IN THE SUPREME COURT OF THE STATE OF NEVADA

KORTE CONSTRUCTION COMPANY, D/B/A THE KORTE COMPANY, A MISSOURI CORPORATION, Appellant, vs. STATE OF NEVADA ON RELATION OF THE BOARD OF REGENTS OF THE NEVADA SYSTEM OF HIGHER EDUCATION, ON BEHALF OF THE UNIVERSITY OF NEVADA, LAS VEGAS, A CONSTITUTIONAL ENTITY OF THE STATE OF NEVADA, Respondent.	**SUPREME COURT NO. 80736** District Court Case No. A-17-763262-B **RESPONDENTS' ANSWERING BRIEF**

APPEAL

From the Eighth Judicial District Court, Clark County
The Honorable TIMOTHY WILLIAMS, District Judge
District Court Case No. A-17-763262-B

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RESPONDENTS' ANSWERING BRIEF

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RESPONSE TO ROUTING STATEMENT

The Board of Regents of the Nevada System of Higher Education on behalf of the University of Nevada, Las Vegas ("UNLV") disagrees with Korte's[1] argument that the case presents any deviation from Nevada precedent, or that this is an important matter needing clarification. Appellant's Opening Brief ("AOB") iii. Rather, as will be addressed herein, the holding in the Nevada case upon which Korte relies, *Leasepartners Corp. v. Robert L. Brooks Trust Dated Nov. 12, 1975*, 113 Nev. 747, 942 P.3d 182 (1997), does not compel or even warrant the result advocated by Korte. However, UNLV has no objection to either the Nevada Supreme Court or the Nevada Court of Appeals deciding this appeal.

STATEMENT OF THE ISSUES

UNLV purchased certain real property and entered into a contract whereby UPA[2] leased the property from UNLV long-term, and UPA was to develop and construct student apartments, and then maintain the property at UPA's own expense. UPA hired Korte to construct the project. Korte's services, as well as the terms of payment thereon, were governed entirely by a contract between Korte and UPA,

[1] "Korte" refers to Appellant Korte Construction Corporation dba The Korte Company.

[2] "UPA" refers both to UPA1, LLC and, where applicable, its predecessor, University Park, LLC.

which Korte entered into after documents evidencing UNLV's ownership interest and UPA's leasehold interest, in the underlying real property, were recorded. A dispute arose between UPA and Korte regarding the work performed under the contract between those parties, and pertinent here, Korte recorded a mechanic's lien against the subject real property, and claimed that it had not been fully paid by UPA under its contract with it. UPA has since posted a mechanic's lien release bond that assures Korte full recovery if Korte prevails. Pertinent to this appeal, Korte also asserted a claim against UNLV for unjust enrichment, based solely on UNLV's ownership of the property, by which Korte sought recovery from UNLV for its work performed under its contract with UPA. The District Court granted summary judgment in favor of UNLV on Korte's unjust enrichment claim.

The issue on appeal is whether the District Court correctly determined that Korte's unjust enrichment claim against UNLV was barred as a matter of law, where:

(1) Korte's unjust enrichment claim was premised entirely upon services that Korte performed pursuant to its contract with UPA, and where Korte's claimed entitlement to relief was its assertion that it had not been paid by UPA as allegedly required by the contract between Korte and UPA; and

(2) A mechanic's lien release bond was posted by UPA that assures Korte full recovery if it prevails.

STATEMENT OF FACTS

On May 15, 2015, UNLV and UPA entered into a Project Development Agreement (the "PDA"). 6 JA 497;[3] AOB 2. The PDA contemplated UNLV purchasing real property (the "Property") and leasing it to UPA under a long-term lease, pursuant to which UPA, and possibly other third-party developers, would "fund, construct, maintain, and operate student housing and certain commercial establishments" on the Property as part of University Park (the "Project"). *Id*. UNLV purchased the Property, and on May 29, 2015, UNLV recorded with the Clark County Recorder's Office documents evidencing its ownership interest in the Property. 6 JA 497; AOB 3. UNLV and UPA also entered into a written Lease Agreement for University Park Phase One (the "Lease") on May 15, 2015, which was recorded against the Property on February 2, 2016. *Id*.

To complete its obligations under the Lease, on February 5, 2016, UPA entered into a written contract with Korte entitled "Cost Plus Agreement Between Owner and Contractor with a Guaranteed Maximum Price" (the "Construction Contract"), whereby UPA hired Korte to act as the general contractor to construct the Project. 6 JA 497; AOB 3. The Construction Contract was entered into after

[3]This record citation is to Volume 6 of the Joint Appendix ("JA") at page 497.

UNLV had recorded its ownership interest in the Project and after UPA had recorded its leasehold interest related to the Project. *Id*.

Subsequently, a dispute between UPA and Korte arose regarding the work performed under the Construction Contract, which resulted in Korte recording a mechanic's lien against the entire Property on October 9, 2017, and further resulted in two consolidated actions below—an expungement action by UPA and an action by Korte to foreclose on its mechanic's lien. 1 JA 23-24; 6 JA 497-498; AOB 3-4. Pertinent to this appeal, after Korte recorded a second amended mechanic's lien against the Project, on May 29, 2018, UPA, as principal, and Hartford Fire Insurance Company, as surety, executed a surety bond in the amount of $5,448,592.82 for the benefit of Korte (the "Bond") and for the release of the mechanic's lien. 6 JA 498; AOB 4.

On October 9, 2018, Korte filed its Second Amended Complaint (the "SAC"). 1 JA 58-82. Therein, Korte set forth claims against multiple named parties, including claims against UPA for breach of contract and foreclosure of mechanic's lien, and claims against UPA pursuant to NRS Chapter 108 and NRS Chapter 624. Korte dismissed its claims to foreclose on the mechanic's lien and, in the alternative, brought a claim directly against the surety bond. Korte also maintained a single claim against UNLV, for unjust enrichment. *Id*.

In its unjust enrichment claim, Korte alleged that UNLV, along with the other Defendants, "received a benefit from the work of Korte, that Korte has made demand upon said Defendants for the work performed, but to date, said Defendants have refused to pay and/or compensate Korte for such work and benefits conferred on them." *Id*. at 76 ¶ 58. Notably, the SAC also provided that "[p]ursuant to NRS 108.2415(6)(a), the surety bond releases the property described in the surety bond from the lien and the surety bond is deemed to replace the property as security for the lien." 1 JA 177 ¶ 68; 6 JA 498; AOB 5. On December 11, 2018, Korte recorded its Third Amended Notice of Lien against the Project, reducing the amount of its mechanics lien to $2,899,988.72 (the "Amended Lien"), nearly half the amount of the posted Bond amount. 6 JA 498.

On August 1, 2019, UNLV filed a Motion for Summary Judgment with respect to Korte's claim for unjust enrichment, which was Korte's sole claim against UNLV. 1 JA 104-121. Therein, UNLV argued that it was entitled to summary judgment on Korte's claim for unjust enrichment for multiple reasons: (1) the Construction Contract governed the terms and recourse for the services provided by Korte; (2) UPA posted a Bond exceeding the amount allegedly owed to Korte for its services; and (3) UNLV had not unjustly retained any benefit from Korte's services. *Id*. at 111. UPA filed a limited joinder to UNLV's Motion for Summary Judgment on the basis that Korte had actual knowledge of UNLV's ownership. 3 JA 346-383.

Korte opposed UNLV's Motion, claiming, *inter alia*, that neither the Construction Contract nor the Bond precluded Korte's unjust enrichment claim. 4 JA 384-399. UNLV replied, 6 JA 435-445, and the District Court held a hearing on the Motion, in which the respective parties provided additional arguments. *Id*. at 447-494.

Following the hearing, the District Court granted summary judgment in UNLV's favor, concluding that Korte's unjust enrichment claim against UNLV was barred as a matter of law. *Id*. at 495-500. First, the District Court concluded that the work and services for which Korte alleged that it was entitled to payment were subject to the Construction Contract, and therefore, Korte's unjust enrichment claim was barred by the existence of the Construction Contract. *Id*. at 499. Next, the District Court concluded that Korte's unjust enrichment claim was precluded by the fact that a Bond had been posted by UPA which exceeded the amount sought by Korte, and provided Korte an adequate remedy at law. *Id*. Accordingly, the District Court directed the entry of final judgment in favor of UNLV. *Id*. This appeal followed. *Id*. at 518.

SUMMARY OF ARGUMENT

At its core, the underlying litigation is a dispute between UPA and Korte, the subject matter of which is controlled by the Construction Contract. Korte's only claimed basis for its unjust enrichment claim against UNLV is that UNLV owned

the Property upon which Korte completed its work as contemplated by the Construction Contract, and for which Korte was allegedly not paid by UPA as contemplated by the Construction Contract. As such, the District Court held that Korte's claim against UNLV was barred as a matter of law because the work and services for which Korte sought payment are subject to the Construction Contract, and independently, because the Bond posted by UPA provided Korte complete relief in the event that Korte prevails.

On appeal, Korte raises two principal arguments: (1) that the District Court acted in contravention of Nevada precedent, specifically *Leasepartners*, in holding that the Construction Contract barred Korte's unjust enrichment claim, AOB 9-12, 14-15; and (2) that the District Court erred in holding that the Bond posted by UPA barred Korte's unjust enrichment claim. *Id*. at 12-14. Korte's arguments lack merit, and the District Court's ruling should be upheld.

With respect to Korte's first argument, Korte grossly overstates the holding in *Leasepartners*. The only relevant conclusion for which *Leasepartners* stands is that the existence of a contract with a party other than the defendant does not *automatically* bar an unjust enrichment claim. In overextending the *Leasepartners* holding in an attempt to apply it to the facts of this case, Korte disregards other Nevada precedent, the significant differences between this case and *Leasepartners* which render the *Leasepartners* outcome inapplicable to this case, and other

applicable persuasive authorities and policy considerations. The District Court did not contravene *Leasepartners* in any way, and the undisputed facts and applicable law fully support the District Court's ruling.

Korte's second argument is similarly meritless. Nevada precedent and other authorities make clear that when the Bond was posted, which guarantees Korte's recovery if it prevails, the Bond then provides Korte with a far more-than-adequate legal remedy, and provides an independent basis to preclude Korte's unjust enrichment claim against UNLV. Korte's unproven supposition that this remedy at law may be inadequate is wholly insufficient to permit Korte's unjust enrichment claim to proceed.

Accordingly, UNLV respectfully submits that the District Court's decision should be affirmed.

ARGUMENT

1. Standard of review.

A district court's decision to grant summary judgment is reviewed de novo. *Paulos v. FCH1, LLC*, 136 Nev. 18, 22, 456 P.3d 589, 593 (2020). While "[a]ll evidence must be viewed in a light most favorable to the nonmoving party," "[t]o withstand summary judgment, the nonmoving party cannot rely solely on general allegations and conclusions set forth in the pleadings, but must instead present

specific facts demonstrating the existence of a genuine factual issue supporting the claims." *Id.*

2. <u>The District Court did not err in concluding that the Construction Contract precluded Korte's unjust enrichment claim against UNLV</u>.

Nevada law is clear that "[a]n action based on a theory of unjust enrichment is not available when there is an express, written contract, because no agreement can be implied when there is an express agreement." *Leasepartners*, 113 Nev. at 755-756, 942 P.2d at 187 (*citing* 66 Am.Jur.2d Restitution § 6 (1973)). Indeed, "[t]o permit recovery by quasi-contract where a written agreement exists would constitute a subversion of contractual principles." *Lipshie v. Tracy Investment Co.*, 93 Nev. 370, 379, 566 P.2d 819, 824 (1977). Korte does not dispute these well-established principles of law. Nor does Korte dispute that the Construction Contract is a valid contract between Korte and UPA that governs the terms of payment and services to be provided by Korte in connection with the Project, and that contract forms the basis for the relief Korte seeks in the underlying action. *See, e.g.*, AOB 3 ¶¶ 5, 8. Indeed, Korte's only apparent basis for unjust enrichment is that UNLV allegedly benefitted from the work that Korte allegedly performed as required by the Construction Contract, but purportedly was not paid for by UPA as required by the Construction Contract. *See generally* AOB.

Notwithstanding the foregoing, Korte claims that, because UNLV was not party to the Construction Contract, Korte may then maintain a claim for unjust

enrichment against UNLV, and that the District Court erred in concluding otherwise. In so arguing, Korte purports to rely upon *Leasepartners*, a Nevada case, to make two unwarranted overgeneralizations: (1) that *Leasepartners* holds that "if an owner is conferred a benefit by the contractor's improvements made under a contract with the tenant, unjust enrichment lies," and similarly that "*Leasepartners* is clear that the existence of a contract between a tenant and a contractor does not preclude a contractor from asserting an unjust enrichment claim against the property owner"; and (2) that under *Leasepartners*, "summary judgment is ***not appropriate*** where there is conflicting evidence about whether an owner actually received a benefit from the work performed by a contractor pursuant to an agreement between a contractor and a tenant." AOB 10-11 (emphasis in original). Thus, Korte claims that the District Court acted in contravention of *Leasepartners* in holding that under the facts of this case, the Construction Contract barred Korte's unjust enrichment claim against UNLV. *See id*.

Korte grossly overstates the scope of *Leasepartners*. The only conclusion for which *Leasepartners* stands is that the existence of a contract with a different party does not *automatically* bar an unjust enrichment claim. In overextending the *Leasepartners* holding to attempt to apply it to the facts of this case, Korte disregards other Nevada precedent, the significant differences between this case and

Leasepartners, and applicable persuasive authorities and policy considerations. Each will be addressed herein.

a. <u>Korte's arguments are belied by Nevada precedent</u>.

First, Korte's sweeping statements are belied by Nevada precedent. *See, e.g.*, *Nevada National Bank v. Snyder*, 108 Nev. 151, 826 P.2d 560 (1992) *abrogated on other grounds by Executive Management, Ltd. v. Ticor Title Insurance Company*, 118 Nev. 46, 50 n.8, 38 P.3d 872, 874-75 n.8 (2002); *Bowyer v. Davidson*, 94 Nev. 718, 584 P.2d 686 (1978).

In *Snyder*, a bank loaned money to a borrower to purchase real property that the borrower intended to develop. 108 Nev. at 153, 826 P.2d at 561. The loan was secured by a deed of trust against the property, which the bank recorded. *Id*. The borrower had already hired an engineering firm, who, in turn, retained an architect, and both had performed planning and studies on the property. *Id*. The engineering firm and architect subsequently recorded mechanic's liens. *Id*. The borrower eventually went bankrupt still owing the engineering firm and architect money, and the bank non-judicially foreclosed on its deed. *Id*. At trial, the district court found, among other things, that the bank was personally liable to the engineering firm and architect for any deficiency in the mechanic's liens not covered by a sale of the property. *Id*. at 157, 826 P.2d at 563. The bank appealed.

This Court reversed. In pertinent part, this Court rejected the arguments by the engineering firm and architect that "the Bank was unjustly enriched, because the work they performed increased the value of the property, and the Bank should be held personally liable for any deficiency," and that "the Bank relied on their work to increase the value of the land and therefore the principle of unjust enrichment is applicable." *Id*. This Court concluded that "**[w]hile there was a benefit conferred on the Bank**, it does not rise to unjust enrichment." *Id*. (emphasis added). Indeed, "[a]ny prudent lender evaluates a loan and hopes that the land will increase in value. There is simply no basis in this case to find that the Bank was unjustly enriched by the work [the engineering firm and architect] performed on the [property], **pursuant to their contract** with [the borrower]." *Id*. at 158, 826 P.2d at 564 (emphasis added).

Snyder contradicts Korte's sweeping assertion that "if an owner is conferred a benefit by the contractor's improvements made under a contract with the tenant, unjust enrichment lies." AOB 10. In *Snyder*, this Court held that even though there was a benefit conferred upon the bank,[4] there was no basis to find that the bank was

[4]While the bank in *Snyder* was a lender who then foreclosed on its deed of trust, such a distinction, if any, is not meaningful for purposes of the issues presented in this appeal. Indeed, this Court in *Snyder* found that the land increased in value—as any lender evaluating a loan would hope that it would—and therefore there was a benefit conferred on the bank, but that it was insufficient to constitute unjust enrichment. *Snyder*, 108 Nev. at 158, 826 P.2d at 564. Similarly, Korte's argument here is that there was a benefit conferred on UNLV because the Property allegedly increased in value. AOB 14-15.

unjustly enriched by the work performed on the property "**pursuant to [the] contract**" with the borrower. 108 Nev. at 158, 826 P.2d at 564 (emphasis added). Applied here, *Snyder* supports the District Court's holding that there was no basis to find that UNLV was unjustly enriched by Korte's work performed on the property pursuant to Korte's contract with UPA. 6 JA 499.

Further, *Snyder* directly contradicts Korte's claim that "summary judgment is not appropriate where there is conflicting evidence about whether an owner actually received a benefit from the work performed by a contractor pursuant to an agreement between a contractor and a tenant." AOB 11. In *Snyder*, this Court expressly concluded that "there was a benefit conferred on the Bank," but that it did not rise to unjust enrichment. 108 Nev. at 158, 826 P.2d at 564. Indeed, this Court opined that "[a]ny prudent lender evaluates a loan and hopes that the land will increase in value." *Id*. If, as in *Snyder*, no unjust enrichment exists even where it is established that a benefit was conferred, then the alleged existence of "conflicting evidence about whether an owner actually received a benefit" clearly does not pose an automatic bar to summary judgment, as Korte claims.

In *Bowyer*, a case which will be discussed in greater detail *infra*, a subcontractor who did work on a construction project brought an action against the general contractor and the owners to recover for unpaid labor and materials. 94 Nev. at 719, 584 P.2d at 686-87. During the lawsuit, the district court entered summary

judgment in favor of the owners and dismissed the complaint as to them, with prejudice. *Id*. The district court subsequently entered a judgment against the contractor, but because the contractor was no longer doing business, the judgment remained unsatisfied. *Id*. at 719-20, 584 P.2d at 687. The subcontractor appealed from the grant of summary judgment in favor of the owners.

On appeal, this Court affirmed. Pertinent to the present appeal, this Court held, *inter alia*, that there was no genuine issue that the respondent owners were not unjustly enriched at the subcontractor's expense. *Id*. at 720, 584 P.2d at 687. "Respondents paid [the contractor] substantially all the amount due on the prime contract. Moreover, appellant could have protected himself by the exercise of his lien rights against the property. NRS 108.222. Under these circumstances, the enrichment, if any, resulting to respondents from appellant's labor and materials is not unjust." *Id*. Accordingly, this Court concluded that "[t]he district court correctly ruled **as a matter of law** that [the subcontractor] is not entitled to recover from [the owners]." *Id*. (emphasis added).

While the applicability of *Bowyer* is more pertinent to the discussions *infra*, *Bowyer* also demonstrates the overreaching nature of Korte's arguments. Again, as with *Snyder*, *Bowyer* demonstrates that even "if any" alleged enrichment results, it does not automatically follow that summary judgment is not appropriate, as Korte claims. AOB 10. Rather, a property owner, even if allegedly enriched by another's

labor and materials, is entitled to judgment as a matter of law if the factual circumstances so warrant.[5] *Bowyer*, 94 Nev. at 720, 584 P.2d at 687.

Accordingly, *Snyder* and *Bowyer* unequivocally demonstrate that Korte's statements about *Leasepartners* are overly-broad. *Leasepartners* does not blindly bar summary judgment in all cases in which the defendant was not a party to the contract forming the basis for the relief sought by the plaintiff, as Korte suggests.[6]

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[5]In fact, multiple other jurisdictions have concluded that for a tenant's contractor to attach liability upon an owner of property under an unjust enrichment claim, the contractor must be able to show that the landlord has engaged in some form of improper, deceitful, or misleading conduct. *See, e.g., DCB Construction Co., Inc. v. Central City Development Co.*, 965 P.2d 115, 122-23 (Colo.1998) (*citing* Restatement of Restitution § 110 (1937) and collecting cases). As explained in *DCB*, "[w]e all enjoy the protection that we are generally not liable for services or goods for which we did not contract. The courts should be slow to impose obligations in the absence of contract; slow to impose the debts of one party upon another." *Id*. at 121; *see also Wang Elec., Inc. v. Smoke Tree Resort, LLC*, 283 P.3d 45, 51 (Ariz. Ct. App. 2012); *Hayes Mech., Inc. v. First Indus., L.P.*, 812 N.E.2d 419, 429 (Ill. Ct. App. 2004). Here, Korte has not even alleged, and certainly cannot establish, that UNLV has engaged in any improper, deceitful or misleading conduct—to the contrary, UNLV required UPA to post the Bond. Subjecting UNLV to liability under the facts of this case would improperly make UNLV "an insurer of the risk assumed by contractors in extending credit to tenants." *DCB*, 965 P.2d at 122.

[6]Korte also argues that "'Nevada public policy favors contractors' right to secure payment.'" AOB 11 n.1 (*quoting Lehrer McGovern Bovis, Inc. v. Bullock Insulatio, Inc.*, 124 Nev. 1102, 1116, 197 P. 3d 1032, 1041 (2008)). UNLV is not arguing that Korte does not have a right to secure payment for the work it has done under Nevada law. UNLV is pointing out that a claim for unjust enrichment against UNLV is not the appropriate avenue to secure such payment. Rather, the Bond that has been executed and recorded is the appropriate way to secure any payment that may be due to Korte.

Further, as will be discussed next, significant distinctions exist between *Leasepartners* and the present case which render the *Leasepartners* holding inapplicable here.

b. Korte's arguments disregard significant differences between this case and *Leasepartners*.

Next, Korte disregards significant differences between this case and the facts upon which the *Leasepartners* holding was premised. *See* AOB 10-12. However, these distinctions readily support the District Court's ruling, and Korte's attempts to extend the *Leasepartners* outcome to the facts and circumstances of this case should be rejected.

Pertinent hereto, in *Leasepartners*, the Brooks Trust, who owned the Royal Hotel, leased the Royal Hotel to the Danzig Corporation ("Danzig"). 113 Nev. at 749, 942 P.2d at 183. During the lease term, Danzig determined that the signage at the hotel needed to be replaced, and therefore, Danzig entered into an equipment lease for electronic signage, which was financed by, and ultimately acquired by, LeasePartners. *Id*. at 751, 942 P.2d at 184. Brooks Trust testified to have neither known about nor approved the new signage. *Id*. at 750, 942 P.2d at 184. Danzig subsequently defaulted on its lease with the Brooks Trust, leading the Brooks Trust to terminate the lease. *Id*. Importantly, until Danzig's default and the subsequent termination of the lease, LeasePartners was unaware that Danzig was only a tenant of the Royal Hotel and that the Brooks Trust owned the Royal Hotel. *Id*. at 751-52,

94 P.2d at 185. Following the default, the Brooks Trust refused to release the signs or pay LeasePartners for them. *Id*. Accordingly, LeasePartners filed a lawsuit against the Brooks Trust and Danzig, asserting, in pertinent part, a claim for unjust enrichment against the Brooks Trust. *Id*. Based upon those specific facts, this Court held, in pertinent part, that the unjust enrichment claim against Brooks Trust was not barred by the existence of a written contract between Danzig and LeasePartners, and further concluded that there was a genuine issue of fact as to whether or not a benefit was conferred upon the Brooks Trust. *Id*. at 756, 942 P.2d at 187.

While *Leasepartners* certainly shares some similarities with the present case, the material differences between the facts of this case and those upon which *Leasepartners* was premised render the *Leasepartners* holding inapplicable here. Most significantly, there was no indication whatsoever in *Leasepartners* that Danzig, the tenant, had posted a bond guarantying payment for LeasePartners's recovery, if any. By contrast, here, it is undisputed that UPA posted the Bond, which now assures payment to Korte if Korte prevails. *See* AOB 4-5; *see also, e.g.*, NRS 108.2421(6); NRS 108.237; NRS 108.2426(4). Thus, even if Korte's overreaching characterization of *Leasepartners* is somehow accurate, *Leasepartners* is simply inapplicable to the Bond considerations that are present in this case, and poses no bar to the relief granted by the District Court. This will be discussed in detail *infra*, in Section 3.

Even beyond the posting of the Bond, multiple distinctions exist, each of which constitutes an independent basis to conclude that the holding reached in *Leasepartners* does not, in any way, compel the result advocated for by Korte. First, in *Leasepartners*, LeasePartners was unaware that Danzig Corp. was only a tenant of the Royal Hotel, and that the Brooks Trust owned the Royal Hotel, until Danzig Corp.'s default and the subsequent termination of the lease. 133 Nev. at 751-52, 94 P.2d at 185. It stands to reason, then, that LeasePartners had no opportunity to account for that important fact in negotiating its contractual obligations or contractual remedies when entering into its lease with Danzig. Such a lack of knowledge would have therefore put LeasePartners in a difficult position to protect itself from the circumstances that eventually unfolded.

By contrast, here, Korte had actual knowledge, or at an absolute minimum constructive knowledge, of UNLV's ownership of the Property at the time upon which it entered into the Construction Contract. *See, e.g.*, 3 JA 347-383. Indeed, it is undisputed that the Deed reflecting UNLV's ownership interest and the Lease reflecting UPA's leasehold interest were recorded against the Property prior to Korte's execution of the Construction Contract. *See, e.g.*, AOB 6; 6 JA 497. Nevada law provides that every document recorded in a county recorder's office gives notice to all persons upon recording. NRS 247.190; *see also In re Crystal Cascades Civil, LLC*, 398 B.R. 23, 29 (Bankr. D. Nev. 2008). In fact, Nevada courts have

consistently held that purchasers of real property are charged with constructive notice of any interest a title search would reveal. *Adaven Mgmt., Inc. v. Mountain Falls Acquisition Corp*., 124 Nev. 770, 779, 191 P.3d 1189, 1195 (2008) (*citing Snow v. Pioneer Title Ins. Co.*, 84 Nev. 480, 484–86, 444 P.2d 125, 127–28 (1968)).

Thus, where Korte had at least constructive knowledge of UNLV's ownership of the Property, but only contracted with UPA and only had an expectation of payment from UPA, the holding set forth in *Leasepartners* is wholly inapplicable to the facts and circumstances here. *Cf., e.g., Hayes Mech., Inc. v. First Indus., L.P.*, 812 N.E.2d 419, 429 (Ill. Ct. App. 2004) (denying a claim for unjust enrichment against a property owner and stating, *inter alia*, that "[t]he contractor assumed the risk of loss when it contracted with the tenant alone. The contractor acknowledged that the party it was contracting with had a mere leasehold on the property, and there is no indication that the contractor misunderstood or was misled about the nature of the tenant's interest in property.").

Further, Korte's attempt to summarily dispose of this distinction as being a "random fact" is unavailing. AOB 12. An opinion "'must be read as a whole, without particular portions read in isolation [so as] to discern the parameters of its holding,'" *Liu v. Christopher Homes, LLC*, 130 Nev. 147, 152–53, 321 P.3d 875, 878 (2014) (quoting *Fisher v. Big Y Foods, Inc.*, 3 A.3d 919, 926-27 (Conn. 2010)), and courts have noted that "[j]udicial holdings must be read with reference to the underlying

facts of the case. Indeed, any discussion in a judicial opinion that goes beyond the facts involved in the issues is mere dictum and does not have the force of precedent." *Fisher*, 3 A.3d at 926 n.17.

Second, even assuming *arguendo* that UNLV received some benefit from Korte's work,[7] its alleged retention thereof was not "unjust." Again, this presents a significant distinction between the facts of this case and the facts forming the holding in *Leasepartners*. In *Leasepartners*, the property owner was not even aware that the tenant had contracted for improved signage. 113 Nev. at 750, 94 P.2d at 184. Logic dictates, then, that the property owner did not provide any consideration for this benefit that would be reflected in its lease with the tenant. By contrast, in this case, a central premise of the PDA was for UPA to develop the Property *at UPA's own expense*. The PDA required that UPA, and potentially other third-party developers,

[7]Korte's sole citation to any authority when claiming that UNLV retained or appreciated some benefit is a generalized citation to the District Court's order to state that the District Court did not expressly consider this factor in making its decision. AOB 14. The argument was, indeed, made below, and if anything, provides an additional basis to affirm the District Court. *See, e.g.*, 1 JA 104-121; *Saavedra-Sandoval v. Wal-Mart Stores*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) ("This court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason."). It should also be noted that other than the single citation to the District Court's order, Korte's argument on this issue contains no citations to the record or to any legal authority whatsoever. AOB 14-15; *see Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (providing that this court need not address issues not cogently argued or supported by relevant authority); *see also* NRAP 28(a)(10)(A) (requiring an appellant to cite to the legal authorities and parts of the record that support its arguments).

would "fund, construct, maintain, and operate student housing and certain commercial establishments" on the Property as part of University Park (the "Project"). 6 JA 497; AOB 2-3. The PDA also required UPA to construct the developments at UPA's "own expense," 2 JA 135, and the Lease provided that UPA would be responsible for "the financing, construction, management, maintenance, marketing, and operations of the Phase One Project." 3 JA 196; *see also id*. at 201 (defining "General Contractor" as "a contractor engaged by [UPA] to perform the Improvement Work or a portion thereof").

There is no dispute that UNLV complied with its contractual obligations with UPA, including paying the agreed-upon purchase price toward the Property. *See, e.g.*, AOB 3. It is also undisputed, and clear from the plain language of the PDA, that UNLV did not contemplate, much less consent to, paying for the services provided by Korte. *See, e.g.*, AOB 2-3 (the PDA provided that UPA would fund the Project). Thus, UNLV is at best simply receiving what it contracted for and provided consideration for. As such, even assuming *arguendo* that UNLV retained a benefit, it was not "unjust."[8] *Cf. generally Bowyer*, 94 Nev. at 719, 584 P.2d at 686-87; *Zalk-*

[8]In fact, one court, collecting cases from 15 other jurisdictions, opined that "[t]he reported decisions involving claims by unpaid subcontractors against owners based on unjust enrichment do indeed almost uniformly deny relief, and…these cases do not turn on whether the owner has fully paid the general contractor." *Bennett Heating & Air Conditioning, Inc. v. NationsBank of Maryland*, 674 A.2d 534, 540–41 (Md. Ct. App. 1996) (also quoting Dobbs Remedies and stating, in pertinent part, that "[t]he subcontractor relied on the credit of the general contractor,

Josephs Co. v. Wells Cargo, Inc., 77 Nev. 441, 448, 366 P.2d 339, 342 (1961) ("Nor was Wells Cargo unjustly enriched to any extent whatsoever by reason of the labor and services provided by [the subcontractor]. Wells Cargo paid over to its subcontractor, Kaufield, the precise amount paid by the state for the services rendered by appellant to Kaufield."). Rather, at most, UNLV received what it was already due under its contract with UPA, and no more.

In fact, if UNLV was required to pay Korte in addition to the consideration that UNLV had already provided in exchange for UPA funding, constructing, and maintaining the Project, then UNLV would be placed in a worse position than that which it had bargained for and paid for. Such a result would contradict the principles of unjust enrichment. *Cf. generally Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 382, 283 P.3d 250, 257 (2012) ("[W]hile [r]estitution may strip a wrongdoer of all profits gained in a transaction with [a] claimant...principles of unjust enrichment will not support the imposition of a liability that leaves an innocent recipient worse off...than if the transaction with the claimant had never taken place.").

Finally, as noted, it was required that **UPA** would "fund, construct, maintain, and operate" the Project, not UNLV. 3 JA 196. UNLV did not have any day-to-day

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not the owner, and it is not unfair to him or enriching to the landowner to respect the contractual arrangement.").

involvement in Korte's work, was not involved in the construction, and did not have a position on the dispute between UPA and Korte. *See, e.g.*, 6 JA 453-454, 473. Nor has Korte ever argued that UNLV enticed Korte to complete the work at issue or promised to pay Korte. *Cf. Bowyer*, 94 Nev. at 720, 584 P.2d at 687 (concluding no contractual intention was implied where "[a]t no time did [the owners] ever promise to pay [the subcontractor], nor did not parties ever contemplate that the owners would assume liability to the subcontractors in the event of [the contractor's] default."). UNLV's alleged retention of any benefit is simply not unjust under these circumstances.

In sum, Korte claims that the outcome in *Leasepartners* must be replicated here, but disregards multiple key distinctions between *Leasepartners* and the present case that demonstrate the inapplicability of *Leasepartners* in this case. Adopting Korte's interpretation of *Leasepartners* to apply even in the presence of such distinctions would dramatically overextend the scope of a claim for unjust enrichment.[9] *Cf. generally, e.g., Wang Elec., Inc. v. Smoke Tree Resort, LLC*, 283

[9]Notably, 66 Am.Jur.2d Restitution and Implied Contracts, upon which *Leasepartners* relied, also states that "[t]he mere fact that the property owner has consented to the improvements provided by the subcontractor and accepted their benefit does not render him or her liable to the subcontractor whose sole remedy is against the general contractor," § 31; that "generally, a third party is not liable for unjust enrichment when it receives a benefit from a contract between two other parties where the party benefited has not requested the benefit or misled the other parties," *id*. at § 30; and that "[w]here a third person benefits from a contract entered into between two other persons, in the absence of some misleading act by the third

P.3d 45, 51 (Ariz. Ct. App. 2012) ("In short, if we hold that [the owner] is liable to the subcontractors for unjust enrichment under these circumstances, we would essentially make [the owner] and all similarly situated property owners unwitting guarantors of their tenants' contracts for improvements. A claim for unjust enrichment does not stretch this far."). Rather, as discussed herein, the District Court did not act in contravention of *Leasepartners*, and the undisputed facts readily support the District Court's summary judgment ruling.

3. The District Court did not err in concluding that the mechanic's lien release bond posted by UPA precluded Korte's unjust enrichment claim against UNLV.

Next, as an independent basis, Korte's unjust enrichment claim is precluded by the fact that UPA executed a surety bond exceeding the amount sought by Korte, for the benefit of Korte. AOB 4. Indeed, even disregarding the *Leasepartners* discussion *supra*, the Bond presents an independent basis to affirm the District Court's ruling.

On appeal, Korte argues that the District Court erred in holding that the Bond precluded Korte's unjust enrichment claim against UNLV because it provided Korte

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person, the mere failure of performance by one of the contracting parties does not give rise to a right of restitution against the third person." *Id*. at § 76; *cf. Leasepartners*, 113 Nev. at 755-756, 942 P.2d at 187 (citing to and/or quoting from 66 Am.Jur.2d Restitution § 3, 6, and 11 (1973) and also stating that "there was no written agreement as contemplated by either *Lipshie* or 66 Am.Jur.2d Restitution § 11….")).

with an adequate remedy at law. AOB 12-14. Citing virtually no law or record support, *see supra* n.7, Korte claims that the District Court's ruling was premature, because Korte is permitted to pursue alternative remedies against different parties. *Id*. at 13. Korte further speculates that "[i]t is possible that Korte could be found to confer a benefit on UNLV by the reason of the Project improvements and yet, for a technical legal reason, Korte is not able to recover [the] mechanic's lien release bond." *Id*.; *see also id*. at 11.

Korte's arguments are unavailing. First, Korte's arguments are again belied by Nevada precedent. In *Bowyer*, as discussed *supra*, this Court affirmed summary judgment in favor of a property owner on a subcontractor's claim for unjust enrichment. *Id*. 94 Nev. at 719, 584 P.2d at 686-687. Notably, this Court made clear that at least one reason for its affirmance was the fact that the subcontractor could have protected its rights under the mechanic's lien statutes: "Respondents paid [the contractor] substantially all the amount due on the prime contract. **Moreover, appellant could have protected himself by the exercise of his lien rights against the property. NRS 108.222. Under these circumstances, the enrichment, if any, resulting to respondents from appellant's labor and materials is not unjust.**" *Id*. (emphasis added). Here, Korte had more than just the opportunity to "protect [itself] by the exercise of [its] lien rights"; a bond has already been posted which assures Korte's recovery in the event that Korte prevails in the litigation. *See generally* NRS

Chapter 108. Thus, under these circumstances, the alleged enrichment, if any, was not unjust.

Further, Korte's unproven speculations that this remedy at law may be inadequate are insufficient to permit Korte's unjust enrichment claim to proceed. *See, e.g.*, AOB 13, 11; 6 JA 466-467. In *Bowyer*, the subcontractor appealed the order granting summary judgment following the final judgment in the case, in which the district court entered judgment against the contractor. *Id*. Notably, at the time of the appeal, "because the contractor was no longer doing business, **the judgment remained unsatisfied**." *Id*. (emphasis added). That fact notwithstanding, this Court still affirmed the summary judgment in favor of the property owners. *Id*. Similarly, in *Snyder*, discussed *supra*, even though the borrower went bankrupt, and even if the sale of the property did not fully satisfy the mechanic's liens, this Court concluded that it would be "unjust to hold the Bank personally liable for a deficiency when it was not a party [to the contract between the respondents and the borrower], and because the Bank is not the person liable for the debt under NRS 108.238."[10] 108

[10]Korte's citation to NRS 108.238 to claim that "the mechanic's lien statutes expressly allow a lien claimant to make alternative claims" is unavailing. AOB 14. NRS 108.238 provides that "[t]he provisions of NRS 108.221 to 108.246…must not be construed to impair or affect the right of a lien claimant to whom any debt may be due for work, materials or equipment furnished to maintain a civil action to recover that debt against **the person liable therefor** or to submit any controversy **arising under a contract** to arbitration to recover that amount." (Emphases added). In *Snyder*, this Court noted Nevada precedent stating that "there must be a contractual relationship regarding the furnishing of labor and materials between the

Nev. at 157, 826 P.2d at 563. Thus, Korte may not simply hold UNLV hostage to the litigation until Korte ensures it is paid by the Bond, as Korte appears to argue, and Korte's proffered hypothetical does not support Korte's position.

In fact, if anything, Korte's hypothetical simply further demonstrates the tenuousness of Korte's position. As noted *supra*, Korte speculates that "[i]t is possible that Korte could be found to confer a benefit on UNLV by the reason of the Project improvements and yet, for a technical reason, Korte is not able to recover [the] mechanic's lien release bond. So, the logic of the district court that in all instances, Korte's maintenance of an unjust enrichment claim will amount to double recovery is not necessarily so." AOB 13. But this is effectively a concession by Korte that it cannot recover against UNLV: at the conclusion of the still-proceeding lawsuit between Korte and UPA, either Korte will have prevailed on the merits, in which case it will be assured full recovery by the Bond, or Korte will have lost, in which

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party foreclosing the lien and the party against whom personal liability is sought." 108 Nev. at 157, 826 P.2d at 563. Indeed, "such a relation is essential to establish a personal liability against the owner of the property in addition to a judgment foreclosing a lien…." *Id*. Next, this Court quoted NRS 108.238, emphasizing the "personal liable therefor" language in the statute. This Court concluded, as discussed *supra*, that "[i]t is unjust to hold the Bank personally liable for a deficiency when it was not a party to the…contract, and because the Bank is not the person liable for the debt under NRS 108.238." *Id*. Accordingly, while Korte may pursue other claims against UPA (UNLV has no position on this), it does not follow that the statute "expressly allow[s]" Korte to pursue claims against UNLV, as Korte argues. AOB 14.

case it could not have established the required elements for a claim for unjust enrichment regardless. Korte's vague musing about losing against UPA on some unspecified "technical legal reason," the only circumstance under which Korte claims it can recover against UNLV, does not provide Korte with a basis to keep UNLV in the dispute.[11]

Accordingly, Korte's complete and more-than-adequate remedy at law forecloses Korte's unjust enrichment claim.[12] *See generally, e.g., Small v. Univ. Med. Ctr. of S. Nevada*, 2016 WL 4157309, at *3 (D. Nev. Aug. 3, 2016) ("Nevada recognizes the general rule that an equitable claim, like unjust enrichment, is not available where the plaintiff has a full and adequate remedy at law."); *cf. generally, e.g., California Commercial v. Amedeo Vegas I, Inc.*, 119 Nev. 143, 144, 67 P.3d 328, 329 (2003) (noting, in a case in which a subcontractor filed a mechanic's lien for work done under contract with a contractor, in which the owner paid the subcontractor the contract price but not delay damages, that "[the subcontractor's]

[11]And, if this were truly a concern for Korte, Korte should have disputed the certification of finality below and/or waited to appeal the District Court's entry of summary judgment in favor of UNLV until after a final judgment is entered in the underlying case which resolves the dispute between Korte and UPA.

[12]Korte's argument that it can pursue different defendants on distinct legal theories disregards that there is no dispute that the Construction Contract was a valid contract or that a Bond has already been posted which guarantees Korte's recovery if Korte prevails. Korte cannot simply disregard these critical factual developments.

argument that, by failing to allow a mechanic's lien for delay-related damages, the district court would permit [the owner] to be unjustly enriched is without merit. It appears that [the subcontractor] was compensated under the contract, so [the owner] was not unjustly enriched. **Furthermore, NRS 108.222 allows a contractor to seek a mechanic's lien for labor, materials, overhead and profit when no contract exists, thereby preventing unjust enrichment**. Presumably, when a contract exists, the parties have already bargained over these terms." (Emphasis added)).[13] Any recourse by Korte regarding improvements on the Property should and can be satisfied by the Bond.

Finally, it must be emphasized that Korte indisputably already had a remedy against UNLV, which Korte pursued: Korte recorded a mechanic's lien against the Property owned by UNLV. However, subsequently, UPA posted a Bond, and as Korte itself claimed in its SAC, "pursuant to NRS 108.2415(6)(a), the surety bond releases the property described in the surety bond from the lien and the surety bond

[13]*See also UTCO Assocs., Ltd. v. Zimmerman*, 27 P.3d 177, 181 (Utah Ct. App. 2001) (holding that where a subcontractor has a breach-of-contract claim against a contractor and an equitable claim against an owner, the subcontractor must pursue its claim against the contractor to conclusion, or submit evidence that pursuit of the contractor would have been fruitless); 68 Causes of Action 2d 1 § 12; *Cummins Law Office, P.A. v. Norman Graphic Printing Co.*, 826 F. Supp. 2d 1127, 1131 (D. Minn. 2011) (holding that where a party had available to it a statutory remedy in the form of an attorney's lien, but chose to forego its statutory rights, it could not pursue an unjust enrichment claim).

is deemed to replace the property as security for the lien." 1 JA 177 ¶ 68. Thus, the Property is, as Korte freely admits, no longer subject to Korte's lien, which is significant given that UNLV's ownership interest in the Property was the only thing connecting UNLV to the dispute between UPA and Korte. It is completely unjustified for Korte to assert a claim for unjust enrichment against UNLV under such circumstances.

Accordingly, UNLV respectfully submits that the District Court did not err in concluding that posting of the Bond barred Korte's unjust enrichment claim against UNLV.

CONCLUSION

Based on the foregoing, UNLV respectfully requests that this Court affirm the ruling of the District Court.

Respectfully submitted this 22nd day of September, 2020.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Answering Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[x] This Answering Brief has been prepared in a proportionally spaced typeface using Microsoft Word version 14.0.6129.5000 (2010) in 14 point Times New Roman font;

2. I further certify that this Answering Brief complies with the page – or type – volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7), it is:

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3. Finally, I hereby certify that I have read this Answering Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the

requirements of the Nevada Rules of Appellate Procedure.

DATED this 22nd day of September 2020.

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CERTIFICATE OF SERVICE

I certify that I am an employee of DICKINSON WRIGHT, PLLC, and that on this date, pursuant to NRAP 25(d), I am serving the attached **RESPONDENTS' ANSWERING BRIEF** on the party(s) set forth below by:

☒ By electronic service by filing the foregoing with the Clerk of Court using the ECF Electronic Filing System, which will electronically mail the filing to the following individual.

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