliberate, clear, and unequivocal, may constitute judicial admissions. *See* 32 C.J.S. *Evidence* § 532 (2022 update). Helix stated in its complaint that it entered the Camco ratification agreement, and Helix asserted claims against Camco based on that factual allegation and was later successful on those claims. Helix's statement thus constitutes a judicial admission to entering the ratification agreement.

Under the terms of the ratification agreement, Helix acknowledged and agreed that Camco replaced APCO as the contractor under the APCO-Helix subcontract and Camco took over APCO's duty to perform and fulfill the subcontract's "executory terms, covenants,

conditions, and obligations," demonstrating a novation of those executory obligations. *See United Fire Ins.*, 105 Nev. at 508, 780 P.2d at 195 (addressing novation); *Jacobson*, 96 Nev. at 61, 605 P.2d at 201 (same); *see also Cincinnati Ins.*, 403 F.3d at 887 (explaining assent to a novation can be implied from the obligee's subsequent behavior). Because under the subcontract the retention did not come due with the progress payments and was not yet due when APCO left the project, we conclude the subcontract's executory obligations include the obligation to pay the retention. *See Executory*, Black's Law Dictionary (11th ed. 2019) (defining "executory" as "[t]o be performed at a future time; yet to be completed").

Further, Gemstone expressly conditioned Helix's continued services on Helix entering the ratification agreement, and the record shows that after APCO left, Helix worked only for Camco and billed only Camco for progress payments and for the entire retention as it continued to accumulate, showing Helix's agreement to look only to Camco and not APCO. The record contains substantial evidence, which the district court's findings of fact and conclusions of law reflect, that Helix impliedly assented to the substitution of Camco for APCO, effecting a novation. *See* 66 C.J.S. *Novation* § 4 (2021) (recognizing that a novation may be implied from the circumstances and the parties' conduct); *see also United Fire*, 105 Nev. at 508, 780 P.2d at 195 (same); *Nev. Bank of Commerce v. Esquire Real Estate, Inc.*, 86 Nev. 238, 240-41, 468 P.2d 22, 23-24 (1970) (affirming a finding of novation and stating that "[a]s in other contract cases, the creditor's assent to the substitution of a new obligor may be inferred from his conduct and other circumstances"); *Westport 85 Ltd. P'ship v. Casto*, 450 S.E.2d 505, 510 (N.C. Ct. App. 1994) (concluding a party demonstrated knowledge and acquiescence of an agreement sufficient to ratify the agreement and effect

a novation where the party was aware of the new agreement, negotiated payment under the agreement, and accepted performance under the agreement). We therefore affirm the district court's holding that APCO had no further obligations to Helix on this basis.[8] *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) (explaining we "will affirm a district court's order if the district court reached the correct result"); *see also May*, 121 Nev. at 672-73, 119 P.3d at 1257 (explaining this court defers to the district court's factual findings as to whether a contract exists); *United Fire*, 105 Nev. at 508, 780 P.2d at 196 (stating that novation is a question of law where the parties' agreement and consent are unequivocal and is otherwise a question of fact).

The district court did not err by awarding attorney fees to APCO under NRCP 68

Helix contends the district court improperly awarded attorney fees to APCO under NRCP 68 where the consolidated trial, which was never bifurcated, began years before APCO served its offer of judgment on Helix. APCO counters that NRCP 68's ten-day rule is calculated from the beginning of the offeree's portion of the trial and that it timely served the offer before the trial on Helix's claims against it. APCO nevertheless argues

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[8]While we are not unsympathetic to Helix's arguments regarding futility of performance, we disagree that any futility here enables Helix to seek the retention against APCO, as opposed to Camco or Gemstone, which parties—and any claims against them—are not before us. And because Helix fails to show that APCO owes Helix any payments (retention or otherwise), the district court also properly determined APCO is not liable to Helix for a deficiency judgment. *See Zitting*, 136 Nev. at 577, 473 P.3d at 1029 (explaining that a subcontractor may seek a deficiency judgment against the party legally liable for the residue).

on cross-appeal that the district court erred by awarding only part of APCO's requested fees under NRCP 68 rather than the entirety of its fees under section 18.5 of the subcontract, which allows the prevailing party in a dispute arising from the subcontract or its work to recover all costs, attorneys fees, and other reasonable expenses.

Addressing APCO's cross-appeal first, we are not persuaded that the district court was required to apply section 18.5 of the subcontract in favor of APCO after the subcontract was assigned from APCO, as once the subcontract was assigned and novated, APCO was no longer a party to it and could not enforce it. *See Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 417, 132 P.3d 1022, 1028 (2006) (fees may only be awarded pursuant to a contract, rule, or statute); *see also* Restatement (Second) of Contracts § 317(1) (Am. Law Inst. 1981) (explaining that under an assignment "the assignor's right to performance by the obligor is extinguished"); 6A C.J.S. *Assignments* § 105 (2022 update) (explaining that generally the assignor retains no rights following an assignment). Thus, we cannot say the district court erred in view of the particular facts of this case and APCO's own (winning) arguments favoring the subcontract's assignment. *See Gunderson v. D.R. Horton*, 130 Nev. 67, 80, 319 P.3d 606, 615 (2014) (explaining we review an attorney fees award for an abuse of discretion); *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005) ("Contract interpretation is subject to a de novo standard of review.").

Neither are we persuaded by Helix's arguments regarding the NRCP 68 offer's timing. NRCP 68(a) allows a party to make an offer of judgment "[a]t any time more than 21 days before trial." Because NRCP 68's purpose is to encourage settlements, courts should select "the last possible point in time for cutting off Rule 68 offers." *Schwartz v. Estate of*

Greenspun, 110 Nev. 1042, 1048, 881 P.2d 638, 642 (1994) (quoting *Greenwood v. Stevenson*, 88 F.R.D. 225, 228 (D.R.I. 1980)). And because consolidated cases retain their separate identities, *In re Estate of Sarge*, 134 Nev. 866, 870-71, 432 P.3d 718, 722 (2018), and APCO made the offer well in advance of the trial on Helix's claims, the district court properly awarded attorney fees pursuant to that rule under the facts of this case. *See Albios*, 122 Nev. at 417, 132 P.3d at 1027-28 (explaining fees may be awarded pursuant to a contract or rule, and that we review awards for an abuse of discretion). We therefore conclude the district court did not err by awarding attorney fees to APCO under NRCP 68.

Accordingly, we

ORDER the judgments of the district court AFFIRMED.[9]

Stiglich, C.J.

Cadish, J.

Pickering, J.

Herndon, J.

Parraguirre, J.

[9]The Honorable Justices Patricia Lee and Linda Marie Bell did not participate in the decision of this matter.

cc: Hon. Mark R. Denton, District Judge
Stephen E. Haberfeld, Settlement Judge
Lewis Roca Rothgerber Christie LLP/Las Vegas
Peel Brimley LLP/Henderson
Fennemore Craig, P.C./Phoenix
Fennemore Craig, P.C./Las Vegas
Marquis Aurbach Chtd.
Spencer Fane LLP/Las Vegas
Eighth District Court Clerk