IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN ILIESCU, JR., individually, JOHN ILIESCU, JR. and SONNIA SANTEE ILIESCU, as Trustees of the JOHN ILIESCU, JR. AND SONNIA ILIESCU 1992 FAMILY TRUST AGREEMENT,

Appellants,

vs.

MARK B. STEPPAN,

Respondent.

Supreme Court No. 68346
Washoe County Case No. CV07-00341
(Consolidated w/CV07-01021)

APPELLANTS' REPLY BRIEF

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I. APPEALED ISSUES.

Steppan claims that the Iliescus are not appealing the district court's second partial summary judgment order, ruling the lien amount would be based on the AIA contract price, and that they do not appeal the attorneys' fees award, or the computation of the lien amount. Respondent's Answering Brief (hereinafter "RAB") 4. However, the Notice of Appeal expressly identified the second partial Summary Judgment (as item (iii)) and the attorneys' fee Order (as part of item (viii)) as being appealed. X AA2450-51. Moreover, the Appellants' Opening Brief ("AOB") directly contested the second partial summary judgment as improper under NRCP 52(a), and as premature, and also challenged the district court's upholding of the flat-fee AIA Agreement on the basis of expert testimony, which was excluded due to the second summary judgment. AOB 28-30. Attorney's fees would not have been awarded, nor any lien amount established, but for the district court's other earlier errors.

II. FACTUAL REVIEW.

A. Steppan's Notice Failures Are Uncontested.

The Appellants demonstrated that Steppan never provided any NRS 108.245 Right-to-Lien Notice or timely NRS 108.226(6) 15-Day Intent-to-Lien Notice. AOB 7-8; 27. These facts continue to be uncontested, and are not disputed in the RAB.

B. Steppan Never Retained FFA to Work as His Subprovider.

The AOB also demonstrated that Steppan never retained FFA as his sub-provider, in order to lien for FFA's work, as though provided "by or through" Steppan. AOB 8-27. NRS 108.222(1)(a) and (b). Steppan's statement of facts ignores this issue and provides no reference to any evidence which supports a contrary finding. However, in his legal arguments, Steppan does contend that FFA was his "sub-consultant" (RAB 45; 54), and that he may lien for FFA's work in the same manner that any prime contractor is allowed to lien for the work of his subcontractors (RAB 36).

However, these assertions ignore certain of Steppan's own sworn testimony in which he affirmatively stated, under oath, that *no* agreement was ever in place requiring him to ever "personally pay" any money to FFA. Appellant's Supplemental Appendix (hereinafter "ASA") at Vol XIII, p. AA2976 at ll. 17-19. Steppan also testified as to the lack of any such oral agreement. XIII ASA at AA2977, ll. 14-16. This testimony was, moreover, provided notwithstanding Steppan's counsel inappropriately interposing speaking objections to warn him from offering the same, the effect of which objections was to further verify that this case is actually pursued for FFA. XIII ASA at AA2974-76.

In any event, zero evidence is cited in Steppan's Statement of Facts of any indicia of a contractor-subcontractor relationship between FFA and Steppan,

despite the RAB's assertion of legal arguments which are premised on the existence of just such a relationship. However, no possible legal or logical contortions can support Steppan's argument that he should be allowed to lien for FFA's work, as though performed as his sub-consultant, where no subcontract existed by which FFA was working for Steppan, or looking to him for payment. Instead, as the voluminous evidence cited in the AOB (AOB 8-27) demonstrates, FFA was working directly for, communicating directly with, and receiving payments[1] directly from the underlying customer, BSC; and the lien is entirely for FFA's outstanding invoices to BSC sent from FFA, on FFA letterhead, FFA having been named as a party to the subject AIA contract with BSC. Respondent's Appendix (hereinafter "RS") at RS 264.[2] The RAB does not refute these facts, and cites to no evidentiary basis to uphold the district court's post-trial oral finding that Steppan employed FFA.

C. Misleading Statements in the RAB.

The RAB quotes from an Order granting third-party defendant Hale Lane's motion for summary judgment (RAB 6-7, 9). However, this Order has been set

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[1] The **$480,000 in payments from BSC (V AA1081) were all paid directly to FFA**, and not to or through Steppan, as arranged from the outset. VI AA1416-1417, 1419; V AA1080-1081; IX AA2040.

[2] Indeed, as shown by Trial Exhibit ("TE") 9, BSC was required to inform not Steppan, but FFA, of any disputes with the invoices (RS at 275).

aside (XIX ASA at AA4403-4408), such that citations thereto are misleading and inappropriate.[3]

Steppan claims that FFA previously designed Nevada projects utilizing a Nevada licensee as the "project architect." RAB 10-11. However, those earlier projects were performed under the Nevada license of Bob Fisher, the first named partner, and thus presumably an owner, in FFA [Fisher Friedman Associates], before he resigned. IV AA0948, AA0956; V AA1004; IX AA2029, 2034. Friedman, however chose not to obtain a Nevada license (IX AA2044), even though he was thereafter FFA's sole owner, including during this project. V AA1085; IX AA2029.

D. Actual Notice Issues.

Steppan references events which occurred on November 15, 2006, and October 4, 2008, to claim actual notice by the Iliescus of Steppan's identity. RAB 15. However, the flat fee portion of the work being liened for (as originally described in the hourly fee invoices which ceased in April of 2006) was completed far more than 31 days before November 2006 (let alone October 2008). AOB 12.

The first partial summary judgment indicated that the Iliescus had knowledge, for purposes of *Fondren v. K.L. Complex, Ltd.*, 106 Nev. 705, 800 P.2d

[3] The claims against Hale Lane were subsequently stayed pending the outcome of the Iliescu-Steppan dispute, and remain pending below. XIX ASA at AA4409-4411.

719 (1990), that the Respondent "and his firm were performing services on the project," but did not reach the question of whether they knew of Steppan's identity, nor discuss why he should be allowed to lien for the work of "his firm" (actually his employer FFA). III AA0509. After that order issued, the Nevada Supreme Court decided *Hardy Companies, Inc. v. SNMARK, LLC*, 126 Nev. 528, 245 P.3d 1149, 1137 (2010), ruling that the property owner must know of the identity of the lien claimant, for the *Fondren* exception to apply. Despite examining *Hardy Companies*, the lower court's post-trial findings ruled only that the Iliescus were aware "of the third-party services" being provided, but conceded (contrary to the misleading wording of Steppan's first stated issue on appeal (RAB 1)), that "Iliescu may not have known, at all times, Steppan's name" (VIII AA1915 at ll. 20-22) and failed to address *when* the Iliescus first learned that name, for purposes of determining what work was lienable, as performed after 31 days prior to such date under NRS 108.245(6).

Thus, whether this Court reviews the *Fondren* notice issue *de novo,* because of the lower court's stated unwillingness to revisit the first partial summary judgment, or does so on a more deferential standard, as though the trial outcome was not predetermined, the outcome must be the same: neither ruling clearly reached the key question of when (if ever) the Iliescus had actual notice of *Steppan's* identity as a future lien claimant, before he recorded his first lien, in

November 2006. VIII AA1731. Contrary to Respondent's claim (RAB 20), the Iliescus *do* aver that genuine issues of material fact should have precluded Summary Judgment, and the later decision upholding the same: including the questions of *when* any actual notice of Steppan's identity was held by the Iliescus, and what if any lienable work was performed after 31 days before that date. AOB 37-42.

Nor is there any basis to imply that the court made a finding on this issue, as sought in Steppan's Stated Second Issue. RAB 1 ¶2. The Affidavit of David Snelgrove (still the main evidence on which Steppan relies[4] to support a claim that the Iliescus knew of Steppan's identity), was shown to be worthless when Snelgrove was deposed and, contrary to any stronger prior statements, testified he did not know whether the Iliescus saw Steppan's name on any documents in his possession. XI AA2523-25.

Respondent claims that the record is "replete with testimony about Iliescus' signing development applications, reviewing plans, attending meetings, and other exposures to Steppan's work and identity" (RAB 21) but ignores the details of said evidence. For example, Snelgrove testified that, had the Iliescus attended a meeting about the project held for their neighbors, on July 27, 2006[5] in the nearby

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[4] RAB 21.

[5] XI AA2513.

Arlington Towers they would have met and been told that "Nathan Ogle" of FFA "is the project architect." V AA1206. Another meeting of which Snelgrove testified, of the Downtown Improvement Association (V AA1206), took place in August of 2006 (XI AA2514), which is more than 31 days after completion of most if not all of the FFA work for which Steppan liens, much of which was completed by April 2006. AOB 41-42. The district court however, never determined how much of FFA's work was completed when, or *when* the Iliescus, if ever, learned of his identity, for purposes of applying NRS 108.245(6).

III. LEGAL ANALYSIS.

A. "*Constructive* or *Imputed* Actual Notice" Is An Illogical Self-Contradiction.

Steppan argues (RAB 22-24) that notice to a property owner's agent should be imputed to the owner, and treated as constructive actual notice by the owner under *Fondren*. Furthermore, Steppan argues that the knowledge of attorney Sarah Class and (in a new twist) that of Sam Caniglia, as a member of the purchaser BSC, should be imputed to the Iliescus. *Id.* Steppan also wishes this constructive actual notice to be treated as impliedly, rather than expressly, found by the district court. RAB 1, ¶2.

However, the Nevada legislature has required written notice to property owners as a prerequisite to asserting a mechanic's lien. NRS 108.245. The Nevada Supreme Court has set aside this legislative enactment only under a

particular set of facts, involving *actual* notice that construction has commenced upon the owner's property, and of the identity of the lien claimant. There is no basis for this Court to further weaken the legislature's original handiwork (with respect to lien rights which are, it should be remembered, wholly a creation of statute) in order to create something called "constructive or imputed *actual* notice" which is a blatant self-contradiction, let alone to allow such notice to be implied rather than expressly found, and, further, to apply this proposed new exception in cases where *no* on-site work even occurred.

Instead, Nevada's post-*Fondren* case law indicates that *Fondren* should be applied narrowly *not* broadly. If landowners are to be robbed of the protections afforded them by the very legislation without which mechanics liens would not even exist in the first place, this should only be done when *actual* notice of on-site work, and of the lien claimant's identity, is *expressly* found. Otherwise, "the exception would swallow the rule." *Hardy Companies, Inc. v. SNMARK, LLC*, 126 Nev. 528, 540, 245 P.3d 1149, 1157 (2010) .

The *Fondren* property owner was held to have actual notice because she had an agent who was regularly inspecting the property and informing her of construction thereon. *Fondren*, at 709, 721. This does not mean, however, that where an alleged agent learns of the subject work but does not inform the property owner, such facts are to be treated similarly. Instead, the Nevada Supreme Court

"will *not* impute knowledge" unless evidence exists that the property owner actually "knew of both the existence and the identity" of any third party who will seek to record a lien. *Id.* 126 Nev. at 542, 245 P.3d at 1158-59. [Emphasis added.] Anything less is insufficient. *Id.* Thus, Steppan seeks to impute knowledge under circumstances in which the Nevada Supreme Court has already said it is inappropriate to do so.

In that light, Steppan's assertion that Nevada law should recognize some sort of oxymoronic and self-contradictory constructive or imputed actual notice must be rejected. Actual notice, by definition, cannot be "imputed" or "constructive." One either has "actual" knowledge, or not. No clear or substantiated finding has ever been made that the Iliescus actually knew of Steppan's identity before he recorded his lien, or, if so, when. Nor was any work ever even performed "upon" the property, as was the case in both *Fondren* and *Hardy Companies*. As noted even in the RAB (at p. 11), the Iliescus hired Karen Dennison (not Sarah Class) as their attorney. And Dennison has testified that she was not aware of Steppan's involvement, was not told of Class's work, and (most importantly) *that she did not inform the Iliescus of Steppan's identity or role.* VII AA1558, 1560-61. The Class memos upon which Steppan relies (RAB 13) were not sent to the Iliescus, but to the purchaser entity and its principal. RS 294-301. Nor has any evidence been cited to demonstrate that Sam Caniglia ever informed the Iliescus of Steppan's identity,

or if so when. If this lien is upheld, it is hard to imagine any set of facts under which any owner would ever be entitled to NRS 108.245 Notice, and the expanding exception will have completely swallowed the statutory mandate requiring written notice.

B. *Fondren* Notice Should Not Apply to Off-Site Work.

Steppan argues (RAB 24-26) that the *Fondren* doctrine applies equally to on-site and to off-site work and that it only "happened to" be the case that *Fondren* involved on-site construction. However, Steppan cites no case applying *Fondren* to off-site services; and the *Fondren* Court repeatedly relied on the language of the lien statute with respect to the effect of work commencing **on** the property, as grounds for its ruling. *See, e.g.*, AOB 33-34. While it is true that Nevada's mechanic's lien statutes allow architects to lien for their work, the statutory language referenced in *Fondren* concerning the effect of on-site work *has not been materially altered* in subsequent iterations of the statute, to deal with architectural liens. Indeed, the *Hardy Companies* case continued to explain the actual notice rule by reference to the statutory effect of construction "upon property." *Hardy Companies, Inc. v. SNMARK, LLC*, 126 Nev. at 536, 245 P.3d at 1149. As the *J.E. Dunn Northwest Inc. v. Corus Construction Venture*, 127 Nev. Adv. Op. 5, 249 P.3d 501 (2011) decision demonstrates, just because an architect's off-site work is lienable, this does not mean that it is treated as equivalent to on-site work for all

purposes under the lien statute.

C. *Fondren* Notice Is Not Superior to Written Notice, and this Rule Was Preserved for Appeal.

NRS 108.245(6) allows a lien claimant to lien for all work performed after the date which is 31 days before the statutorily required written right-to-lien notice is provided to the property owner. Steppan argues (RAB 27-29) that *Fondren* "actual notice" should magically be treated as superior to the statutorily required written notice for which it substitutes, and renders lienable all work which was ever performed by a lien claimant, not only after the date which is 31 days before actual notice takes place, but from the beginning of time, regardless of when actual notice finally occurs. Steppan needs this preposterous theory to be true, to claim a lien for the entirety of the work, regardless of when it was performed, by showing that the Iliescus may have been exposed to Steppan's name, in July, or August, or November of 2006, much more than 31 days after most of the work was done. This position would also render innocuous the lower court's failure to ever make any finding as to the date on which actual notice allegedly occurred, or to ever require the lien claimant to prove up what percentage, if any, of its work was completed thereafter (minus 31 days). No legal authority however supports Steppan's position.

Steppan avers that the Iliescus' argument on this point was "first raised in a reply brief in support of a motion to alter or amend the judgment" and that the

Iliescus never raised this issue before trial. RAB 27; 6. These assertions are simply false. In fact, these same points were made years before trial, at the very first hearing in this case, on May 3, 2007, in which the Iliescus' counsel argued at length that "*Fondren* says that actual notice is a substitute for . . . the pre-lien notice. The pre-lien notice says you get to go back 31 days so . . . even assuming that Dr. Iliescu at some point had actual notice, the property could only be liened for work going back 31 days" from that time, forward. I AA0109; AA0163-0165.

The correctness of this position could not be more clear. It is facially absurd, and defies logic, to contend that a lien claimant who ignores the statutory requirement of providing written notice, and relies on a common law *substitute* for such notice to *excuse* his failure, is somehow entitled to better treatment than a claimant who properly complied with NRS 108.245. *See, e.g., Wysocki v. Sparks Nugget, Inc.*, 112 Nev. 413, 915 P.2d 261 (1996) (private self-insurer has no greater rights than traditional SIIS Insurer to recoup payments); *Levy v. Fargo*, 1 Nev. 415, 420 (1865) (party who chooses alternative procedure for responding to complaint may not be treated better than if he had simply answered).

D. Steppan's Failure to Provide a Fifteen Day Notice of Intent to Lien.

With respect to Steppan's failure to comply with NRS 108.226(6), Steppan claims the "Iliescus did not raise the 15-day notice of intent to lien before trial" but did so only in post-trial motions. RAB 1; 29. Once again, these assertions are

simply wrong. This violation was raised in the Iliescus' initial Application to expunge the lien, many long months "before trial." I AA0001; 0002 ll. 2-4; 0005 ll. 1-22 (as Steppan himself later admits, at RAB 31). This argument was thereby preserved for appeal, after final Judgment entered on these two consolidated cases, which consolidated cases include that initial Iliescu filing. Steppan's parallel claim (RAB 31) that the Iliescus did not raise this issue in their Answer to his lien foreclosure Complaint, is also inaccurate, as it ignores the Iliescus' Second Affirmative Defense, averring Steppan's failure to perfect his standing to pursue his lien by complying with the lien statutes, at NRS 108.221 *et seq.* I AA0216, at ll. 7-11.

Respondent Steppan's claim that the 15-day notice statute does not adequately define the difference between a multi-use project which includes residential construction, and a non-residential project (RAB 34) must also be rejected. NRS 108.226(6) clearly states that it applies to any construction project which "**involves** the construction of . . . **multi-family** or single family **residences**, including, **without limitation**, apartment houses." Emphasis added.

Moreover, Steppan also failed to substantially comply with NRS Chapter 108 in numerous other ways. IX AA2004-2008.

E. Steppan's Mechanic's Lien Is Not to Secure Payment for Work "Provided By or Through the Lien Claimant" Steppan, but Rather, Seeks Payment for FFA's Unpaid Invoices, for Its Unlicensed Work, Provided Directly to the Customer.

Steppan argues he is entitled to lien for FFA's work because FFA was acting as a retained "sub-consultant to Steppan" such that FFA's work was performed "by or through" Steppan, rendering it lienable by him under NRS 108.222(1)(a) or (b). *See*, RAB 36; 45; 54. The problem with this theory, as demonstrated via voluminous citations to the record in the AOB, is the lack of any trial testimony that Steppan retained FFA as his subprovider, and the voluminous contrary evidence that FFA performed its work directly for the customer, BSC. *See* AOB at pp. 8-27; 43-50. Steppan's new contrary assertions also contradict his own sworn testimony[6] that he owed no payment liability to FFA, on the basis of any agreement he entered into with FFA, which assertions cannot be squared with his subsequent claim that he had retained FFA as his subprovider.

(i) FFA's Work was Unlicensed, and Therefore Was Not the Proper Subject of a Steppan Lien, Including Under the DTJ Design Decision.

Steppan's lien is for work performed by FFA, and its employees,[7] and for its unpaid invoices. Steppan sidesteps these inconvenient facts by focusing instead on

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[6] XIII ASA at AA2976, ll. 17-19.

[7] Including Steppan, who contrary to his current assertions (RAB 38-39) remained for all practical purposes merely an employee of FFA during the work. VIII AA1913, at ll. 17-19; AA1916 at ll. 2-3; XIII-XIV ASA at AA3071-3074.

the assertion that he, Steppan, was licensed to perform the contract FFA directed him to sign with BSC. RAB 39-41.

This contention misses the point. Steppan cannot lien for FFA's work where that work was performed by FFA and its employees directly for the customer and not as a subprovider to Steppan, regardless of whether FFA had one licensed employee, and even if Steppan could lien for his own work.

Steppan's license does not mean that any joint venture with FFA for him and FFA to "both" provide services to BSC (IX AA2054) "violated no licensing statute or regulation." (RAB 39). Rather NRS 623.349 requires that, if a Nevada licensee is to jointly practice architecture with a non-Nevada licensed entity, such an association must be owned, 2/3, by the Nevada licensee. *See also*, *DTJ Design Inc. v. First Republic Bank*, 318 P.3d 709, 711-12, 130 Nev. Adv. Op. 5 (2014) , applying this rule to a single construction project. FFA was solely owned, during the contract work, by Friedman, and its sole licensee Steppan owned 0% thereof. Steppan was paid his regular salary by FFA during the time period the project was performed, and he expected no bonus or profit sharing from the project. XIII-XIV ASA at AA3072-3074.

Steppan further claims that it "is undisputed that Steppan . . . maintained 'responsible control' over the project." RAB 39. This is false as it very much *is* disputed that Steppan maintained responsible control over the project. Steppan's

definition of responsible control, that it is a level of responsibility which must be assumed "as [the project]'s approaching a time for sealing and signing" (as quoted at RAB 40) is the very attitude which the relevant architectural regulations warn against. NRS 623.029 requires "responsible control" to be exercised "during . . . preparation" of the instruments of service, *not* later, only once those documents are approaching the date to be signed. *See also*, IX AA2197-98.

Steppan's claim that he only needed to become more materially involved in the project later on, if it had ever approached a time for the work product to be signed and sealed, also demonstrates that his lien for FFA's work should have been rejected under *DTJ Design*. In that case, the Nevada Supreme Court noted that had the unlicensed foreign architectural firm, DTJ Design, pursued a lien in the name of its sole Nevada licensed member, Thomas W. Thorpe (*i.e.*, if DTJ Design had done exactly what FFA did here) such a lien would still need to be rejected where Thorpe owned less than 2/3 of DTJ Design (just as Steppan owns 0% of FFA), and where Thorpe did not become principally involved in the project until "nearly a year after the contract was signed" (*DTJ Design*, 318 P.3d at 711) (just as Steppan did not plan to become more principally involved until the project approached the time for his signing and sealing).

Thus, Steppan's lien must be rejected *for the exact same reason that the Nevada Supreme Court said a lien in the name of Thorpe would have been rejected*

in the *DTJ Design* case: Like Thorpe, Steppan was not a 2/3 owner of FFA, and Steppan was less than principally involved in the project, as compared with FFA's owner, and its other architects and employees, who contributed almost 95% of the work (X AA2339), with Steppan, like Thorpe, not planning to become more materially involved until much later. Moreover, Steppan's own witness, FFA owner Friedman, under questioning by Steppan's own counsel, refuted any possible suggestion of Steppan having principally or materially supervised the work in any meaningful fashion at any earlier period, including for purposes of claiming responsible control thereof, testifying that he, Friedman, supervised this project, and Steppan would only have assumed that role if Friedman were away from the office. V AA0995; 1006-07. The invoices also refute Steppan's alleged responsible control, listing Nathan Ogle, not Steppan, as the project manager (*see, e.g.*, VIII AA1799, 1801), a role supported by the numerous communications between Ogle and the client which are not even "cc"ed to Steppan. *See, e.g.*, VIII AA1755; 1757; 1771; XIX ASA at AA4388; AA4390; AA4391; AA4397.

Steppan's attempts (RAB 46) to distinguish *DTJ Design* must therefore be rejected, as the only real difference between this case and *DTJ Design* (which was unavailable to guide the court or the parties during trial, having been decided thereafter, such that it is of key importance in reviewing the district court's post-trial rulings) is that this case involved the very sham (having an employee with a

license pursue the lien in the name of the foreign firm) which the Nevada Supreme Court indicated would not have worked any better for DTJ Design than it should have worked here for FFA.

Moreover, even if Steppan *had* hired FFA as his sub-architect, where FFA was not licensed, Steppan cannot include FFA's work in his lien. *See, e.g., Holm v. Bramwell*, 67 P.2d 114 (Cal. Ct. App. 1937) (lien claimant cannot lien for an unlicensed subcontractor's unlicensed work). Even if it were providing those sub-architect services to Steppan (which it was not) rather than directly to BSC, FFA was doing so without a license, in violation of NRS 623.360(b)(1), and without a written contract with its purported client, Steppan, as required by NRS 623.325.

(ii) Steppan/FFA Failed to Properly Prove Compliance with NRS Chapter 623.

Steppan argues that these licensing and related Steppan-involvement issues were not timely raised below so as to be properly preserved for appeal. RAB 41. Once again, this is inaccurate. III AA0532; AA0588-89. Moreover, as noted in the AOB at p. 29, the Iliescus felt precluded from raising these issues again, at trial, based on the second partial summary judgment order, which was premature, based on this preclusive effect, which is further grounds to reverse and set aside the Summary Judgment rulings which precluded a full trial on the merits.

More importantly, architectural lien claimants are required to "plead and prove" their compliance with Nevada's architectural licensing statutes, as part of

their own "*prima facie* case when seeking compensation for . . . architectural services" in Nevada regardless of whether this compliance is or is not "raised as an affirmative defense." *DTJ Design*, 318 P.3d at 710, 712. Thus, Iliescus may challenge Steppan on this issue on appeal, based on Steppan having failed to adequately prove-up his own case on this issue, and on the related issue of the need for him to prove that his lien was for his own work performed by or through him.

(iii) The Architectural Board's Determination Is Not Binding.

Steppan also contends that the architectural board investigated and rejected these licensure arguments. RAB 42. In fact, however, the complaint to the architectural board did not result in any evidentiary hearings by that board (for purposes of creating any *res judicata* effect), but was, instead, not acted upon until *after* the district court trial and decision, upon which, the architectural board, citing that "decision" of the "Washoe County District Court" chose not to move forward. IX AA2119. Thus, it is wholly circular reasoning for Steppan to now suggest that the district court's order is supported by a later architectural board determination, when that district court order was in fact relied upon for that board determination. *Cunegin v. Zayre Dept. Store*, 437 F.Supp 100 (E.D. Wis. 1977) (*res judicata* principles only apply to agency determinations if both parties had a full and fair

opportunity to litigate and argue their version of the facts).[8]

In any event, agency determinations are not binding upon this Court, whose function is to interpret the law, in a manner which is "in no way bound by [an] agency's legal interpretation." 73 Corpus Juris Secundum. Public Administrative Law Procedure §53 (*citing, Chavez v. Mountain State Constructors*, 929 P.2d 971 (N.M. 1996)). *See also, Fireman's Pension Commission v. Jones*, 939 S.W.2d 730 (Tex. Ct. App. 1997) (although an agency's interpretation of a statute is entitled to serious consideration if it is reasonable ... such interpretation is a legal determination that does not bind the court.) *Schneider v. Chertoff*, 450 F.3d 944, 952 (9th Cir. 2006) (an administrative agency's interpretation or application of a statute is question of law reviewable *de novo* by court).

(iv) No Evidence Has Been Cited to Support the Finding that Steppan Hired FFA.

Because he is unable to cite any trial testimony or evidence to demonstrate that he retained FFA, Steppan instead asks this Court to rely on a statement made by the district court, in which it averred that its rulings were supported by the trial record. RAB 44. Significantly, however, in making this, take-my-word-for-it assertion, the trial judge also did not reference any specific evidence that would

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[8] Although this case does not involve a direct challenge to or appeal from any board determination, it should be noted that, under NRS 233B.135(3) courts may set aside a final decision of an administrative agency on the basis of an error in law or if clearly erroneous in view of reliable, probative and substantial evidence or if arbitrary or capricious or an abuse of discretion.

support his post-trial oral finding that Steppan employed FFA.

Nevertheless, this assertion by the trial court is the only refutation offered by Steppan to the facts demonstrated at AOB 7-27, and the citations to the record contained therein. Thus, zero evidence has been referenced by Steppan to support any finding that FFA was ever retained or hired by Steppan to act as a subprovider to Steppan, or to refute the voluminous evidence that FFA worked directly for the customer.

Steppan, in conclusory fashion, argues that "this Court cannot find that the district court abused its discretion" because the district court says that its rulings were "based on the trial evidence." RAB 45. However, "the district court said so" is not the standard of appellate review. No trial testimony has been cited by Steppan to demonstrate that Steppan employed FFA, or to explain or refute the repeated Steppan and Friedman statements during trial indicating FFA's direct relationship with BSC, despite ample opportunities, by now, to have cited to any such countervailing evidence if it existed. *See, e.g.*, X AA2297-2298; 2437 ll. 15-28. More importantly, the claim that FFA had been retained by Steppan to act as his sub-consultant is not only unsupported by any evidence, but is directly contradicted (i) by Steppan's own sworn testimony that he never entered into any agreement to personally pay FFA (XIII ASA at AA2976, ll. 17-19), such that FFA was not his subprovider looking to him as its customer for payment, and (ii) by the

voluminous evidence that FFA was working directly for BSC. *See*, AOB at pp. 7-27, and 43-50.

(v) Nevada National Bank v. Snyder Supports this Appeal.

The need to overturn the lower court is not based solely on the *DTJ Design* decision, but this Court should also do so pursuant to the Nevada Supreme Court's decision in *Nevada National Bank v. Snyder*, 108 Nev. 151, 826 P.2d 560 (1992), *partially abrogated on other grounds by Executive Management Ltd. v. Ticor Title Insurance Co.*, 118 Nev. 46, 38 P.3d 872 (2002), for the reasons discussed at AOB 43-46.

Steppan attempts to distinguish *Snyder,* by claiming that it was based solely on a finding that the lien claimant had always done business as a corporation, not as a sole proprietor. However, Steppan also always previously did his work as an employee of FFA, and took no steps to establish himself as a Nevada sole-proprietorship. IX AA2037-38. Moreover, the *Snyder* decision was *not* based solely on this single factor. Rather, in *Snyder*, the Court also determined that it was improper for an individual member of a foreign architectural firm to act as the plaintiff in a lien foreclosure suit where (i) it was the foreign architectural firm who had produced the "construction drawings" (ii) which were created by the "employees of" the foreign entity, not the employees of the individual lien plaintiff, and (iii) where after a certain date, "all invoices" being liened for were

"submitted to" the customer on behalf of the foreign architectural firm (all of which factors, and many many more, are also true here).

FFA's contention that *Snyder* can be distinguished because "FFA has never asserted that it had standing to record a lien or sue to foreclose" thereon (RAB 47) entirely misses the point. Although in *Snyder,* the foreign firm had originally asserted the lien and sued to foreclose thereon, this was not the focus of the decision, which instead examined whether one of the firm's individual members could foreclose a lien on the firm's behalf. This is exactly what happened in the present case (AOB 25-27), and is exactly what *Snyder* forbids.

Indeed, the present case demonstrates exactly *why* the principles outlined in *Snyder* are so important. Steppan, again and again, below, wasn't required to meet his own burden to prove-up his own lien, and was instead able to repeatedly rely on evidence as to *FFA's* work, and *FFA's* invoices, and *FFA's* advances to its subproviders, etc., to support a supposed *Steppan* lien.

For example, Steppan testified (not even on his own behalf, but in his capacity "as the executive vice president of" FFA) as to the methods used by *FFA* to ensure that its company invoices were valid, in order to support his *Steppan* lien for those *FFA* invoices (VI AA1412-1416); Steppan was allowed to provide evidence that *FFA* performed and invoiced for extra side work, extraneous to the initial agreement, to uphold a *Steppan* lien for that *FFA* performed and *FFA*

invoiced side work (VI AA1402-1408); Steppan was allowed to lien for *FFA's* subcontractor reimbursable advances, without showing (or even claiming) that he was the party who had contracted for, let alone paid, said advances. AOB 21. Indeed, Steppan has admitted that FFA paid these advances and that he, Steppan, "wouldn't have been responsible" to pay the same (XIV ASA at AA3074-3075) notwithstanding which testimony Steppan included these advances in his own purported "Steppan" lien.

Any objective party who did not know the name of the caption of this case, reading the testimony presented by the Plaintiff at trial from his own witnesses, Friedman and Steppan, under examination by their own counsel, would conclude that FFA, not Steppan, was the Plaintiff. Indeed, notwithstanding the caption, on more than one occasion, the district court itself expressly recognized that the evidence was clearly being presented to establish FFA's (and not Steppan's), right to payment! *See, e.g.*, VI AA1402 at ll. 11-22; AA1405 at ll. 17-24, AA1407 at ll. 9-15. But the court nevertheless upheld a lien in *Steppan's* name for the same.

This is precisely what the *Snyder* decision forbids. If this was truly *Steppan's* lien, then why wasn't he ever required to plead and prove it up as his own lien in the same manner as any other lien claimant would have been required to do? Why is Steppan allowed to include, within *his* lien, amounts owed to FFA, for *its* work, and its flat fee invoices for that work; for *its* side work, and *its* side-

work invoices; and for *its* advances to *its* subproviders, and *its* invoices for those advances; even though Steppan has sworn under oath that he was never liable to pay FFA? Has any other lien claimant in the history of this State been allowed to lien for someone else's advances to their subproviders? Or for moneys owed to a co-worker who had his own independent relationship with the customer? There is no rational basis to allow Steppan to do here, for FFA, what an individual member of a foreign architectural firm was prohibited from doing for that foreign architectural firm in *Snyder*.

F. NRS 623 Was Violated in This Case.

Steppan also contends that FFA was merely a design consultant to Steppan; that Nevada's architectural licensing statute does not prohibit this relationship; and that any contrary ruling would render Nevada's statutes unconstitutional. RAB 51-57. Each of these arguments is inaccurate.

(i) No Consultant Relationship Existed Between Steppan and FFA in this Case.

Steppan's arguments at RAB 54-55, asserting that he should be treated as having retained FFA as his subprovider, must be rejected. Steppan has provided testimony that he owes no liability to FFA, which is obviously inconsistent with any claim that he ever retained FFA. XIII ASA at AA2976-77.

Moreover, even if Steppan had retained FFA as his subprovider, he has *still* failed to provide any legal authority for his assertion that an individually licensed

architect can utilize unlicensed, out-of-state individuals and firms to complete architectural work under NRS Chapter 623. RAB 54-55. Nothing in the statute supports this assertion. Steppan is thus reduced to arguing that the plain language of the statute does not apply, because "FFA only worked as a design consultant to Steppan" not as an architect, "and is therefore exempt from NRS Chapter 623." RAB 51. This contention is absolutely absurd. NRS Chapter 623 does not even recognize "design consultant" as a category. FFA cannot have its employees other than Steppan perform 95% of the subject architectural work, and handle all of the direct communications with the client, and with government agencies, and then expect to be taken seriously when it avers it was working only as a mere "consultant" to Steppan. *See,* AOB at 47-48, for further analysis on this point.

(ii) The proper reading of NRS Chapter 623.

Steppan further argues that because "the architectural board has granted Steppan a license even though he is employed by a design firm that is not two-thirds owned by Nevada licensees" the Iliescus' reading of NRS Chapter 623 must be faulty. RAB 53.

This is a straw man misreading of the AOB. The Iliescus are not contending that Steppan had no right to be licensed in Nevada, or to contract for Nevada work, or to retain other sub-architects to work for him, assuming that those sub-architects were also properly licensed, and signed a written contract to provide sub-

architectural services, as required by the statute. What the Iliescus argue is that no such facts exist. Nevada's relevant statutes need not be read in a manner which is inconsistent with their plain language, or with *DTJ Design*, or with *Snyder* in order to determine that said statutes were violated. *See, e.g., United Electric Supply Co. v. Greencastle Gardens Section III Ltd. Partnership*, 373 A.2d 42 (Md. Ct. App. 1977) (rejecting mechanic's lien where an unlicensed party "permit[ted] its employees to perform electrical work" and "knowingly covered that illegality by using [a licensee's] license as a shield to obtain" the work, which illegality was not overcome simply because licensee was supposed to supervise the work); *Power City Communications, Inc. v. Calaveras Telephone Co., et al.* 280 F.Supp. 808 (E.D.Cal. 1968) (Contractor which submitted bid and signed contract in the name of a licensed corporation whose "communications division" the Washington contractor had recently purchased, did not thereby comply with the licensing requirement and could not pursue compensation for its work); *Burry & Son Homebuilders, Inc. v. Ford*, 426 S.E. 2d 313, 315 (S. Car. 1992) (unlicensed builder's use of one licensed hourly employee held to not substantially comply with statute requiring residential builder to itself be licensed to enforce building contract); cases cited at AOB 46.

Steppan's strawman misreading of the AOB should be rejected.

(iii) Steppan's Constitutionality Red Herring.

State professional licensing statutes have been routinely upheld as well within the policing power or taxing power of a state legislature, for decades. *Clark County v. Los Angeles City*, 70 Nev. 219, 265 P.2d 216 (1954). There is, in any event, no *constitutional* right to a mechanic's lien (let alone for someone else's work), as mechanic's liens are purely a creation of statute. The legislature, in creating the statutory privilege (not the constitutional right) to a mechanic's lien, was well within its rights to limit that privilege to lien claimants who are liening for their own licensed work, and to forbid the unlicensed work of unlicensed providers from creating any statutory lien. No authority to the contrary has been provided, and Steppan's red-herring constitutionality arguments, based on strawman versions of the Iliescus' arguments, should be rejected.

It should also be noted that, even if FFA had been fully licensed, there would still in any event be no basis for Steppan to lien for FFA's work, which FFA so clearly performed directly for BSC, and not as a subcontractor to Steppan.

G. NRS 108.239(12) Does Not Create Any Basis for a Property Owner's Personal Liability.

The lien, if allowed to be foreclosed upon, would be Steppan's full remedy for his complaint, which listed only one cause of action, to foreclose thereon. AOB 50-55.

Respondent presents no substantive contrary arguments on this point, instead

merely arguing that this issue is not ripe. However, if the issue was not ripe, then Steppan should not have insisted that language regarding the same be included in the final Judgment (X AA2369-74), which language, preserving Steppan's misreading of NRS 108.239(12), creates an appealable issue.

Based on the only substantive arguments which have been presented on this issue, this Court should rule against Steppan thereon, if this issue even needs to be reached because the lien is upheld (which it should not be).

CONCLUSION

Based on the foregoing and on the AOB, this Court should reverse the two Summary Judgments entered below, the post-trial findings and decision, the final Judgment, and all other orders, and awards derived therefrom.

DATED this 11th day of August, 2016.

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DATED this 11th day of August, 2016.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c), I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT, and that on this 11th day of August, 2016, service was made by the following mode/method a true and correct copy of the foregoing **APPELLANTS' REPLY BRIEF,** to the following person(s):

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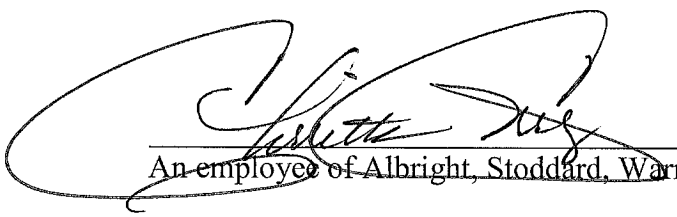

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