Docket Number 78086

In the

SUPREME COURT

For the

STATE OF NEVADA

J.E. JOHNS & ASSOCIATES;
A.J. JOHNSON,

Appellants,

v.

JOHN LINDBERG; MICHAL LINDBERG
AND JUDITH LINDBERG

Respondent

Appeal from a Decision of the Second Judicial District of the State of Nevada,
Washoe County, Court Case No. cv15-00281

APPELLANTS' OPENING BRIEF

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Disclosure Statement, NRAP 26.1

The Appellants have been represented in this matter by C. Nicholas Pereos, Esq., (13) and Glade L Hall, Esq. (1609). Both Mr. Pereos and Mr. Hall are sole practitioners who own their own practices. There are no members of corporate entities appearing as counsel in this case.

Dated this 25th day of June 2019.

/s/ Glade L. Hall
Glade L. Hall, Esq.
Attorney for Appellant

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ROUTING STATEMENT-
RETENTION IN THE SUPREME COURT

This case is presumptively retained for the Supreme Court to "hear and decide" because it raises a question of statewide public importance, NRAP 17(a)(14).

This belief is based on the interest being shown by numerous inquiries and comments being received by Appellants and their counsel from the members of the real estate sales profession and related businesses, escrow and title companies. (See Statement of Issues on Appeal).

TIMELINESS OF APPEAL

The Amended Judgment appealed from was entered and Notice of Appeal given on January 24, 2019.

Notice of Appeal was filed on February 4, 2019.

The appeal was from the final Amended Judgment filed by the district court.

INTRODUCTION

This case was commenced by Respondents under a claim of actual and punitive damages caused by alleged failure of the seller and real estate brokers and agents to disclose certain facts pertaining to the sale of a residence in a single family residential zone, where an auxiliary structure on the residential lot was connected underground to the septic system of the main residence. The auxiliary structure had been used as residence.

Respondents settled with the other defendants for $57,5000, the seller settled the claim against them for $50,000 and the buyer's broker and agent settled the claim against them for $7,500.

Appellants made a formal offer of judgment in the amount of $5,000 shortly after the other defendants settled. At that point in time, Respondents had incurred $13,820.85 in attorneys' fees. The district court later found the actual damages suffered by Respondents to be $27,663.95. Accordingly, at the time of the Appellants' Offer of Judgment, Respondents alleged injury was a total of $41,494.80. Appellants' offer of $5,000 would have brought the total recovery of the Respondents to $62,500. Nevertheless, the district court ordered that Appellants were only entitled to a contribution from the sellers', Reynolds, settlement of one/third of the amount paid by the Reynolds.

After a rejected offer of judgment, the sellers' broker and alleged agent continued to trial before the district court, sitting without a jury.

The evidence showed that while the transaction was in its due diligence period, the Respondents received an inspection of the septic system which disclosed the actual capacity of the septic system. Respondents were also advised by the Reynolds that there was a blueprint of the septic system, but Respondents never bothered to request that blueprint. The Respondents proceeded to close escrow with this knowledge, thus invoking the provisions of NRS 113.150, that the buyers take the property under such circumstances without further recourse.

The district court found that the sellers' broker and agent mislead the buyers by failing to disclose that the septic tank was too small to serve the main residence and the Mother-in Law Quarters (hereinafter "MiLQ").

The district court found that the Respondents had been damaged by the cost to add additional septic system capacity and to obtain a variance authorizing residential use of the MiLQ.

The district court awarded Respondents claim for attorney's fees in the amount of $48,116.84, together with interest thereon from the commencement of the case on February 10, 2015.

On Motion to Alter or Amend the Judgment, based on the rejected offer of

judgment and contribution by the settled defendants, the district court reduced the damages award to $3,513.95 but did not reduce the attorney's fee award.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

1. Did the district court commit error of law when it held that the Appellants should have known that the septic tank was too small for the existing uses?

2. Did the district court commit error of law when it held that the Respondents were misled by Appellants on the size of the septic tank on the subject property when the actual size of the septic tank serving the property was determined and disclosed to Respondents in a written report which they signed off on at close of escrow?

3. Did the district court commit error of law when it failed to apply the provisions of NRS 113.110-150, that the buyer is without recourse if he or she elects to proceed to close escrow when the actual size of the septic tank serving the property was determined and disclosed to Respondents by a report which they signed at close of escrow?

4. Did the district court commit error of law when it found that the Respondents had been damaged by the costs of the addition of new septic capacity to obtain a variance to enable lawful usage of the MiLQ as residential living space?

5. Did the district court commit an error of law when it failed to find a wrongful rejection of an Offer of Judgment from the Appellants of $5,000, at a point in time when the Respondents had settled with other defendants for $57,500,

their attorney's fees were $13,829.85, and the Respondents' actual damages were some $27,663.95? Had these Appellants' offer of judgment been accepted, Respondents would have received a total of $62,500 by way of settlement, on damages of $27,663.95 and attorney's fees of $13,820.85 for a total of $41,484.80. Had these Appellants' offer of judgment been accepted, the additional attorney's fees of $35,820.85 from that point in time forward would not have been incurred. Application of the sanctions of NRCP 68 to the Respondents would have been a complete denial of attorney's fees and costs, and the possibility of attorney's fees and costs to the Appellants herein.

6. Did the district court commit error of law when it awarded interest on the full amount of attorney's fees from February 10, 2015 on, when the fees had been incurred commencing in 2015 and the bulk of the time and charges were incurred during 2017 and 2018?

7. Was the cost of obtaining the additional septic tank capacity and variance the legally appropriate measure of damages for the alleged failure to disclose when Respondents could have continued lawful use of the lot and residence, without using the auxiliary structure as residence and have suffered no cost of such lawful use? The cost of obtaining the additional residential space was, therefore, not to

compensate for a loss, injury proximately caused by the corrected disclosure, during escrow, or that residential use of the MiLQ was not lawful.

STATEMENT OF THE FACTS

In September of 2012, the Reynolds, defendants in the district court, were the owners of real property commonly known as 20957 Eaton Road, Washoe County, Nevada (Hereinafter, "the property"). (App. 3, 615 and 607). The property consisted of a single family residence, a two-bay garage, one bay of which was converted into the MiLQ with a second story loft, and a barn, part of which was converted into an office area. (App. 603) The MiLQ had been constructed under a building permit but the final inspection had not been performed. (App. 213). The MiLQ was being occupied at the time of the subject sale by Reynolds mother-in-law. (App. 598). That space was also used by the Lindbergs (buyers) as a mother-in-law quarters immediately after the property was purchased. Sewage disposal for the property was by a septic system. (App. 614 - 615).

The market area of the property was described by the involved appraiser as typically having "out buildings, finished and unfinished, garages, barns and guest houses". The appraiser also opined that the improvements to the subject (the improved area of the garage and barn) as conforming for the area and may contribute to the overall marketability of the subject. (*Id.*). The appraiser reported

that the (App. 614) Washoe County Assessor's records show the MiLQ "guest house" as containing 1460 sq. ft. More important, the appraiser reports that "Over time, the guest house has been improved to be more in line with the quality of the main residence, however, the improvements **may or may not be legal and for appraisal purposes, were given little value."** (App. 614, Emphasis supplied). He noted that the Washoe County Assessor's office shows these improvements and their dimensions, which he has accepted and reported.

On September 21, 2012, Reynolds met with appellant, AJ. Johnson (Hereinafter "A.J.") to complete the documents necessary to authorize A.J. to list and sell the property. These included a SELLER'S REAL PROPERTY DISCLOSURE form (App. 177), a DUTIES OWED BY A NEVADA BY REAL ESTATE LICENSEE form (App. 602), and a Residential Listing Input form. (App. 603).

The Residential Listing Input form is signed by the Reynolds. Above their signatures is a section of the form which provides:

> Execution of this listing input form confirms that I/we have executed concurrently herewith an "Exclusive right to sell listing agreement with the undersigned licensee unless otherwise noted in the body of the listing form
>
> **I/we acknowledge that the information herein is true and correct to the best of my/our knowledge** and I/we agree to indemnify and hold the undersigned licensee his/her

> broker, and the NNMLS free and harmless . . .from any liability or damage arising from incorrect or undisclosed information provided by me/us. Reynolds dated and signed this form. (App. 593).

The information provided by the Reynolds and accepted by A.J. was that the property had 3 bedrooms, 2 baths, and a total of 3880 feet of living space, 2180 square feet of that reported space was in the main house and 1700 was in the "second house." Reynolds told A.J. that the square footage was correct because ". . . they had had permits and had the in-law quarters completed." (Tr. 93, See also Tr. 93 and 102 "all permits in place"). The Reynolds requested that A. J. list the living area as 3880 square feet. A. J. felt uncertain about how the listing described the property and so telephoned the board of realtors and spoke with the their attorney who advised her that so long as she described the breakdown of the square footage among the three structures in the 'Remarks" section of the listing, the listing would be appropriate. (Tr. 93). A.J. relisted the property in accordance with that advice two hours after the initial listing had been entered. (Tr. I, 93).

A.J.'s listing; however, was withdrawn by her broker Jim Johns (Hereinafter "Johns"), and the property was relisted with Johns as the listing agent/broker on December 1, 2012. (App. 192). Based, again, on information supplied by the Reynolds and the Washoe County Assessor's office, the listing stated that the total

living space was 3,880 square feet. The MLS "Remarks" on this listing clarified that the property was comprised of three separate units. (App. 162). Among other "puffing," the listing states "Three separate units on the property in-law quarters or guest house, office or studio or tack room or office. The possibilities are endless. . .." (App. 193).

Lindbergs employed Ken Amundson and Brian F. Kincannon to represent them in the ensuing transaction. An offer to purchase the property for $375,000, prepared by Amundson, was presented to the Reynolds on January 3, 2013. (App. 184). On January 4, 2013, Reynolds counteroffer of $385,000 was accepted. (App. 183). The agency disclosure forms prepared by both A. J. and Johns and later signed by the Lindbergs clearly stated that A. J. and Johns were representing the interests of the sellers and not the interests of the buyers, the Lindbergs. (App. 602).

On January 3, 2013, the Lindbergs acknowledged that they had read and understood the Information Regarding Private Well and Septic System form provided to them by their own agent. (App. 189). This form recites the following:

> Real Estate agents have no special training, knowledge or expertise concerning these systems. The Seller is required by law to disclose any problems with the system on the SELLER'S REAL PROPERTY DISCLOSURE FORM. The seller's disclosure is not a substitute for thorough and professional inspection

> of the system by licensed professionals.
>
> The buyer is strongly urged to obtain such inspections. Performance in the past is not an indication. . ..
>
> If you are buying a home with a private well and/or septic system, it is the buyer's responsibility to have the system checked by licensed professionals and to verify costs associated with owning these systems. Buyer is advised to check with the appropriate agencies to verify potential costs and time frame associated with hook-up to public systems. NEITHER THE SELLER, NOR THE SELLER'S AGENT WARRANT THE CONDITION OF THE PRIVATE WELL OR SEPTIC SYSTEMS AND WILL NOT BE RESPONSIBLE FOR FUTURE PROBLEMS DISCOVERED AFTER CLOSE OF ESCROW.

Also, on January 3, 2013, the Lindbergs submitted questions to Reynolds through their agents concerning the septic tank capacity and other issues with the property. (App. 656). Reynolds responded through A. J. that the septic tank capacity was 1500 gallons. A. J. made a typographical error by passing on the information to Amundson that the capacity was 15,000 gallons. (App. 657). The Offer and Acceptance Agreement, required Reynolds to provide a "SEPTIC PUMPING" and a "SEPTICE INSPECTION". (App. 187, ln. 42-43).

Waters Vacuum Truck Service was employed to pump the septic system and make that inspection. On January 18, 2013, Waters submitted their report to the escrow. (App. 206 - 212). A copy was sent to the Lindbergs through their agents.

(Tr. pg. 34). The capacity of the septic tank was disclosed as being 1000 gallons in that report in three separate places: (App. 208, upper middle of page; App. 209, middle of page: and App. 211 upper middle of page, right side.). Lindberg admits that he was aware of the septic capacity before close of escrow. (Tr. I, 34).

Copies of these pages were presented to the Lindbergs, read by them, and signed during close of escrow under the notation "Read and Approved". Witness, Gloria Grubic, the escrow officer conducting the transaction, testified that the Lindbergs did, in fact, read and accept those pages. (Tr. III, 9).

When Reynolds first contacted A.J. to list their property with her, A.J. recommended that they obtain an appraisal to determine what the listing price should be. (Tr. 114). A.J. also wrote in the listing form, "Agent request appraisal be done to verity info." (App. 600). Reynolds employed an appraiser, Richard Lake, to conduct an appraisal as requested by A.J. The report describes the subject property as having three bedrooms, (App. 614, mid page), 2180 sq. ft. of "Gross Living Area", (*Id.* mid-page). The appraiser notes:

> "The subject also has the utility of a guest house and a loft above the guest house. (App. 615)
>
> The guest house is 1460 sq. ft. The Washoe County Assessor shows the guest house and a loft above the guest house. Over time, the guest house has been improved to be more in line with the quality of the main residence, however, the improvements **may**

> **or may not be legal** and for appraisal purposes, were given little value. With that said, since **the market area typically has out buildings, finished and unfinished, garages, barns and guest houses, the improvements to the subject is conforming for the area** and may contribute to the overall marketability of the subject.
>
> (*Id.* text, bottom) (Emphasis supplied).

The appraisal confirms that the property was zoned LDS, single family residential. (App. 615).

This appraisal was delivered to the Lindbergs agent and Lindbergs saw the appraisal in their agent's office at the time the offer was being prepared. (Tr. 27).

Inspections of the well, and a general inspection were performed, and the resulting reports delivered to the Lindbergs. (App.206-214). Lindbergs were advised that Reynolds had a blueprint of the septic system and were willing to share that with the Lindbergs. (App. 657, ln. 2, 659). Note that App. 653 discloses that the septic system served both houses. (App. 653, ln. 1). There is no record of the Lindbergs making any effort to obtain this blueprint.

During this process, neither A. J. nor Johns met with, or communicated directly with the Lindbergs.

Just prior to close of escrow, and pursuant to the OFFER AND ACCEPTANCE AGREEMENT, (App. 187, lns. 50 -51), the Lindbergs conducted

a walk-through inspection of the property to ensure compliance with the terms of this agreement. They did so on February 26, 2013 and signed the WALK THROUGH AND PROPERTY CONDITION RELEASE with the notation "Fine per Inspection". (App. 700).

At the close of escrow, the Lindbergs were presented with the appraisal of the property, the septic report, a well report, and other documents that accurately described the property. The Lindbergs acknowledged receipt of such reports, signed off on them with the notation, "Read and Approved," and proceeded to close the escrow. (Tr. III, 9-12).

Accordingly, the Lindbergs accepted the subject property with full knowledge of the conditions and circumstances of the property. Specifically: that the zoning allowed single family residences, that the MiLQ may or may not be lawfully used for residential purposes; that the septic tank capacity was 1000 gallons, and that the one septic tank served both houses. It is the falsely alleged failure to disclose these conditions and circumstances that were the basis for the claims in the instant action. (App. 35-37).

Note that notwithstanding the knowledge that the MiLQ may or may not be lawfully used for residential purposes, the Reynolds were using the mother-in-law quarters to house their mother in law and the Lindbergs mother-in-law occupied

those quarters immediately after close of escrow, (App. 250, lower left of page), "property has since sold and has continued illegal use." (App. 655, upper page and App. 664-5).

The legal basis for Respondents' allegations against Appellants is a duty owing to the Respondents to disclose material and relevant information concerning the property and a breach of that duty. (App. 35-37).

However, both available appraisals were based on there being only 2,180 square feet of living space. Moreover, the appraisal report dated February 19, 2013, indicated an appraised value of $406,838.00, using the cost approach, and based solely on the size of the primary structure of 2,180 square feet. Clearly, neither the in-law quarters nor the barn office were considered as living area in the two valuations. They were given little value by the appraisers (App. 559). Lindbergs paid $385,000.00 for the property. The appraisals each set the fair market value of the property at $400,000.00 and $406,000.00. Accordingly, the Lindbergs did not pay for any living area outside the 2,180 square feet of the main residence.

On January 19, 2013, the Lindbergs read and approved the Waters Vacuum Truck Service invoice and report that disclosed that the septic tank size of the subject property was 1000 gallons.

On February 26, 2013, Lindbergs signed the standard WALK THROUGH AND PROPERTY CONDITION RELEASE (App. 700), reciting that they had inspected the premises located at 20957 Eaton Road on that date and agreed that:

> "all inspections requested and/or deemed needed have been performed and the results and/or and the results and/or copies of the inspections have been provided to Me/us. All repairs previously requested of the SELLER(S) have been either personally inspected or receipts of work completed have been provided to Me/us. I/We/ do approve of all repairs. If there were other inspections requested in the Offer and Acceptance Agreement that I/We choose not to do, I/We hereby waive the need for those inspections to be completed.
>
> The following items are not in compliance with the purchase agreement and must be corrected prior to close of escrow or funds for their completion may be held in escrow until satisfied.
>
> (LEFT BLANK)."

Over one year after close of escrow, the Lindbergs commenced this action, ultimately suing the Reynolds based on fraud and suing Appellants, and their own agent and broker for violation of NRS 645.252. In their Complaint, the Lindbergs allege that A.J. should have known the size of the sewer tank prior to the inspection by Waters and should have known that the existing tank was too small to serve the property. This allegation refers to a point in time when no one knew or

could have known the tank capacity because it was buried underground and the "problems could not be directly identified." (App. pg. 88, ln. 14-15).

The sellers, Reynolds, and the Lindbergs' broker and agent settled out of the action as will be described in detail in a following section of this brief. Appellants elected to proceed to a bench trial. Respondents called Ms. Cartinella, alleged to be an expert, as their principle witness on liability.

The district court's decision is embodied in the FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT, entered September 18, 2018. (App. 85-94). The court finds that all parties were aware of the zoning code violation prior to close of escrow. (App., ln. 20). It was apparent, however, that the property could be lawfully used as long as the MiLQ were not used as residential areas.

The district court ruled in favor of Respondents. The court states in its order that it considered Ms. Cartinella to be a credible witness and relied on her testimony in making its decision. (App. 87). Appellants submits that such reliance was misplaced.

The district court has interpreted her testimony to be that an agent must know "relevant state laws, zoning requirements, and health regulations." (App 87

and 89, lns. 2-3). This is contrary to the actual standard dictated by the Nevada Legislature as will be shown hereinafter.

Respondents' counsel, Mr. Moore, characterized Ms. Cartinella's function as an expert witness was to give her "thoughts" as an expert witness. (Tr. 5). Ms. Cartinella states that she "looked at just to verity the in regard to the size of the septic for the different bedrooms within a property." (Tr. 10). She "looked at some zoning requirements with the county as well," (Tr. 11) which implies that she did not know those requirements without an investigation. Yet, she testified that the Appellants should have known these requirements.

Mr. Moore asked her what she learned about what the realtors knew in this transaction. (Tr. 12, ln. 9). Ms. Cartinella states that she viewed the listings in this case and that the listings discloses in the comments section that there were three separate units on the property, In-law quarters, guest quarters, guest house, office or studio." This language is describing four separate units and she did not list the main residence. She appears to be saying that there are three units in addition to the main house. (Tr. 25) Her later testimony confirms that she is, in fact, mistaken as to what improvements are existing on the property, "you could add three additional units to that property" (Tr. 25, ln. 24). This was of concern to her because the one-acre parcel is allowed one septic, and the county goes by bedrooms. (Tr. 13). And

the listing says it is a 3 bedroom. And with the other additional units being potential bedrooms, that would what made **me** have concerns." *Id.* Mr. Moore asks, "did you learn there were actually more than three bedrooms on this property?" Ms. Cartinella answers that "The listing, when it says there are three separate units I would **assume** that these . . .can be used for guest quarters. So, I am **assuming** that would be a bedroom." *Id.*

What caught her eye was the lot size of 1.12 acres and the requirement of only one septic per acre.[1] She then refers to the Waters' septic report that "clearly states that it is a thousand gallons." She repeats this statement near the bottom of page 14. She then states this is information the realtors knew or that they should have known. (Tr. 15). Again, prior to the Waters report, no one knew the tank capacity. She then states the legal conclusion that the NRS 645 statutes had been violated.

Mr. Moore asks, "What else should Miss Johnson and/or Mr. Johns have known about this septic system?" Ms. Cartinella answers:

"As far as the size is concerned, it would have to do

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[1] At this point in time, the listing period from September to January 3, 2013, the size of the septic tank was unknown. Had the tank capacity been 1,500, as Reynolds told A.J. that it was, that would have been adequate for lawful use of the MiLQ.

with the bedrooms and the -- on the property.
And a three would be adequate for the thousand gallons.
But after that it is -- I believe and I would have to check
for certainly, but I believe it goes up now into 4 to 5.
It is 1500 gallons and then after that it goes up by
250 gallons per bedroom."

Note that nowhere in the information supplied by the sellers (Reynolds) and used by Appellants for the listings, is the property described as having more than three bedrooms. So, the actual septic tank capacity is adequate for what the Reynolds state they were selling. A second appraisal obtained by the Lindbergs lender also appraised the property as a single-family residence with three bedrooms. It gave little value to the space in the auxiliary structures because they may or may not be legal.

Ms. Cartinella states twice that the tank capacity of 1000 is shown very clearly in the Waters report. The answers to the questions posed by the Lindbergs state clearly that the septic serves "both houses." (App. 644, 655) The Waters report was received by A.J. on January 18, 2013 and forwarded to Lindbergs agents on January 19, 2013, forty days before the close of escrow. (App. 671) Also note that the Lindbergs signed off on the Waters report as "Read and Approved" before the close of escrow. The Lake appraisal of September 12, 2012 was supplied to the Lindbergs on or before January 2013 and discloses that the MiLQ may or may not be legal.

Ms. Cartinella continues to explain that it was the fact of there being only one septic tank allowed per acre that made her question the situation. *Id.* Again, the capacity of the tank was unknown at the point in time she is referring to. Had the tank capacity been 1500 gallons, as Reynolds said it was, the residential use of the MiLQ would have met health department requirements.

She is then asked what she believes Ms. Johnson and Mr. Johns should have disclosed regarding the septic tank. She answers, "I don't know that it's a matter of disclosures because the disclosures typically come from the seller. But in my opinion the agents should have seen a red flag come up when that many units were on the property and that's what I would think." The number of units on the property was obvious and undisputed.

Mr. Moore asks what the agents should have done about those red flags. Ms. Cartinella answers that the agents should have checked with the seller and disclose or make certain the seller understands and discloses the fact that the septic was not adequate for the property.

Mr. Moore then asks whether there was ever a disclosure made by the seller related to the adequacy of the septic system. Ms. Cartinella answers that she did not see anything in the property disclosure. This response does not answer the question and is evasive because there were documents that disclosed the

information necessary to make the legal conclusion that the septic system was not adequate for the property. Finally, she is asked "Do you have an opinion as to whether A.J. or Johns violated their statutory duties to ensure that information that was known or should have been known was disclosed? Ms. Cartinella answers:

> **"I believe** that it is my opinion that as a real estate agent we would know certain things about a transaction. And **I feel** that it is volatile on the "knew" or "should have known. But it is very clear with the county, with many other transactions and I do feel that they should have known that that was a problem."[2]

The level of abstraction in this testimony renders the testimony uncertain and ambiguous.

Mr. Moore compounds the ambiguity when he asks "Do you have an opinion that the problem that you believe should have been known should have also been disclosed? She answers "yes."

Cartinella's testimony does not contain any reference to a standard of care on which Ms. Cartinella is basing her beliefs or opinions. Her testimony completely ignores the statutory standard of care set forth in NRS 645.254 (1), the degree of care that a reasonably prudent real estate licensee would exercise in similar

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[2] She is saying that A. J. and Johns should have immediately known there was a problem and not flagging that problem was a failure to disclose. i.e. the later discovery of the correct information does not relieve Appellants of liability for the initial error in reporting.

circumstances. That is, that the licensee must not act incompetently or with gross negligence. NRS 645.633(1)(h).

Likewise, the testimony completely ignores the statutory standard of care prescribed by NRS 645.253(2), NAC 645.605 (5), a licensee is expected to have the knowledge required to obtain a then current real estate license and to act on that knowledge. In fact, Ms. Cartinella bases her opinion on her personal experience, and states that the knowledge she believes a licensee should have is acquired by experience, not what must be learned to pass the licensing exam. (Tr 24).

The excuse or justification for allowing the buyers to complete the transaction and still avoid the consequences of being without further recourse is that by the time the facts are discovered the buyer has "fallen in love." (App. 37).

Ms. Cartinella admitted on cross examination that she was not aware that the correct size of the septic tank was disclosed to the Lindbergs prior to the close of escrow. This gap in her knowledge about the transaction completely undermines her personal beliefs and opinion testimony. The court in its dialogue with Lindbergs' counsel states "But it (the appraisal) was made available to the buyers?" Moore: Our contention is that's the case. . . The court: "He admitted that he saw it." Moore: "Certain portions of it, correct." (Tr. 35). The court then states to the witness that the appraisal was received by the Lindbergs prior to the close of

escrow. It is clear that Ms. Cartinella was not aware of this fact until it was presented to her while she was on the witness stand. (Tr. 35, ln. 24). When the court asks her the question, "So does that (the may or may not be legal language) put anybody on notice of the situation?" Ms. Cartinella has no answer. She bumbles:

> "Well if they read - - I guess. By the time you are into the transaction this far, I would - - again, I don't know the timeframes. I was not really privy to the appraisals for my report my opinion. But, again, depending on when it was given, by then you have - - you are already into the transaction. You have already - -"[3]

The court interjects: "Fell in love? The Witness; "Fell in love." (Tr. 37).

Ms. Cartinella then goes on to justify her opinion by reference to the numbers of people who see the listings. Ms. Cartinella never answers the court's question, because she can see that, prior to close of escrow, everyone involved was on notice of the correct facts with regard to the septic tank capacity. The appraisal, she did not see before forming her "opinion," discloses that the MiLQ are probably in violation of the zoning if they are used as residences. That is why her admission "I was not really privy to the appraisals for my report my opinion," (Tr. 37, ln. 11) is

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[3] It is clear that she is searching in her mind for support for her conclusions. She is thereby shown to be an advocate for the Lindbergs and not an independent expert.

so fatal to her testimony. She never saw the source of information that discloses the facts she said were not disclosed, size of the septic tank, auxiliary structures may or may not be legal, and that the septic tank served both houses.

Appellants submit that after careful examination of Ms. Cartinella testimony, it is clear that Ms. Cartinella was an under-informed person who testified on the basis of her personal beliefs and feelings, which are contrary to the applicable law and legal standards.

In light of the foregoing, it is clear that all of the material facts concerning the septic system were known by all parties before the close of escrow. Lindbergs, therefore, made the election to close the escrow with this degree of knowledge. As a matter of law, this means that Lindbergs are without further recourse. (NRS 113.130 and 150).

The statutory language does not confine this legal effect to the sellers. The legal effect is stated positively as an unqualified, blanket, and general result of closing with knowledge. (NRS 113.110-150). The agents and/or actions of agents involved in a transaction under NRS Chapter 113 are referred to six times in the statutory language. They are clearly involved in the statutory process. It follows, therefore, that the agent of a seller is covered by the language, "without further recourse." This places the provisions of NRS 645.252 in direct and unavoidable

conflict with the provisions of NRS Chapter 133. This is pointed out to the district court in closing arguments. The district court, however, completely fails to address this conflict.

LAW

Disclosure of the condition of residential real property upon sale is mandated and controlled by NRS 113 Chapter 113.100-150.

NRS 113.120 provides:

> Regulations prescribing format and contents of form for disclosing condition of property. The Real Estate Division of the Department of Business and Industry shall adopt regulations prescribing the format and contents of a form for disclosing the condition of residential property offered for sale. The regulations must ensure that the form:
>
> 1. Provides for an evaluation of the condition of any electrical, heating, cooling, plumbing and sewer systems on the property, and of the condition of any other aspects of the property which affect its use or value, and allows the seller of the property to indicate whether or not each of those systems and other aspects of the property has a defect of which the seller is aware.
>
> 2. Provides notice:
>
> (a) Of the provisions of NRS 113.140 and subsection 5 of NRS 113.150.
>
> (b) That the disclosures set forth in the form are made by the seller and not by the seller's agent. . ..

NRS 113.130 provides:

Completion and service of disclosure form before conveyance of property; discovery or worsening of defect after service of form; exceptions; waiver.

1. Except as otherwise provided in subsection 2:

(a) At least 10 days before residential property is conveyed to a purchaser:

(1) The seller shall complete a disclosure form regarding the residential property; and

(2) The seller or the seller's agent shall serve the purchaser or the purchaser's agent with the completed disclosure form.

(b) If, after service of the completed disclosure form but before conveyance of the property to the purchaser, a seller or the seller's agent discovers a new defect in the residential property that was not identified on the completed disclosure form or discovers that a defect identified on the completed disclosure form has become worse than was indicated on the form, the seller or the seller's agent shall inform the purchaser or the purchaser's agent of that fact, in writing, as soon as practicable after the discovery of that fact but in no event later than the conveyance of the property to the purchaser. If the seller does not agree to repair or replace the defect, the purchaser may:

(1) Rescind the agreement to purchase the property; or

(2) Close escrow and accept the property with the defect as revealed by the seller or the seller's agent **without further recourse**. (Emphasis Supplied)

2. Subsection 1 does not apply to a sale or intended sale of residential property:..

3. A purchaser of residential property may not waive any of the requirements of subsection 1. A seller of residential property may not require a purchaser to waive any of the requirements of subsection 1 as a condition of sale or for any other purpose. . .

As used in this section:

(a) "Seller" includes, without limitation, a client as defined in NRS 645.060.

(b) "Service report" has the meaning ascribed to it in NRS 645.150.

NRS 113.130 does not require a seller to disclose a defect in residential property of which the seller is not aware. A completed disclosure form does not constitute an express or implied warranty regarding any condition of residential property. Neither this chapter nor chapter 645 of NRS relieves a buyer or prospective buyer of the duty to exercise reasonable care to protect himself or herself.

NRS 113.140 provides:

Disclosure of unknown defect not required; form does not constitute warranty; duty of buyer and prospective buyer to exercise reasonable care.

1. NRS 113.130 does not require a seller to disclose a defect in residential property of which the seller is not aware.

2. A completed disclosure form does not constitute an express or implied warranty regarding any condition of residential property.

3. Neither this chapter nor chapter 645 of NRS relieves a buyer or prospective buyer of the duty to exercise reasonable care to protect himself or herself.

NRS 113.150 Provides:

Remedies for seller's delayed disclosure or nondisclosure of defects in property; waiver.

1. If a seller or the seller's agent fails to serve a completed disclosure form in accordance with the requirements of NRS 113.130, the purchaser may, at any time before the conveyance of the property to the purchaser, rescind the agreement to purchase the property without any penalties.

2. If, before the conveyance of the property to the purchaser, a seller or the seller's agent informs the purchaser or the purchaser's agent, through the disclosure form or another written notice, of a defect in the property of which the cost of repair or replacement was not limited by provisions in the agreement to purchase the property, the purchaser may:

(a) Rescind the agreement to purchase the property at any time before the conveyance of the property to the purchaser; or

(b) Close escrow and accept the property with the defect as revealed by the seller or the seller's agent **without further recourse**. (Emphasis Supplied)

3. Rescission of an agreement pursuant to subsection 2 is effective only if made in writing, notarized and served not later than 4 working days after the date on which the purchaser is informed of the defect:

(a) On the holder of any escrow opened for the conveyance; or

(b) If an escrow has not been opened for the conveyance, on the seller or the seller's agent.

4. Except as otherwise provided in subsection 5, if a seller conveys residential property to a purchaser without complying with the requirements of NRS 113.130 or otherwise providing the purchaser or the purchaser's agent with written notice of all defects in the property of which the seller is aware, and there is a defect in the property of which the seller was aware before the property was conveyed to the purchaser and of which the cost of repair or replacement was not limited by provisions in the agreement to purchase the property, the purchaser is entitled to recover from the seller treble the amount necessary to repair or replace the defective part of the property, together with court costs and reasonable attorney's fees. An action to enforce the provisions of this subsection must be commenced not later than 1 year after the purchaser discovers or reasonably should have discovered the defect or 2 years after the conveyance of the property to the purchaser, whichever occurs later.

5. A purchaser may not recover damages from a seller pursuant to subsection 4 on the basis of an error or omission in the disclosure form that was caused by the seller's reliance upon information provided to the seller by:

(a) An officer or employee of this State or any political subdivision of this State in the ordinary course of his or her duties; or

(b) A contractor, engineer, land surveyor, certified inspector as defined in NRS 645.040 or pesticide applicator, who was authorized to practice that profession in this State at the time the information was provided.

6. A purchaser of residential property may waive any of his or her rights under this section. Any such waiver is effective only if it is made in a written document that is signed by the purchaser and notarized.

II.

DUTIES OF DEFENDANT AGENTS

NRS 645.252 provides:

A licensee who acts as an agent in a real estate transaction:

1. Shall disclose to each party to the real estate transaction as soon as is practicable:

(a) Any material and relevant facts, data or information which the licensee knows, or which by the exercise of reasonable care and diligence should have known, relating to the property which is the subject of the transaction.

4. Unless otherwise agreed upon in writing, owes no duty to:

(a) Independently verify the accuracy of a statement made by an inspector certified pursuant to chapter 645 of NRS or another appropriate licensed or certified expert.

(b) Conduct an independent inspection of the financial condition of a party to the real estate transaction.

(c) Investigate of the condition of the property which is the subject of the real estate transaction.

Warnings on the form Sellers Real Property Disclosure "SRPD":

The very last paragraph on the SRPD is just above the signature block for the Buyer(s) and reads as follows:

> Buyer may wish to obtain professional advice and inspection of the property to more fully determine the condition of the property and its environmental status. Buyer(s) has/have read and acknowledge(s) receipt of a copy of this Seller's Real Property Disclosure Form and copy of NRS Chapter 113.100-150, inclusive, attached hereto as pages three (3) and four (4).

John and Michal Lindberg both signed the SRPD provided to them. The duties owed by a Nevada Real Estate Licensee form is a disclosure of those duties.

NEVADA CASE LAW

Nevada case law makes clear that the buyer has the burden to investigate once the buyer is put on notice of uncertainty in the seller's description of the property. The seller is under a general duty to become informed about the description of the property.

> "However, the seller is not held to this responsibility if the purchaser has information which would serve as a "red light" to any normal person of her intelligence and experience that the boundaries are uncertain or that he or she should not rely on the seller to accurately describe the property. If the purchaser is aware of facts from which a reasonable person would be alerted to make further inquiry, then he or she has a duty to investigate further and is not justified in relying on the seller's description of the property. *Woods v. Label Investment Corp*, 107 Nev. 419, 426, 812 P.2d. 1293 (1991). [4]

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[4] This holding is misrepresented in the Nevada Law and Reference Guide as being applicable to the duties of a licensee. (App. 349) The Nevada Supreme Court in that case was describing the interplay between the seller's duty to be informed and disclose and the buyer's duty to investigate when uncertainty in the disclosed information is made to appear. The case clearly states that the seller is relieved of the consequence of the breach of his or her duty when the buyer fails to make further inquiry to protect himself or herself. The issue is reliance. The rule of law is that the buyer may not reasonably rely on information he or she knows to be questionable. i.e.. when a buyer is informed that the use of the subject property "may of may not be legal".

The Nevada Real Estate Division prepares and provides brokers and agents a resource guide titled *"The Nevada Law and Reference Guide."* This document is the interpretation of the agency with the responsibility to execute the foregoing statutes.

The Third Edition, 2012, of this guide, was in effect at the time of this transaction. This is the guidance regarding disclosures related to public information as found on page 1-15 of *"The Nevada Law and Reference Guide,"* Third Edition, 2012. (App. 308 - 495).

Items of Public Record: "A licensee cannot be held liable for a seller's failure to disclose information that is of public record and which is readily available to the client (NRS 645.259(2). Under current Nevada law, a seller of a residential property is required to complete a state mandated form called the Seller's Real Property Disclosure (NRS 113.130 and NRS 113.135). Answers to many of the questions asked on the form would only be known by the seller, who must disclose what he or she knows. Some of those items may be of public record thereby, theoretically, available to anyone. Should the seller not disclose a material fact that is of public record, this statute provides that the licensee cannot be charged with nondisclosure if the licensee reasonably had no knowledge of the

item and the public record was readily available to the client. **The licensee is not required to search the public records to ensure the seller told the truth.**

The district courts holdings are based on what the licensee should have known. This requirement does not apply to the areas outside the expertise of an individual holding a real estate license. For example, a licensee should know that there is a septic tank, but that does not carry the responsibility of being an expert or having the expertise on all matter related to septic tanks.

SUMMARY OF ARGUMENT

1. At the time of listing the property for sale and up to January 18, 2013, none of the parties to this appeal knew or could determine the size or capacity of the underground septic tank. It was, therefore, irrational for the district court to have found that appellants should have known the septic tank was to small and therefore inadequate for the property.

2. After the Waters Vacuum Truck Service investigation and report of January 18, 2013, each of the parties to this appeal knew the actual size of the septic tank was 1000 gallons. The buyers, Lindbergs, proceeded to close escrow on February 28, 2013 with full knowledge of the size of the septic tank and that the MiLQ living space may or may not be legal for residential use. Accordingly, it was

error of law for the district court to hold that the Lindbergs had been misled by earlier incorrect information.

3. The provisions of NRS Ch. 113 provide that a buyer of residential real property who learns corrected information during the due diligence period of an escrow may either withdraw from the purchase of the property or close escrow and be "without further recourse." The failure of the district court to hold that the Lindbergs were precluded from suing appellants by having elected to proceed with the close of escrow with full knowledge of the correct information pertaining to the property, was error of law.

4. The Lindbergs received the full value and consideration which was listed and which they contracted to buy, a three-bedroom residential home with 2180 square feet of living space. Had they occupied that property and only used that space, there would have been no violation of zoning or health regulations. The appraisals of the property both found the fair market value of the property, used in that manner, to be in excess of the negotiated purchase price. Accordingly, when the Lindbergs later elected to increase the septic tank size so as to enable a variance for use of the MiLQ for residential purposes, they were enhancing the utility, and, therefore, the value of the property, not expending money to recover some loss or injury. Accordingly, the expenditures awarded as damages by the

district court were not proximately caused by any failure to disclose, but rather by the Lindbergs desire to add utility and value to the property.

5. There is no applicable legal authority or rational basis for reducing the contribution offset of the $50,000 settlement by the Lindbergs by two-thirds. NRS 17 is clear and straight forward, compensation offset is to be for the full amount of the settlement.

6. Awarding interest on the full amount of attorney's fees from the outset of a case where the bulk of those attorney's fees are incurred nearly three years after the outset is patently unjust. Especially where, as in this case, the attorney is employed on a contingent fee basis, so there is no expenditure of money the use of which forms the justification for charges of interest.

ARGUMENT

I.

Appellants could not have known the septic capacity and, therefore, could not have known it was "too small"

The district court holds that the Lindbergs discovered that the septic system of the property was not up to code, "disenabling" the residential use of that structure. (App. 98). It further found that A. J. Johnson should have known that the septic system was too small for the property.

The phrase "too small" connotes the existence of an item with known dimensions and the dimensions of a second item or a standard that can be measured, then compared to the measurement of the first item. It is logically impossible to compare the attribute of size as between two items, if the dimensions of one of those items is not known. Yet, that is what the district court has held, in its decision, that A. J. should have known. In its decision, the district court finds that no one knew, or could have known, the size of the existing tank, no one could have taken a measurement of the tank because the septic tank was buried underground. (App. 100, ln. 14-15) (This holding speaks to the period before the Waters determination was completed). That measurement being unavailable, there logically could be no comparison of the tank's size to any other tank or size standard set by regulation.

A decision is arbitrary and capricious when not made on a rational basis. *City Counsel of Reno v. Irvine,* 102 Nev. 277, 721 P.2d 371 (1986). Accordingly, the district court's basis for the holding that A. J. knew or should have known that the tank was too small was arbitrary and capricious.

Additionally, NRS 47.250(16) sets forth the presumption that is to be applied when direct evidence on an issue is not available. The presumption is "That the law has been obeyed." This presumption is based on the wisdom and

experience of lawyers, judges, and legislators and embodies the public policy of Nevada. Application of the presumption to the facts of this case would lead to the conclusion that the prior owners of the Reynold's property and the Reynolds had complied with the law in constructing the two auxiliary structures, that is, that a variance was obtained to authorize residential use of these structures, at the time of their construction. A.J. states clearly that the Reynolds told her that the permits had been obtained and the work competed. However, one cannot know this without making an investigation of the property. NRS 645.252(4)(c) specifically provides that a licensee owes no duty to: . . ." conduct an investigation of the property which is the subject of the real estate transaction."

The licensee has the right to rely on the client's representations about the property unless the licensee knows or should know the information is false. This Court has held that, "an agent is not responsible for an independent search for concealed facts in the absence of any information which would have put the agent on notice. *Prigge v. South Seventh Realty*, 97 Nev. 640, 641, 673 P.2d 1222 (1981). Here, the Reynolds told A.J. during the initial stages of the listing that the MiLQ had been permitted and the improvements completed. There was a permit issued, and the work properly done, but the Reynolds did not call for the final inspection, so the process of complying with the procedure to get the final

certificate of occupancy was not completed. If an investigation of the permit history was required to disclose that there was a failure to complete the permit process, it was not the duty of A.J. or Johns to conduct that investigation.

II.

Lindbergs could not have been misled by the early mistake in reporting the septic tank size, when the actual size was determined and reported to them well prior to close of escrow.

As set forth above, the Lindberg's, through their real estate agent, properly asked a number of questions related to the septic tank, water rights, costs, electrical, flood insurance, and natural gas, etc. The Sellers answered these questions and stated that the septic tank was 1500 gallons that served both houses. (App. 645). However, when the Buyers contracted with Waters Vacuum Truck Service to inspect the system and pump the tank, the correct size of 1000 gallons was determined and disclosed in writing on January 18, 2013. This was clearly provided to and acknowledged by the Lindbergs.

The Lindberg's completed and signed the Seller's Real Property Disclosure form (hereinafter "SRPD") that was provided to the Buyer. The Seller and licensees are required to disclose material facts and defects that they have knowledge of. However, NRS 113.140(1) does not require a Seller to disclose

defects they do not know about. Moreover, NRS 113.140(2) clearly instructs the seller that the SRPD is not regarded as a warranty of the condition of the property. Finally, NRS 113.140(3) places the burden of due diligence on the purchaser. If a buyer has information which would serve as a 'red light' to any normal person of her intelligence and experience [or] is aware of facts from which a reasonable person would be alerted to make further inquiry, then he or she is not justified in relying on the seller's description of the property. *Woods v. Label Investment Corp.,* 107 Nev. 419, 426, 813 P.2d 1293 (1991).

The court found that the seller's agents violated NRS 645.252 for failing to disclose that the only septic system served both the primary residence and a mother in law quarter in a separate structure. (App. 88, lines 14 - 21). The court held that:

> "The problem was when it was "discovered" that the mother-in-law quarters had its sewer pipe connected to the main house's sewer pipe which then poured into the 1000-gallon tank which was inadequate without a variance from the county health department.

This is plain error of fact because the written response to the Lindbergs' initial set of questions disclosed clearly that the septic system served "both houses". (App. 653, line 1). How the underground piping was configured is of no significance. The point is that the effluent from both houses had to empty into the same tank. There was only one tank and nowhere else for the effluent to go.

The district court goes on to find that "when the agents became aware that the property, with two structures previously used as living space, were located in a single-family residential zone, they should have known that the septic tank was too small." Again, there is no logical connection between two structures previously used as living space and the concept that the septic tank was "to small". Again, no one among the parties to this transaction knew the septic tank's capacity until receipt of the Waters inspection which determined and reported that the tank had a 1000-gallon capacity. (Note that, if the tank had a 1500-gallon capacity, as the Reynolds had reported, the septic system would have been adequate to serve both houses). At that point in time, the Lindbergs and their agents had been made completely aware, at the very least through the appraisal reports, of the zoning restrictions and that the living space in the property was 2180 sq. ft. and did not include the space in the MiLQ.

The district court opined that this situation should at least have raised red flags and a need to inquire further. However, it is clear from the set of questions sent to the Reynolds on the very day of the initial offer that the Lindbergs and/or their agents were aware of issues with the capacity of the septic system and with which of the structures it served. When the answer, "both houses" is relayed to the Lindbergs and accepted by them, there can be no claim of nondisclosure of the

joining of the piping of the septic system. Further, with the answer "both houses" the claim that this was later discovered is bogus. Knowledge of the specific routing of the sewer drainpipes is not material to the issues that form the basis for the Lindbergs' claims.

Further, A.J. had been told by the Reynolds that the improvements to the MiLQ had been made pursuant to a building permit. As a matter of law, building permits are not issued for construction that violates zoning or health regulations. Washoe County Building Code 100.200.4.

NRS 645.252 is clearly based on the characteristics of the common law of fraud. Nondisclosure of material fact, treble damages, etc. However, this statutory provision does not mention the elements of acts in reasonable reliance on the failure to disclose. Appellants submit that such reliance should be incorporated as a required element of a cause of action under NRS 645. NRS 113.140 (3) implies that the buyer is not relieved of his or her responsibilities under the common law. There should be no punitive damages without these elements existing in each case. The evidentiary requirement should be clear and convincing evidence. As applied by the district court in the instant action, NRS 645.252 could be characterized as "strict liability fraud."

In the instant action, there can be no reasonable reliance on non-disclosure because the Lindbergs knew that the septic tank had a capacity of 1000 gallons, served "both houses" and that the drainpipe for the MiLQ emptied into the septic system of the main house. They also knew the zoning of the property. Each of these items were known well in advance of their election to proceed with the transaction, and in proceeding with the transaction with that knowledge the statutorily mandated effect of taking the property without further recourse.

III.

Failure of the district court to dismiss the instant action against the appellants nullifies the intent of the legislature in adopting the provisions of NRS 113.100 -150.

The statutory scheme embodied in NRS Chapter 113 is clearly intended to reduce the amount of litigation created by residential real estate transactions. (See Summary of Legislation, Research Division of the Legislative Counsel Bureau, 1995). The basic premise of that scheme is that when an offer and acceptance has been arrived at, the transaction is put in escrow, and the parties conduct due diligence, inspections and other investigations during the escrow period. Problems with the transaction are thereby discovered and resolved or the

transaction is terminated, and the potential buyer walks away without the threat of litigation for specific performance or other remedies.

In the instant action, that basic premise was ignored by the district court. The Lindbergs were fully informed of what the zoning of the property would allow, and that the MiLQ may or may not be lawful for residential purposes. The documents received and approved by them at the close of escrow clearly invoke the application of these statutory provisions and these statutory provisions should have been vindicated by dismissal of the Lindbergs complaints as to the appellants. That result would have achieved the objective of these statutory provisions. When the Lindbergs knowingly executed the documents necessary to successfully complete and close the escrow, they made the clear and informed election to forego litigation based on the known facts concerning the property. The form is entitled "Release" and the language of waiver is set forth in the body of the document. The Lindbergs thus relinquished any claims of nondisclosure based, as this case is, on earlier inaccurate information that had been corrected.

The statute is clear that the close of escrow means they are without further resource.

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IV.

The cost of installing new septic capacity was not caused by the claimed nondisclosure

The district court holds that after the discovery that the sewer drains from the MiLQ into the septic tank of the main residence, the use of that structure for residential purposes was "disenabled." This is plain error of law.

The record is clear that, prior to the close of escrow, the Lindbergs knew the prior use of the auxiliary structures may or may not have been lawful and that they could only occupy the main residence for residential purposes. So long as they complied with the legal limits for residential occupancy they were not required to make any changes to the property.

The MiLQ were never legally enabled for use as a residence by the Lindbergs or any owner previous to them. Therefore, the holding that residential use of the auxiliary structures was disenabled by discovery that the sewage from the MiLQ flowed into the septic tank is plain error of law. Those quarters were never enabled for residential use.

It further follows that the claimed damages, consisting of the cost of adding septic tank capacity, was for the purpose of obtaining lawful additional residential space consisting of the previously illegal MiLQ. This cost was not a loss or injury

that could support a claim for damages. It was an election to enhance the lawful utility of the property.

The definition of the term "damages" is:

> "A pecuniary compensation or indemnity which may be recovered in the courts by any person who has suffered any loss detriment, or injury to his person property or rights, through the wrongful act or omission, or negligence of another"

"Actual Damages" are:

> "real, substantial, and just damages or the amount awarded to a complainant in compensation for his actual and real loss or injury..."

Compensatory Damages are such as will compensate the injured party for the injury sustained and nothing more. (Black's Law Dictionary, Fifth Ed., pg. 467) Quoted with approval in *Arnesano v. State Dept. of Transp.*, 113 Nev. 815, 942 P.2d 139 (1997).

The costs to enlarge the septic tank servicing the property in the instant case were not a "debt" were not "costs" and were not damages in the sense of compensation for loss or injury.

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V.

The decision to only allow contribution offset by one-third of the $50,000 settlement paid to Lindbergs by Reynolds was error of law

Additional Facts Specific to This Issue:

In 2017, the property owners, Reynolds, reached a confidential settlement of $50,000.00 with the Lindbergs. There is no evidence of record that the settlement included any amount for punitive damages. The money was paid, and dismissal of the Reynolds was entered, but the settlement amount was not disclosed. (App. 81). The Lindbergs also settled with their real estate agent and broker for $7,500.00. Again, there is no basis in law for finding that any amount of that settlement was based on punitive damages. On November 3, 2017, Appellants made an offer of judgment in the amount of $5,000.00, which was rejected. At that point in time, the Lindbergs had incurred attorney's fees in the amount of $13,820.85. After trial the district court found that Lindbergs has suffered damages of $27,663.95. Accordingly, at the point in time when Johns made their offer of judgment, Lindbergs total of damages plus the attorney's fees was $41,484.80. Acceptance of the Appellants' offer would have brought the amount of settlement received by Lindbergs to $62,500.00. The Lindbergs rejected this offer. The Lindbergs then went on to incur an additional $34,296.85 in

attorney's fees. The total amount of attorney's fees awarded by the district court was $48,116,84, with interest, on the full $48,116.75 from February 10, 2015 to the present.

Following entry of the district court's decision, Appellants learned of the amount of the settlements. They then filed a motion to alter or amend the judgment, pursuant to NRCP 59(e), based on a claim for offset by contribution from the settlements. (App. 113). The district court ordered a hearing regarding the correct amount of contribution to be offset against the damages and attorney's fees awarded by the court. After the hearing, the court ordered that only one-third of the Reynolds settlement was appropriate to be offset. This conclusion by the district court was based on the finding that the Reynolds settlement was for a claim of treble damages and only one-third of that settlement was compensatory damages.

Appellants' motion was based on NRS 17.245 which provides that Appellants were entitled to a set-off and a form of contribution as to prior settlements in good faith, because such settlements under subsection (a) of NRS 17.245 reduce the claim against non-settlement tortfeasors **by the amount of the settlement,** i.e. through an equitable set-off. *The Doctors Company v. Vincent*, 120 Nev. 644, 98 P.3d 681 (2004).

The language of the statute is even more clear and certain. "When a release . . . is given in good faith to one or more persons liable in tort for the same injury it reduces the claim against the others to the extent of any amount stipulated by the release or in the amount of the consideration paid for it, whichever is greater." Nothing in NRS 17.245 supports a reduction of the amount of offset because the claims against the settling defendants included a claim for punitive damages. The reduction of the offset in the instant action is without legal foundation and an error of law.

Further, the practical effect of reduction of the offset is to impose the provision for punitive damages on the real estate licensees in this case. The provision for punitive damages only applies to principals in a real estate transaction, not agents or brokers. NRS 113.150(4).

By the district court's judgment, two thirds of the Reynolds settlement were deducted before the amount of offset applied to the contribution is computed. This place the penalty of treble damages on the agent. This is plain error of law.

V.

It was error of law to award interest from the inception of the case on the full amount of attorney's fees when the bulk of the fees were incurred years after the inception of the case

The district court awarded attorney's fees plus interest on the full amount of those fees from the commencement of the case, even though the bulk of the attorney's fees were incurred later in the case, $19,128.49.

Appellants are aware of this Court's holding in *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 570 P2d. 258 (2006), that when attorney's fees are awarded as damages, interest on attorney's fees was allowed from the time of service of the summons and complaint. Appellants respectfully submit that the application of the *Albios* holding in the factual setting of the instant case shows the application of that ruling can become unjust. Here, the case was being prosecuted on a contingent fee basis. Accordingly, the Lindbergs were not paying their attorneys during the period before judgment, they were not suffering any loss or injury attributable to the loss of use of their money. This Court's decision in Albios is *sua sponte* and focused on the language NRS 17.130(2). The key phrasing of NRS17.130(2) are the terms, "debt," "damages," and "costs." "Damages," however, is a generic term. The base definition of "damages" is "A pecuniary compensation or indemnity which may be recovered in the courts by any person who has suffered any loss detriment, or injury to his person property or rights, through the wrongful act or omission, or negligence of another."

"Actual Damages" are "real, substantial, and just damages or the amount awarded to a complainant in compensation for his actual and real loss or injury..." Compensatory Damages are such as will compensate the injured party for the injury sustained and nothing more. (Black's Law Dictionary, Fifth Ed., pg. 467) Quoted with approval in *Arnesano v. State Dept. of Transp.*,113 Nev. 815, 942 P.2d 139 (1997).

The attorney's fees in the instant case were not a "debt" were not "costs" and were not damages in the sense of compensation for loss or injury. Accordingly, it is respectfully submitted that the plain language of NRS 17.130(2.) does not support the award of interest from the service of the Summons and Complaint. In fact, the application of the rule in *Albios* to the instant action is adding an unjust windfall to an already over compensated party.

CONCLUSION

Each of the alleged failures to disclose that form the bases for the Lindbergs' claims in this case, in fact, were disclosed. Once licensees have disclosed the material facts they are responsible to disclose, then it is the responsibility of the purchasers to exercise reasonable care to protect themselves. They did not do so.

In this case the Lindberg's had received documents, responses to questions, and appraisals that presented information that the MiLQ may or may not be lawful,

once they received such information, the burden shifts to the buyers to investigate further. Accordingly, the factual information relied on for their claims in the instant action, present issues that should have been investigated by them.

The district court finds that A.J. should have known the septic tank was too small to serve the property. However, at the time of listing the property for sale and up to January 18, 2013, none of the parties to this appeal knew or could determine the size or capacity of the underground septic tank. The district court's finding that appellants should have known the septic tank was to small and therefore inadequate for the property, is irrational and, therefore arbitrary and capricious.

The Lindbergs proceeded to close escrow on February 28, 2013 with full knowledge that the MiLQ living space may or may not be legal for residential use. It is error of law for the district court to hold that the Lindbergs had been misled by earlier incorrect information when they knew the incorrect information had been superseded by correct information.

The failure of the district court to hold that the Lindbergs were "without further recourse," by having elected to proceed with close of escrow with full knowledge of the correct information pertaining to the property, was error of law.

The Lindbergs' addition of increasing the septic tank size so as to enable a variance for use of the MiLQ for residential purposes, enhanced the utility, and,

therefore, the value of the property. Accordingly, the expenditures awarded as damages by the district court were not proximately caused by any failure to disclose, but rather by the Lindbergs desire to add utility and value to the property.

There is no applicable legal authority or rational basis for reducing the contribution offset of the $50,000 settlement by the Reynolds by two-thirds. NRS 17.245 is clear and straight forward. Compensation offset is to be for the full amount of the settlement.

Awarding interest on the full amount of attorney's fees from the outset of a case where the bulk of those attorney's fees are incurred nearly three years after the outset is patently unjust. Especially where, as in this case, the attorney is employed on a contingent fee basis, so there is no expenditure of money the use of which forms the justification for charges of interest. It is respectfully submitted that this Court should tighten the circumstances under which such attorney's fees are allowed.

This Court should enter its opinion and order that the Amended Judgment is vacated and order that the matter be remanded to the district court for a determination of whether appellants are entitled to an award of attorney's fees and costs based on appellants' rejected offer of judgment.

Respectfully submitted this 25th day of June 2019

/s/ Glade L. Hall
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Reno, NV 89509
Attorney for the Appellants

AFFIRMATION

The undersigned affirms that the foregoing pleading does not contain a social security number of any person..

DATED this 25th day of June 2019.

/s/ Glade L. Hall
Glade L. Hall
Attorney for Appellants

ATTORNEY S CERTIFICATE - NRAP 28.2

1. I hereby certify that this 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 10 in 14 point Times New Roman type style.

2. I further certify that this 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)(C), it is proportionally spaced, has a typeface of 14 points, and contains 11,387 words.

3. Finally, I hereby certifies that he has read the brief to which this certificate is affixed; that to the best of his knowledge, information and belief, the brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and that the brief complies with all applicable Nevada Rules of Civil Procedure, including the requirement of Rule 28(e) that every assertion in the brief regarding matters in the record be supported by a reference to the page and volume number, if any, of the 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 25th day of June 2019.

/s/ Glade L. Hall

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CERTIFICATE OF SERVICE

Pursuant to the Nevada Rules of Civil Procedure (5)(b), I certify that I am an employee of the Law Office of Glade L. Hall , and that on the date listed below, I caused to be served a true copy of the foregoing pleading on all parties to this by electronically filing the foregoing with the Clerk of the Court by using CM/ECF system which served the following parties electronically:

JOHN DAVID MOORE, ESQ.
3715 Lakeside Drive, Suite A
Reno, Nevada 89509

DATED this 25th day of June 2019.

/s/ Glade L. Hall
Glade L. Hall, Esq.
Employee of Law Office of Glade L. Hall