IN THE SUPREME COURT OF THE STATE OF NEVADA

J.E. JOHNS & ASSOCIATES, a Nevada business entity; and A.J. JOHNSON, an individual, Appellants/Cross-Respondents, vs. JOHN LINDBERG, an individual; MICHAL LINDBERG, an individual; and JUDITH L. LINDBERG, an individual, Respondents/Cross-Appellants.	No. 78086 District Court Case No. CV15-00281

Appeal from the Second Judicial District Court
of the State of Nevada In and For Washoe County

The Honorable Jerome Polaha, District Judge Presiding

RESPONDENTS' ANSWERING BRIEF AND OPENING BRIEF ON CROSS-APPEAL

Attorney for Respondents/Cross-Appellants John Lindberg,
Michal Lindberg, and Judith L. Lindberg
John D. Moore, SBN 8581
Moore Law Group, PC
3715 Lakeside Drive, Suite A
Reno, NV 89509
Tele: (775) 336-1600
Fax: (775) 336-1601

IN THE SUPREME COURT OF THE STATE OF NEVADA

J.E. JOHNS & ASSOCIATES, a Nevada business entity; and A.J. JOHNSON, an individual, Appellants/Cross-Respondents, vs. JOHN LINDBERG, an individual; MICHAL LINDBERG, an individual; and JUDITH L. LINDBERG, an individual, Respondents/Cross-Appellants.	No. 78086 District Court Case No. CV15-00281

NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) that must be disclosed:

NONE

These representations are made in order that the judges of this court may evaluate possible disqualifications for recusal.

The undersigned counsel appears on behalf of Respondents/Cross-Appellants John Lindberg, Michal Lindberg, and Judith L. Lindberg (hereinafter referred to in this brief as "Respondents") and was counsel for Respondents in the District Court action.

DATED: August 8, 2019. MOORE LAW GROUP, PC

By: /s/ John D. Moore
JOHN D. MOORE, ESQ.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

NEVADA STATUTES

RESPONDENTS' ANSWERING BRIEF

I. STATEMENT OF THE CASE

a. Procedural Background of this Matter

Respondents filed a complaint against various defendants on February 10, 2015 to vindicate their rights arising from the sale of property to Respondents that took place on or about February 28, 2013. (Appellant's Appendix Vol. 1 pp. 1-9). During this matter, the Respondents' claims were eventually fully stated in a second amended complaint, filed on May 18, 2016. (Id. at pp. 33-42). The Respondents' claims set forth in the second amended complaint against the sellers of the property, who were named defendants in this action, arose under NRS 113.150 as a result of the sellers' failure to disclose that an in-laws quarters located on the property the sellers sold to Respondents was converted into living space without permits and as a result of the sellers' failure to disclose other items related to the property. Respondents also asserted claims of negligent and fraudulent misrepresentation against the sellers. (Id.) Respondents asserted separate claims arising under NRS 645.252, NRS 645.257, and NAC 645.600, against the sellers' realty agent and broker, A.J. Johnson, James E. Johns, and J.E. Johns & Associates and against the buyers' realty agent and broker, Brian Kincannon, Robert Clement, and Group One, Inc., dba Keller Williams Realty. (Id.) These claims were stated as a result of the realtors' failure to disclose information that they knew or that they should have

known related to the septic system at the property, among other issues, which constitutes statutory violations of NRS 645.252, NAC 645.600, and NRS 645.257.

During this litigation, the sellers themselves and the buyers' realty agent and broker resolved all claims the Respondents raised against them. The only remaining defendants at the time this matter proceeded to trial were the sellers' realty agent and broker, A.J. Johnson, James E. Johns (who is deceased) and J.E. Johns & Associates ("Appellants"). The claims against the Appellants were statutory in nature, the Appellants did not assert a right to an offset against other defendants in their answer to Respondents' second amended complaint and the Appellants did not assert crossclaims for contribution or indemnity against the other defendants that settled with the Respondents. (Respondents' Appendix Vol. 1 pp. RA 0015 – RA 0020). As such, the Appellants did not appropriately plead a right to an offset in this case.

This matter proceeded to trial against the Appellants. Following a three-day trial, the District Court entered judgment in Respondents' favor, awarding Respondents $75,789.70, plus $19,121,48 in interest on the judgment. (Appellants' Appendix Vol. 1 pp. 100-101). Despite the Appellants' basic failure to appropriately plead their claims in this matter, including a right to contribution, indemnity, or an offset, the District Court, after trial, granted the Appellants' motion to amend the judgment previously entered against Appellants, therein providing Appellants with an offset of amounts paid to Respondents in settlements with the defendants that are

no longer involved in this matter. (Id. at pp. 131-139 and pp. 159-162). It is from this amended judgment that both the Appellants and the Respondents have filed appeals, with the Appellants claiming that the District Court did not offset the judgment enough and with Respondents asserting that the District Court erred in offsetting any amounts from the original judgment.

b. Objection to Appellants' Opening Brief

Appellant J.E. Johns & Associates ("J.E. Johns") is not a proper appellant in this case. On February 13, 2018, because J.E. Johns had not answered Respondents' second amended complaint, Respondents served J.E. Johns' attorney with a notice of intent to take default. (Respondents' Appendix at Vol. 1 pp. RA 0060 – RA 0062). Thereafter, J.E. Johns did not answer the Second Amended Complaint and the Clerk of the District Court entered J.E. Johns' default on March 1, 2018. (Id. at RA 0195 – RA 0196). J.E. Johns has not acted to set aside this default. As such, J.E. Johns is not entitled to participate in this appeal and the appeal should be dismissed as to J.E. Johns. *Estate of Lomastro ex rel Lomastro v. American Family Ins. Group*, 124 Nev. 1060, 1068-1069, 195 P.3d 339, 344-346 (2008)(addressing the distinction between the entry of default, which limits a defaulted party's participation, and entry of a default judgment). A.J. Johnson is the only appropriate appellant remaining in this matter.

In her Opening Brief, A.J. Johnson, fails to cite the legal standard(s) of review

applicable to the issues addressed in her appeal. Moreover, at multiple locations within the Appellants' Opening Brief, which are too numerous to list here, A.J. Johnson fails to support factual statements and references to the record outlined in her Opening Brief with a citation to portions of the Appendix. In many instances as well, citations to portions of the record in support of statements contained in the Opening Brief refer to the wrong document or to the wrong pleading. Finally, A.J. Johnson did not attach the transcript of the trial of this matter to her Appendix, though Ms. Johnson appears to reference this transcript throughout her Opening Brief. To alleviate this error, Respondents have attached the trial transcript to their Appendix, with other documents and pleadings left out of Appellants' Appendix.

II. JURISDICTIONAL STATEMENT

The Nevada Supreme Court and the Nevada Court of Appeals may both exercise jurisdiction over this appeal and cross-appeal in accordance with NRAP 3A(b)(1). The amended judgment in this matter is a final judgment upon which an appeal may be taken. The amended judgment in this matter and notice of entry of the amended judgment were both filed and served on January 24, 2019, and the Appellants/Cross-Respondents J.E. Johns & Associates and A.J. Johnson (collectively referred to herein as "Appellants") filed their notice of appeal on February 4, 2019. Respondents filed their notice of cross-appeal on February 25,

2019, within the time permitted for the filing of a cross-appeal under NRAP 4(a)(1).[1] The notice of appeal and notice of cross-appeal were, therefore, timely.

III. ROUTING STATEMENT

The amended judgment that is the subject of this appeal and cross-appeal may be heard by the Nevada Supreme Court under NRAP 17 because the District Court's decision to offset amounts in the amended judgment, when Appellants never alleged in their pleadings a right to an offset and when the District Court previously ruled that Appellants did not possess a right to an offset or to contribution, constitutes a matter of first impression upon which the Nevada Supreme Court may retain jurisdiction. This matter of first impression was considered by the District Court when it granted Respondents' motion in limine number 2 prior to trial, outlining that Appellants did not possess a right to an offset or to contribution, and again when the District Court considered the Appellants' motion to amend the judgment and, thereafter, altered its prior ruling and permitted the Appellants' request for an offset after trial. (Respondents' Appendix Vol. 1 pp. RA 0212 - RA 0218)(Appellants' Appendix Vol. 1 pp. 105-166). However, NRAP 17(b)(7) also supports jurisdiction in the Nevada Court of Appeals because this appeal and cross-appeal are the result

[1] The final day to file an appeal or cross-appeal in this matter, under NRAP 4, fell on February 23, 2019, a Saturday, and therefore, by rule, the cross-appeal could be filed on the next business day, which was Monday, February 25, 2019.

of a "post-judgment order in a civil case," when the District Court granted Appellants' motion to amend the judgment.

IV. STATEMENT OF THE ISSUES ON APPEAL

1. The findings of fact of the District Court related to when the Appellants knew or should have known of the actual size of the septic tank located on this property are supported by substantial evidence and should not be overturned by this Court. As a result, the District Court did not commit error of law when it found that the Appellants should have also known that the septic tank was too small for the property.

2. Moreover, relying upon when the Appellants knew or should have known the actual size of the septic system, the District Court did not commit error of law when it found that the Respondents were damaged by the Appellants' failure to disclose that the septic tank was too small for the property. The fact that the size of the septic tank was known to the Respondents during this transaction does not alleviate the Appellants of their statutory duty to disclose that the septic tank was too small for the property, which Appellants knew or should have known.

3. NRS 113.110-150 does not apply under the facts of this case. Respondents are not asserting a right to recover against Appellants because they failed to disclose the size of the septic tank. Instead, once the septic tank's size was known during this transaction, which is not disputed, Appellants knew or should

have known that it was too small for this property, which was never disclosed to Respondents. NRS 113.110-150 do not shield a realtor from disclosing to all parties to a transaction information that they knew or should have known. Again, the actual size of the septic tank and the date this was known to Respondents does not provide any information about whether the tank is appropriately sized for the property in question, which is something that the Appellants knew or should have known.

4. The District Court's award of damages to Respondents was appropriate. This paragraph responds to Issues #4 and #7 set forth in Appellants' Opening Brief, which appear to be the same issue stated in two different ways.

5. The District Court appropriately rejected Appellants' claim that they could "add up" an offer of judgment with settlements reached with other defendants in this case to come to an award of damages that Respondents "could have obtained" if they had accepted Appellants' paltry offer of judgment prior to trial. In an "apples to apples" comparison of Appellants' offer of judgment ($5,000.00) to the judgment ultimately obtained against Appellants after trial, Respondents clearly obtained a better result at trial. Rather, Appellants should have accepted the Respondents' offer of judgment ($7,500.00) prior to trial.

6. Controlling case law upholds the award of interest on attorney's fees awarded as damages from the date of the filing of the complaint until the judgment

entered is paid in full.[2]

7. In their Opening Brief, the Appellants focus exclusively on the District Court's findings that Appellants knew or should have known that the septic tank was inadequate for this property. Appellants completely ignore the second basis for liability found in this case, which the District Court outlines in its findings of fact and conclusions of law. That second basis for recovery includes that the Appellants knew or should have known that this property, zoned as single family residential, could not have multiple residential structures on the property. The District Court concluded that Appellants should have disclosed this zoning issue to the Respondents. The District Court also concluded that the damages awarded to Respondents in this case were available under this second theory of liability. The Court should uphold this second theory of liability, which the Appellants failed to address in their Opening Brief.

V. STATEMENT OF THE FACTS DETERMINED AT TRIAL

In September of 2012, Harry and Deann Reynolds (the "Sellers") listed for sale their residential real property located at 20957 Eaton Road, Reno, Nevada

[2] Appellants did not, at trial or in their Opening Brief, contest the award of attorney's fees as damages to Respondents. As such, they have waived this issue on appeal. *Pellegrini v. State*, 117 Nev. 860, 866, 34 P.3d 519, 523 (2001)(noting that issues, in a criminal case, were waived because they were not raised at trial or on appeal). Respondents recognize there are exceptions to this general rule, but none of those exceptions should apply here.

89521. (Respondents' Appendix Vol. 1 p. RA 0369)(Appellants' Appendix Vol. II pp. 579-582). The original listing for the property placed on the northern Nevada Multi-Listing Service ("MLS") listed the total living space at the real property as 3,880 sf. (Appellants' Appendix Vol. II pp. 579-582). This listing also indicated that the property was "single-family residential," even though the listing itself demonstrates that there are two living quarters located on the property and a third accessory building, meaning that the property is being used as "multi-family" even though it is zoned as "single-family." (Id.) A.J. Johnson, a licensed real estate agent in Nevada at the time, listed the property for sale originally in September 2012. (Id.)

Eventually, toward the end of 2012, the Sellers removed the original listing from MLS and placed a new listing of the same property on MLS, also listing the total living space at the real property as 3,880 sf and indicating that the property was "single-family residential." (Appellants' Appendix Vol. 1 pp. 181-182). The second listing was made by James E. Johns, Ms. Johnson's broker and husband, who is now deceased. (Id.) Ms. Johnson has been substituted into this matter as Mr. Johns' legal representative. (Respondents' Appendix Vol. 1 pp. RA 0013 – RA 0014).

Even though Mr. Johns was the listing realtor on the property in the second listing, Ms. Johnson acted as a real estate agent during the listing and during the eventual sale of the property. (Appellants' Appendix Vol. 1 pp. 183-190, Vol. III pp. 587-592 and pp. 602-605). She communicated directly and frequently with the

Respondents' realtor, Brian Kincannon, by email and by other means, she signed counter-offers for Appellants, and she is listed as their agent on intake forms from Ms. Johnson's broker. (Id.) In fact, the documents produced in this case demonstrate that Mr. Johns himself never communicated with Brian Kincannon by email. (Id.)

Before the Sellers listed the property for sale in September 2012, they obtained an appraisal of the property at the suggestion of their realtor, A.J. Johnson. (Appellants' Appendix Vol. III pp. 611-648). This appraisal demonstrates that the property itself contains 3,640 sf of livable space, not 3,880 sf. (Id.) Ms. Johnson had this appraisal in her possession during this sales transaction with the Respondents because she refers to this appraisal in an email directed to Brian Kincannon, the Respondents' realtor, that is dated January 4, 2013. (Id. at p. 660).

Ms. Johnson also indicated in a Residential Listing Input Form dated September 21, 2012, that Ms. Johnson prepared during this transaction that the listed square footage of the property was confirmed by the owners and by an appraiser, which also demonstrates that Ms. Johnson had the appraisal in her possession at the beginning of this sales transaction. (Id. at pp. 602-605). The appraisal is dated September 5, 2012, meaning that when Ms. Johnson filled out the Residential Listing Input Form on September 21, 2012, where she states that the square footage was confirmed by an appraiser, she had the appraisal in her possession. (Id.)

On January 3, 2013, the Respondents made an offer to purchase the property

for $375,000.00. (Appellants' Appendix Vol. 1 pp. 184-190). In an email dated January 4, 2013 sent at 12:36 p.m. directed to Brian Kincannon, the Sellers through Ms. Johnson made a counter-offer to sell the property for $385,000.00, indicating that they were making the counter-offer because they had an appraisal that showed the appraised value of the property exceeded $385,000.00. (Id. at p. 183 and at Vol. III p. 660). This email dated January 4, 2013 refers to the appraisal specifically and appears to have the appraisal attached to the email. (Id. at Vol. III p. 660). After receiving this email from Ms. Johnson, Respondents accepted the Sellers' counter-offer at 1:42 p.m. on January 4, 2013. (Id. at Vol. 1 pp. 184-190).

During the testimony of Ron Cohen, the Respondents' consultant who helped them navigate the issues in this case, Mr. Cohen outlines the zoning requirements in this area of Reno, Nevada, which allows for "single-family residential" use with one main residential structure and a second accessory building on the property. (Respondents' Appendix Vol. III pp. RA 0490 – RA 0517). Zoning for this area does not allow for two accessory structures. (Id.) The property that is the subject of this litigation has one main residential structure and two accessory structures, in violation of zoning requirements. (Id.). According to expert testimony provided in this case, Ms. Johnson and Mr. Johns knew or should have known the zoning requirements for this area and should have known that the property in its then listed state violated local zoning requirements. (Respondents' Appendix Vol. III pp. RA 0463 – RA 0468; RA

0488 – RA 0490). Ms. Johnson also testified at trial that she understood the zoning requirements of this area and that multiple units are not permitted without a special use permit or special zoning change. (Respondents' Appendix Vol. III pp. RA 0550 – RA 0551).

During the sales transaction in this matter, Mr. Lindberg had questions regarding the septic system because he owned another property that had a septic system. (Appellants' Appendix Vol. III pp. 656-657). As such, Mr. Lindberg's realtor communicated Mr. Lindberg's questions regarding the septic system to Ms. Johnson, including questions related to its size, when it was last cleaned out, and other pertinent questions. (Id.) These questions were asked by email and Ms. Johnson gave responses by email. (Id.) In response to questions about the size of the septic tank, Ms. Johnson conveyed that the septic tank was 15,000 gallons in size. (Id.) Ms. Johnson claims that she obtained this information related to the size of the septic tank from her clients. (Id.) Despite this clear error in the reported size of the tank, Ms. Johnson did not investigate the actual size of the tank.

Later, during the pendency of this transaction, the sellers were required to obtain an inspection of the septic system, which was obtained on or about January 18, 2013. (Appellants' Appendix Vol. 1 p. 187 and pp. 206-212). Ms. Johnson and/or Mr. Johns received a copy of the septic system inspection report as stated in the report itself. (Id. at pp. 206-212). Ms. Johnson then forwarded the septic system inspection

report by email to Respondents' realtor on January 19, 2013. (Id. at Vol. III p. 659). The septic system report that Ms. Johnson obtained on January 18, 2013 and that she forwarded to Respondents' realtor on January 19, 2013 shows that the septic system was served by a 1,000-gallon tank, 15 times smaller than what Ms. Johnson disclosed previously. (Id. at Vol. 1 pp. 206-212). Despite the clear error in reporting the size of the tank earlier in this transaction, Ms. Johnson did not further investigate the septic system after learning of its true size.

With the report in hand during this transaction, Ms. Johnson knew or should have known the actual size of the septic tank. (Id.) Ms. Johnson also knew or should have known that the septic tank served two residential structures. (Id. at Vol. III p. 657). Ms. Johnson also knew or should have known the size of the lot upon which the two residential structures were located and that a lot of this size could only support one septic tank. (Respondents' Appendix at Vol. II, p. RA 0302)(Appellants' Appendix at Vol. 1 pp. 192-193). With all this information that Ms. Johnson knew or should have known, according to the uncontroverted expert testimony of Sherrie Cartinella, Ms. Johnson also should have known that the septic tank with only a 1,000-gallon capacity was too small for this property, which is information that Ms. Johnson was obligated to disclose to the Respondents prior to the closing of this sales transaction. (Respondents' Appendix Vol. III pp. RA 0453 – RA 0468, RA 0488 -

RA 0490.[3]

Ms. Johnson did not disclose the information she knew or should have known about the adequacy of the septic tank to Respondents before they closed on the sales transaction on February 28, 2013. Unfortunately, Respondents learned almost one year after the purchase of the property that the square footage of living space found at the property was less than advertised (3,640 square feet, not 3,880 square feet), that the converted living area in the carriage house turned into a mother-in-law's quarters was not properly permitted, and that the septic system in question was too small for the existing structures.

Under this state of the facts, Respondents proved at trial that Appellants violated NRS 645.252, NRS 645.257 and NAC 645.600, and that Appellants are responsible for the actual damages Respondents suffered in this case, as stated under NRS 645.257(1). At trial, Respondents requested the payment of the abated value of the property as listed for sale (3,880 sf) and the property as it existed at the time of the sale (3,640 sf), requesting $23,802.80 in damages. (Respondents' Appendix at Vol.

[3] All information noted above that Ms. Johnson knew or should have known, including information about the proper square footage of the house, the size of the septic tank, and all other such facts and information about the property should have also been known to the Respondents' realtor, Brian Kincannon, and by extension to Mr. Kincannon's broker, Robert Clement, which is why these two individuals were defendants to this action. That is why ordinary people like the Respondents hire realtors. That is also why realtors must disclose all known information, or information that they should know, to all parties to a real estate transaction.

III RA 0632). Respondents also requested $27,663.95 in damages associated with increasing the capacity of the septic system, which was necessary for Respondents to obtain a variance from Washoe County to install a second septic tank at the property to make the septic system conform to Washoe County's building code requirements, and to perform all other requirements imposed by Washoe County to remedy the septic system. (Id. at RA 0633 – RA 0635). Respondents also requested at trial an award of attorney's fees and costs as damages, either in the amount of the contingent fee ($12,484.34) or in the lodestar amount of attorney's fees actually incurred ($42,158.34), plus an award of costs. (Id. at RA 0636 – RA 0637). In this regard, Respondents proved at trial and the Court awarded $48,116.84 in attorney's fees and costs as damages. (Appellants' Appendix Vol. 1 pp. 89-97). The District Court also awarded Respondents the damages requested to remedy the septic system, in the amount of $27,663.95, finding that Appellants should have known that the septic system, as actually constructed, was not adequate for the property. (Id.) The District Court denied Respondents' request to be paid the abated price of the home, finding that Respondents were aware of the actual size of the property before they closed on the property. (Id.)

Prior to trial before the District Court, Appellants and Respondents filed various motions in limine touching on issues to be raised at trial. In one of their motions in limine, Appellants sought to exclude or limit the testimony of Respondents' expert, Sherri Cartinella, claiming that Ms. Cartinella was not qualified to testify as an expert and that her opinions were inadmissible. (Respondents' Appendix Vol. I pp. RA 0037 – RA

0059). Respondents opposed that motion and outlined why the District Court, in its discretion as a gate keeper of expert testimony, should allow Ms. Cartinella to testify. (Id. at Vol. I pp. RA 0071 – RA 0185). At trial, the District Court allowed Ms. Cartinella to testify as an expert and heard her testimony on the second day of trial. (Respondents' Appendix Vol. III pp. RA 0453 – RA 0490). The District Court considered Ms. Cartinella's testimony as very valuable and relied upon it in its findings of facts and conclusions of law. (Appellants' Appendix Vol. 1 pp. 90-91).

In one of their motions in limine, the Respondents sought to limit the Appellants' ability to offer evidence of settlements with other defendants to this matter, outlining why the claims raised against the Appellants did not warrant any type of offset of settlement amounts reached with other defendants. (Respondents' Appendix Vol. I pp. RA 021 – RA 036). Appellants opposed this motion in limine. (Id. at pp. RA 0063 – RA 0070). The District Court granted Respondents' motion in limine on this issue, finding that the Appellants did not have a right to an offset and cited no authority that provided otherwise. (Id. at pp. RA 0212 – RA 0218).

Following the trial of this matter, Appellants filed a motion to amend the judgment on October 9, 2018, seeking an offset for amounts paid in settlements to other defendants. (Appellants' Appendix Vol I pp. 105-115). Respondents opposed that motion on October 24, 2018, outlining that the District Court had already disposed of this issue, ruling that evidence of settlements with other defendants was not relevant or admissible at trial

because the Appellants had no right to an offset or to contribution. (Id. at pp. 116-122).[4] Respondents also opposed the motion to amend the judgment on the grounds that the claims against the sellers arose from different facts and resulted in different damages, making an offset inappropriate. (Id.) Despite the District Court's prior ruling on this issue prior to trial, the District Court granted the motion to amend and amended the judgment by reducing the judgment by the settlements paid by other defendants in this case. (Id. at pp. 131-166). It is from this amended judgment that the appeal and cross-appeal are taken.

VI. ARGUMENT

A. Summary of the Argument

The District Court's factual findings should not be disturbed in this matter because those findings are supported by substantial evidence. The factual findings of the District Court support the original judgment and the amended judgment. The Appellants' entire argument is premised on a fundamental misunderstanding of the District Court's factual findings.

The actual size of the septic tank and its condition are not the issues upon which liability was found against the Appellants. These issues were disclosed or, prior erroneous disclosures were altered, during this transaction. However, as soon

[4] Appellants omitted the exhibits attached to this Opposition, which Respondents include in Respondents' Appendix at Vol. II pp. RA 0219 – RA 0279.

as the actual size of the septic tank was discovered through appropriate inspections, all other available information caused the Appellants to know or they should have known that the septic system in its existing condition at the property was inadequate. This conclusion is supported by the unchallenged expert testimony of the only expert that testified in this case. The Appellants did not disclose this information, which they knew or which they should have known, to the Respondents.

The Respondents were damaged by the Appellants' failure to disclose information that they knew or that they should have known related to the adequacy of the septic system. This is because the Respondents were required to make significant improvements to the septic system for them to continue to occupy the property they had already purchased. The Respondents could have avoided or limited these damages if the Appellants had complied with their statutory disclosure requirements under NRS 645.252, NRS 645.257, and NAC 645.600. Nothing in the law can be used to require the Respondents to limit their occupancy of the property to only using one of the two advertised residential structures, as Appellants suggest in their Opening Brief.

The District Court appropriately evaluated this case under NRCP 68, correctly denying the Appellants' claim that the Respondents did not obtain a better result than the Appellants' $5,000.00 offer of judgment. An "apples-to-apples" comparison of the judgment obtained with the $5,000.00 offer of judgment shows that

Respondents obtained a much better result going to trial. Finally, an award of interest on attorney's fees and costs awarded as damages is appropriately measured from the date Respondents filed their complaint in this matter until the present.

Finally, the Appellants do not challenge the District Court's second basis for liability found to exist in this case. According to the District Court, Appellants knew or should have known that the property as it stood at the time of sale violated local zoning requirements. (Appellants' Appendix Vol. 1 pp. 93-94). To obtain a variance to have more than one structure on the property, Respondents were required to update the septic system. (Id.) As a result, Respondents were damaged when the Appellants failed to disclose that the property as constructed violated zoning requirements, which is something the Appellants knew or should have known. (Id.) This second basis of liability is also supported by substantial evidence.

B. Standard of Review

Appellants' Opening Brief does not set forth the standard of review applicable to its appeal. Appellants also spend a significant amount of time in their Opening Brief questioning the expert credentials and testimony of Sherrie Cartinella (Opening Brief at pp. 16-24), but Appellants do not ascribe any error to the District Court for admitting Ms. Cartinella's testimony or for relying upon her expert opinions. (Opening Brief at pp. 4-5). Elsewhere in their Opening Brief, Appellants do not challenge the District Court's award of attorney's fees to Respondents as

damages in this case, but Appellants simply question the award of interest on the amount of the awarded attorney's fees from the date Respondents served their complaint in this matter to the present. (Opening Brief at p. 5, paragraph 6). In the Statement of Issues set forth in Appellants' Opening Brief, they claim various "errors of law," but they fail entirely to outline the standard of review to be applied to such claimed "errors." (Opening Brief at pp. 4-5). Without such guidance from the Appellants, Respondents are unfairly disadvantaged on how to address Appellants' stated issues on appeal.

Instead, Respondents must guess as to what the District Court did wrong in this case. For example, should this Court review the District Court's decision to award interest on attorney's fees under a *de novo* standard, or are such decisions by the District Court reviewed for an abuse of discretion? In the "LAW" section of Appellant's Opening Brief (Opening Brief at pp. 25-29), Appellants refer to many statutes, but they offer no standard of review for their apparent claim that the District Court misapplied these statutory provisions at trial. When discussing the factual findings of the District Court that A.J. Johnson knew or should have known that the septic system was too small for the residential structures found at the property, Appellants cite an "arbitrary and capricious" standard for the review of this factual determination. (Opening Brief at p. 35). Appellants also reference a statutory presumption arising under NRS 47.150(16) but fail to describe how this presumption

applies in this case. (Id.) Appellants also briefly cite the "plain error" standard when assessing the factual findings of the District Court but fail to cite any case law that illuminates this standard. (Id. at p. 38). Here, for the issues Appellants raise in their Opening Brief, Respondents must assume that the "plain error" standard, also known as the "arbitrary and capricious" standard, is the standard of review that applies on this appeal.

Under the arbitrary and capricious standard of review, the Nevada Supreme Court will review a District Court's disposition of a motion to amend or alter a judgment under NRCP 59(e) for an abuse of discretion, giving deference to a District Court's order on the motion to amend. *See AA Primo Builders LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010)(citing 11 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2810.1, at 119 (2d Ed. 1995); *Arnold v. Kip*, 123 Nev. 410, 168 P.3d 1050 (2007)). A court abuses its discretion when the record contains no evidence to support a district court's decision. *Oregon Natural Res. Council v. Marsh*, 52 F.3d 1485, 1492 (9th Cir. 1995). Under abuse of discretion review, courts do "not substitute [their] judgment for that of the district court." *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990). Moreover, when reviewing a District Court's stated findings of fact, an abuse of discretion standard of review also applies, meaning that the Supreme Court will defer to the District Court's factual findings unless they are clearly erroneous or

not based on substantial evidence. *May v. Anderson*, 121 Nev. 668, 672-73, 119 P.3d 1254, 1257 (2005). Here, because Appellants challenge the factual findings of the District Court that support the original judgment and the amended judgment and they question the District Court's handling of their motion to amend, an abuse of discretion standard applies. Because Appellants cannot demonstrate that the District Court clearly erred in its decision or that the findings of fact were not supported by substantial evidence, the Supreme Court should uphold the District Court's findings that ultimately support the original judgment and the amended judgment.[5]

C. The First Two Issues Presented for Review in the Appellants' Opening Brief are tainted with an Incorrect Assessment of the District Court's Findings of Fact.

In their Opening Brief, the Appellants demonstrate a fundamental misunderstanding of the evidence presented at trial and the factual findings of the District Court, which are substantially supported by the evidence in the record in this case. Over the course of their Opening Brief, the Appellants assert that the Respondents have "falsely alleged" that the Appellants failed "to disclose [the actual size of the septic tank]" before the Appellants could have known its size and that this

[5] Respondents maintain and will argue *infra* in their Opening Brief on Cross-Appeal that it was an abuse of discretion for the District Court to amend the original judgment at all in this matter. However, Respondents contend that the factual findings that supported the original judgment and the amended judgment should not be disturbed by the Supreme Court.

failure to disclose forms the basis of the Respondents' claims for relief. (Opening Brief at p. 13). Appellants then spend multiple pages in their Opening Brief arguing factual findings that were never actually entered by the District Court. (Opening Brief at pp. 35-41).

In their Opening Brief, Appellants wrongfully contend that the District Court in this case found that the Appellants should have known the size of the septic tank at this property BEFORE the septic tank was inspected during due diligence. (Id.) Yet, the District Court never found that the Appellants should have known this fact before the true size of the septic tank became known on or about January 18, 2013. Instead, the District Court specifically found that, once the actual size of the septic tank became known to the Appellants AFTER the January 18, 2013 septic inspection, the Appellants should have also known that the septic tank was not adequate for the property in question. (Appellants' Appendix Vol. I pp. 90-91). The actual size of the tank and when its size became known are not the issue in this case. Instead, the issue decided by the District Court at trial centered on whether the Appellants appropriately disclosed information about the septic tank they should have known AFTER Appellants learned of the septic tank's true size as a result of the January 18, 2013 septic inspection. (Id.) This transaction did not close until February 28, 2013, meaning that from January 18, 2013 to the closing date, the Appellants (and the Respondents' realtor) had ample opportunity to disclose to the

Respondents the information they should have known about the septic system. The Appellants did not disclose this information, resulting in damages to Respondents.

To clarify this issue, the factual record presented at trial establishes with substantial evidence that the Respondents eventually agreed to purchase the property from the Appellants' clients on January 4, 2013, after offers and counteroffers were made. (Appellants Appendix Vol. I pp. 183-190). The closing for this sale was to take place on February 28, 2013. (Id.) Before Respondents agreed to purchase the property, Respondents asked various questions about the septic tank, including questions about its size. (Id. at pp. 656-657).[6] During due diligence prior to closing, the Appellants secured an inspection of the septic tank on January 18, 2013, which was then forwarded to Respondents through their realtor on January 19, 2013. (Id. at Vol. I pp. 206-212 and Vol. III p. 659).[7] After January 18, 2013, Appellants knew

---

[6] The Appellants wrongfully disclosed to Respondents, through their realtor, prior to closing and before the septic tank was inspected that the tank was 15,000 gallons. This misreporting, however, is not the issue in this case. The issue is that Appellants failed to disclose information they should have known about the septic system AFTER the true size of the septic tank was made known on January 18, 2013, more than a month prior to closing.

[7] Appellants falsely state in their Opening Brief that ***the Respondents*** contracted with Waters Vacuum Truck Service to inspect the septic system at the property. (Opening Brief at p. 37). It is clear from the record in this case that ***the Appellants and their clients*** were required to obtain this inspection and in fact obtained the inspection, and then they forwarded the inspection to Respondents' realtor, as shown in multiple exhibits presented at trial. (Appellants' Appendix Vol. 1 p. 187 and pp. 206-212).

the actual size of the septic tank. (Id.) At this same time, Appellants knew the acreage size of the property upon which two residential structures with four total bedrooms were located. (Respondents' Appendix Vol. 2 p. RA 0367.) Appellants also knew that the two residential structures were served by only one septic tank. (Appellants' Appendix Vol. III p. 657). Appellants knew the zoning requirements of the property and that only one septic tank could be constructed on the property. (Respondents' Appendix Vol. III p. RA 0550 – RA 0551).

With all of this information that the Appellants knew on or after January 18, 2013, Appellants also knew or should have known that the septic tank was not appropriately sized for this residential property, as stated in the testimony of the only expert witness that testified at trial in this case, Sherrie Cartinella. (Respondents' Appendix Vol. III pp. RA 0453 – RA 0468 and RA 0488 – RA 0490.)[8] The septic tank was only 1,000 gallons in size, but the Appellants knew or should have known that a property of this size with the number of bedrooms located at the property required a 1,500-gallon septic tank. (Respondents' Appendix Vol. III pp. RA 0453 – RA 0468 and RA 0488 - 0490. Appellants (and Respondents' realtor) were duty

[8] Appellants obtained expert testimony during discovery in this matter that attempted to rebut the testimony of Sherrie Cartinella, but this expert testimony was either not presented during trial or was excluded by the District Court prior to trial. Appellants do not challenge the District Court's ruling that excluded some expert testimony from Appellants' experts at trial. Appellants have not offered why they did not present any other expert witness testimony at trial.

bound by statute to disclose that the septic tank, as constructed, was not adequate for the property in question, as set forth in the testimony of Sherrie Cartinella. (Id.) The District Court never held or found that Appellants should have known the size of the septic tank prior to January 18, 2013, and the Appellants' six-page argument in their Opening Brief that the District Court so concluded is simply wrong.

According to the District Court in its findings of fact and conclusions of law the District Court concluded that Appellants:

> "knew the actual size of the septic during this transaction, which was much smaller than previously disclosed. Because the size of the septic system was much smaller than previously disclosed, the [Appellants] should have exercised reasonable care to investigate the septic system further. In so doing, this Court concludes that [the Appellants] should have known that the septic system was too small for the residential property in its existing state at the time of the sale. [The Appellants] should have then disclosed this information to [the Respondents] during this transaction." (Appellants' Appendix Vol. I p. 93).

The District Court also found that, even though the Respondents knew the actual size of the septic tank after January 18, 2013, the Respondents themselves had no way of appreciating that the septic tank was inappropriately sized for the property they were in the process of purchasing. (Id. at 91). The Respondents' realtors, on the other hand, also should have known that the septic tank was not appropriately sized, and these realtors also should have disclosed this to the Respondents, which is why these realtors were also defendants in this case at one time. (Id.) These findings of fact and legal conclusions of the District Court are supported by

substantial evidence and should not be disturbed by this Court. Accordingly, the Court should reject the Appellants' first two stated issues presented for review found in Appellants' Opening Brief because these two issues rely on a false narrative that the District Court concluded that the Appellants should have known the size of the septic tank prior to January 18, 2013. That was not a finding of the District Court.

D. Knowing the Actual Size of the Septic Tank and how the Septic System was Constructed are not the Issues in this Case and NRS 113.110-150 do not, therefore, Apply.

Respondents do not dispute the District Court's factual finding that all parties knew the size of the septic tank after the January 18, 2013 septic inspection. The knowledge of the size of the septic tank and when it was known, as outlined above, are not the issues decided in this case for which liability rests upon the Appellants. Instead, the issue decided in this case is that, once the Appellants knew of the actual size of the septic tank after January 18, 2013, they knew or should have also known that the septic system was not adequate for the property in question. This was established by the uncontroverted and unchallenged expert testimony of the Respondents' expert, Sherri Cartinella. As a result, the fact that the Respondents knew the actual size of the septic tank before they closed and agreed to close anyway on the property does not result in any waiver of claims against Appellants under the provisions of NRS 113.110 through NRS 113.150. Respondents are not complaining about the actual size of the septic tank. Instead, they have complained against

Appellants and proved with substantial evidence at trial that Appellants knew or should have known that the septic system was not adequate for this property. The adequacy of the septic system for this property, which is something the Appellants knew or should have known, not the size of septic tank, was never disclosed to the Respondents. That is the issue.

To argue its case on appeal and that there should be "no recourse" available to Respondents under NRS 113.110 through 113.150, Appellants falsely claim that a set of blueprints for the entire septic system were made available to Respondents prior to closing in this case. (Opening Brief at pages 2 and 12). There is no evidence of the existence of a blueprint for the entire septic system in the record in this case and there is no evidence in the record that Appellants offered this blueprint to the Respondents prior to closing. Instead, in an email that is found in the record, which contains hand-written notes, a statement is made that there is a blueprint for the septic system's "leach field," which is separate, usually by several hundred feet, from the septic system's tank and which would not disclose the size of the tank or how it was constructed. (Appellants' Appendix Vol. III p. 657). Appellants conflate this hand-written statement in this email to claim falsely that Respondents knew how the septic tank was constructed prior to closing. Yet, the construction of the septic system and the knowledge of its construction are not the issues in this case, as outlined above.

Instead, the issue is that Appellants should have known that the septic system was not adequate for this property, as a result of all the additional information the Appellants knew about the septic system prior to closing. The District Court's finding on this issue that Appellants knew or should have known that the septic tank was not adequate for this property should not, therefore, be disturbed, and Respondents have recourse resulting from this failure to disclose under NRS 645.252, NAC 645.600, and NRS 645.257.

E. The Appropriate Measure of Damages arising from the Appellants' failure to disclose information they Knew or Should have Known about the Septic System is the Cost to enlarge the Septic System or the value of the Property Appellants claim the Respondents can now choose not to Occupy.

The Appellants make an interesting and confusing argument about damages in their Opening Brief at pages 43 and 44. Here, the Appellants claim that the Respondents knew that they could not legally use the mother-in-law quarters found at the property because an appraisal obtained in this case suggested that the improvements made at the mother-in-law quarters "may or may not be legal." (Opening Brief at p. 43). With this argument, the Appellants claim that the Respondents have not been damaged because they could have voluntarily chosen not to occupy the mother-in-law quarters by simply not enlarging the septic tank, and that the enlargements of the septic system enhanced the property above and beyond what was sold to the Respondents. (Id.)

However, the advertisement for the sale of this property stated that the realty included "three separate units on the property, in-law quarters or guest house, office or studio or tack room or office. The possibilities are endless." (Appellants' Appendix Vol. 1 pp. 181-182). With this advertisement, the Respondents believed, and the Appellants advertised that the Respondents would be able to occupy legally all three structures at the property. Because the Respondents intended and expected to occupy all three structures at the property, including the advertised in-law quarters, they are entitled to recover as damages what they were required to spend to obtain a variance from Washoe County to occupy legally the in-law quarters. This cost included the expenses necessary to enlarge the septic system capacity at the property so that both the main residence and the in-law quarters could be occupied.

Respondents were damaged by the Appellants' failure to disclose that the septic system was not adequate for this property, which the Appellants knew or should have known, and the amount of those damages is $27,663.95.

F. The District Court correctly reviewed the Original Judgment and the Amended Judgment to conclude that Respondents obtained a Better Result at Trial than the Appellant's $5,000.00 Offer of Judgment.

Appellants made an offer of judgment in the amount of $5,000.00 prior to the trial of this matter. (Appellants' Appendix Vol. I pp. 113-115). What Appellants fail to disclose is that the Respondents made an offer of judgment in the amount of $7,500.00 prior to trial that the Appellants unreasonably rejected. (Respondents

Appendix Vol. III p. RA 0639). Because the District Court awarded Respondents attorney's fees and costs as damages in this case, the Respondents did not seek to obtain an award of attorney's fees and costs under NRCP 68, which they would have been entitled to under the original judgment in this case. The Respondents have been reasonable throughout this dispute and the Appellants have unreasonably increased the costs of litigation through their conduct and because they did not accept the Respondents' $7,500.00 offer of judgment, which is the same amount Respondents accepted to settle this dispute with their own realtor/broker. (Id.)

In their Opening Brief, the Appellants claim that the District Court incorrectly failed to consider the amount of the settlements reached with the sellers ($50,000.00) and with the Respondents' realtor/broker ($7,500.00), and that, combined with the Appellants' $5,000.00 offer of judgment made prior to trial, the Respondents would have recovered $62,500.00, which is a better result than the original judgment in this case. (Opening Brief at pp. 45-47). Adding these settlements to Appellants' offer of judgment has no basis in law and does not represent an apples-to-apples comparison required under NRCP 68 when assessing whether a litigant obtained a better result than an amount made in an offer of judgment. The District Court appropriately assessed this argument in its order denying in part the Appellants' motion to amend. (Appellants' Appendix Vol. 1 pp. 137-138). This Court should not overturn the District Court decision on this issue.

Respondents will address the other assertion made at pages 45-47 of the Appellants' Opening Brief in Respondents' Opening Brief on Cross-Appeal, because the Respondents contend that the District Court erred in reducing the original judgment entered against Appellants by any amount. If, however, a reduction of the original judgment was appropriate, which the Respondents do not admit, the reduction made by the District Court was correct. The claims against the sellers were for "treble the amount necessary to repair or replace" the known defect, not for the cost of repair itself, meaning that none of the repair costs awarded to Respondents against Appellants are rightfully attributable to the settlement with the sellers. As a result, the District Court should not have reduced the damages by any amount of the sellers' settlement payment of $50,000.00.

G. Existing Case Law supports an Award of Interest on Attorney's Fees and Costs awarded as Damages in this Case from the Date the Respondents filed their Complaint until the Present.

In their Opening Brief, Appellants cite a case that contradicts their position regarding the award of interest to Respondents in the original judgment and in the amended judgment. Under *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 570 P.2d 258, (2006), this Court previously concluded that interest on attorney's fees and costs awarded as damages must be calculated from the date the Respondents filed their complaint in this matter. Under *Albios*, there is no other date prescribed by statute from which interest may be calculated. Additionally, Appellants claim that

the District Court erred because it should have only awarded interest on the amount of attorney's fees awarded to the Respondents as a contingent fee.

However, in this case, the Respondents requested that the District Court award either the contingent fee amount as attorney's fees or a lodestar amount, being the actual attorney's fees expended in this matter. (Respondents' Appendix at Vol. III pp. RA 0636 – RA 0637). Upon considering these two options, the District Court awarded the lodestar amount of attorney's fees to the Respondents. (Appellants' Appendix Vol. 1 p. 94). The District Court concluded that these attorney's fees were awardable to Respondents as damages and as a measure of damages required to make the Respondents whole under NRS 645.257(1), which provides that the Respondents are entitled to "damages" that are the "proximate result of a [realtor's] failure to perform any duties required by NRS 645.252. . ." Accordingly, the District Court awarded these attorney's fees to Respondents as damages and as a result of the Appellants' failure to abide by the statutory provisions that govern the realty industry. According to the District Court, the attorney's fees awarded were proximately caused by the Appellants' conduct that violated NRS 645.252, and other applicable statutes. (Appellants' Appendix Vol. 1 p. 94).

H. All Damages awarded to Respondents are supported by a Second Theory of Liability, which Appellants ignore in their Opening Brief.

Appellants' Opening Brief is over 50 pages in length and not once do

Appellants assert that the District Court erred in its findings of fact and conclusions of law when the District Court found a second basis of liability supporting an award of damages against the Appellants. First, the District Court found that Appellants should have known that the septic tank was inadequate for this property, supporting an award of damages against Appellants. (Appellants' Appendix Vol. 1 p. 90-91, 93). The District Court also concluded that the Appellants incorrectly listed the property as "single family residential" when the Appellants knew that the property had more than one residential structure thereon and because the Appellants knew the zoning requirements for the area. (Id. at p. 93-94). This second basis for liability supported the same award of damages to Respondents, but the District Court did not award the damages twice to avoid a double recovery. (Id.)

The evidence supporting this second basis of liability is significant. Ron Cohen at trial set forth the zoning requirements in this area of Reno, Nevada, which allowed for "single-family residential" use with one main residential structure and a second accessory building on the property. (Respondents' Appendix Vol. III pp. RA 0490 – RA 0517). Zoning for this area does not allow for two accessory structures. (Id.) Yet, the property sold to the Respondents has three buildings, one main residence and two accessory structures, in violation of code requirements. According to expert testimony provided in this case, Ms. Johnson and Mr. Johns knew or should have known the zoning requirements for this area and should have

known that the property in its then listed state violated local zoning requirements. (Respondents' Appendix Vol. III pp. RA 0453 – RA 0468 and RA 0488 – RA 0490). Ms. Johnson also testified at trial that she understood the zoning requirements for this area and that multiple units are not permitted without a special use permit or special zoning change. (Respondents' Appendix Vol. III p. RA 0550 – RA 0551).

The Respondents then spent a large amount of money to obtain a variance to have more than one accessory structure at their property. This included the requirements imposed by Washoe County to increase the capacity of the septic system. The damages proximately caused by the failure to disclose the clear zoning violation are supported by a mountain of evidence in the record, spanning Exhibits 10 – 48 presented at trial. (Appellants' Appendix Vol. I pp. 213-250 and Vol. II pp. 251-339). Respondents were appropriately awarded damages on this second basis establishing liability, although the District Court was careful in its findings of fact and conclusions of law not to award these damages to Respondents twice.

If this Court concludes that the first basis for liability does not support an award of damages to the Respondents or that this basis for liability is not supported by substantial evidence, which the Court should not do, then the Court should uphold the award of these same damages on this second basis for liability. This basis for liability is supported by substantial and unchallenged evidence on appeal.

///

VII. CONCLUSION

In their Opening Brief, Appellants demonstrate a fundamental misunderstanding of the facts surrounding this case. Appellants claim, erroneously, that the District Court found that the Appellants knew or should have known the size of the septic tank in this matter prior to January 18, 2013. That simply is not one of the District Court's findings in this case. Instead, after January 18, 2013, with full knowledge of the size of the septic tank and with knowledge of other facts related to the property (including it size, the number of bedrooms, and other considerations), the District Court found that Appellants should have known that the septic tank was too small for the property as sold to Respondents. This finding of the Court was supported by substantial evidence presented at trial and should not be overturned.

Additionally, upon finding that the Appellants knew or should have known that the septic tank was not appropriate for this property, the District Court appropriately awarded Respondents the damages they suffered to alter the septic system so that it would be adequate under existing regulations. The Respondents were required to add a second tank to the existing system, to upgrade the leach field, and to make other necessary improvements to the system, all of which cost the Respondents $27,663.95. The District Court appropriately awarded this amount to the Respondents in its original judgment.

The District Court also appropriately awarded interest on the entire amount of

attorney's fees awarded to the Respondents, as the manner of calculating interest in this case is the appropriate way to do so on an award of attorney's fees as damages, as stated in *Albios*. Moreover, the District Court appropriately rejected the Appellants' claim that their offer of judgment of $5,000.00 represented a better result than the judgment ultimately obtained in this case by Respondents. The Respondents were awarded significantly more than the $5,000.00 offer of judgment and more than the $7,500.00 offer of judgment the Respondents made to Appellants prior to trial. If anything, Appellants should be required to suffer the consequences of NRCP 68 for rejecting a more favorable offer of judgment.

Finally, the Appellants ignore the second basis for liability stated in the District Court's finding of fact and conclusions of law. As found by the District Court, the Appellants also knew or should have known that the property, as constructed with three structures thereon, violated zoning requirements for this area. The Appellants should have disclosed this information to the Respondents. The cost to alleviate this zoning violation was to install the increased septic capacity. Accordingly, the District Court appropriately found a second basis for liability but did not award damages a second time to avoid double recovery. The second basis for liability independently supports the award of damages to the Respondents. The Appellants' failure to address this second basis for liability is fatal to their appeal.

Accordingly, the Court should not overturn the amended judgment. If

anything, as discussed more thoroughly below, this Court should rule that the District Court's decision to reduce the original judgment was error.

RESPONDENT'S OPENING BRIEF ON CROSS-APPEAL

A. INTRODUCTION

The Respondents incorporate into this Opening Brief on Cross-Appeal the Statement of the Case, the Jurisdictional Statement, the Routing Statement, the Statement of the Issues on Appeal, and the Statement of the Facts Determined at Trial that are set forth in the Respondents' Answering Brief as though stated fully here. The proceedings and factual findings of the District Court apply equally to this Cross-Appeal and are relevant to this dispute.

In this Cross-Appeal, the Respondents contend that the District Court erred when it reduced the original judgment in this case by a proportionate amount of a settlement reached with the sellers (who were defendants in this case) because the issues presented against the sellers, who settled with the Respondents prior to trial, are based on separate statutes that do not form the basis of a claim against the Appellants and are based on different facts. Indeed, the sellers and the Appellants are not "joint tortfeasors" under NRS 17.245 or NRS 17.255, and as a result, an offset in any amount of the settlement reached with the sellers ($50,000.00) would be inappropriate in this matter.

Additionally, the Respondents believe that the District Court should not have

reduced the damages in this case by the amount of the settlement with the Respondents' realtor and broker because the statute that governs this issue does not provide for an offset of such liability. As a result, the settlement with the Respondents' realtor and broker ($7,500.00) was not an appropriate offset to the original judgment.

B. PROCEDURAL HISTORY RELEVANT TO THIS CROSS-APPEAL

Prior to the trial of this matter, the Respondents settled with the sellers ($50,000.00) and with the Respondents' own realtor and broker ($7,500.00). Respondents understood that Appellants knew the amount of these settlements and that they intended to present these settlements at trial to argue an entitlement to an offset. As a result, prior to trial, the Respondents filed motion in limine number 2, seeking to exclude at trial the presentation of any evidence regarding settlements with any settling party. (Respondents' Appendix Vol. I at pp. RA 0021 – RA 0036).

In this motion in limine, Respondents outlined that the Appellants "appear to be attempting to apply principles of contribution in an effort to create a credit for settlements already reached with other defendants that are no longer parties to this dispute." (Respondents' Appendix Vol. I at p. RA 0022). The Respondents argued in this motion in limine that:

> "[t]he [District] Court should not allow [Appellants] to present evidence or argument of these other settlements with other defendants because such evidence or argument is not admissible to prove or disprove liability under NRS 48.105, [Appellants] have no right of contribution under a plain reading

> of NRS 17.[225], the disclosure of such evidence is irrelevant, and the disclosure of such evidence or argument, if relevant, would be overly prejudicial to Plaintiffs." (Id.)

In their opposition to this motion in limine, the Appellants argued that they were entitled to an offset of the $7,500.00 paid by the Respondents' realtor and broker to settle this dispute to avoid a "double recovery." (Respondents' Appendix Vol. I p. RA 0068). Upon considering this motion in limine, the opposition the Appellants filed in response to this motion, and the Respondents' reply, (Id. at pp. RA 0186 – RA 0194), the District Court granted the motion and excluded the introduction of settlement evidence at trial. (Id. at pp. RA 0212 – RA 0218).

In its order granting motion in limine number 2, the District Court noted that the "[Appellants] acknowledge that the only basis for liability against the [Appellants] is statutory. [Appellants] argue that they are entitled to a credit in the amount of $7,500 to prevent a double recovery by the [Respondents]." (Id. at RA 0215). In granting motion in limine number 2, the District Court also concluded that "[Appellants] claims are purely statutory, and the statutes involved do not contain provisions for joint liability or contribution. Further, the [Appellants] have not cited any binding authority that would entitle them to offset the $7,500.00 [settlement with the Respondents' realtor and broker]." (Id. at RA 0216)

Despite this prior ruling from the District Court that Appellants were not entitled to an offset or to contribution, after the District Court entered its original

judgment in this matter, the Appellants revisited the offset issue, claiming again in a motion to amend the judgment that they were entitled to offset the original judgment not only by the $7,500.00 settlement with the Respondents' realtor and broker but also by the $50,000.00 settlement with the sellers of the property. (Appellants' Appendix Vol. I pp. 105-115). In their motion to amend, the Appellants did not cite any additional authority that allowed for such an offset that was not already cited by the Appellants in opposition to the previously granted motion in limine number 2. (Id.)

In opposition to the motion to amend, the Respondents pointed to the District Court's prior ruling and noted that the motion to amend should not change that prior ruling because the prior ruling should still govern this case. (Id. at pp. 116-122)(Respondents' Appendix Vol. II at RA 0219 – RA 0279). Respondents also outlined again that this was not a case of joint tort liability that would support an offset or contribution, but that the case was purely statutory in nature and that statutory damages owed by one defendant were not the same as the statutory damages owed by another. (Id.) Despite the District Court's prior ruling on this issue, the District Court changed course and ruled in favor of the Appellants, finding that the Appellants were entitled to an offset and contribution, even though the District Court had previously ruled otherwise. (Appellants' Appendix Vol. I pp. 131 - 139). It is from the District Court's change of course on this issue that the

Respondents filed this Cross-Appeal.

C. STATEMENT OF FACTS SUPPORTING THIS CROSS-APPEAL

Approximately one year after purchasing the property, Respondents discovered that two structures found on the property were not constructed with building permits. Respondents alleged that the sellers knew this at the time of the sale to Respondents. Significantly, the basis of Respondents' claims against the Appellants are not based upon their knowledge of the lack of permits but are based upon what the Appellants knew or should have known about the septic tank and that the Appellants listed the property incorrectly as "single-family residential." As such, the Respondents sued the sellers under NRS 113.150 for their failure to disclose in a seller's real property disclosure form the fact that two of the buildings on the property were not permitted. Respondents also sued the Appellants in this matter asserting that the Appellants knew or should have known that the septic system at the property was undersized and that the listing of the property as a "single family residence was improper," among other claims. As noted above, the District Court ultimately ruled that the Appellants knew or should have known that the septic tank at the property was inadequate for its existing use, that the Appellants improperly failed to disclose this inadequacy, and that the Appellants listed the property improperly as being "single family residential."

If the Respondents had proceeded to trial against the sellers, their claims

against the sellers would have been based on damages available under NRS 113.150(4) to "recover from the seller treble the amount necessary to repair or replace the defective part of the property [i.e., the lack of permits], together with court costs and reasonable attorney's fees." These "treble damages" are specific to the seller of real property and the Appellants were not responsible to pay these damages arising from the seller's failure to disclose, unless the agent knew of the failure to disclose the lack of permits. NRS 113.150. The Respondents' claims against the Appellants, on the other hand, were set forth in a different statute, NRS 645.252, NRS 645.257, and NAC 645.600. Under these statutes, the Respondents would be entitled to recover damages that are the "proximate result of a licensee's failure to perform any duties required by NRS 645.252, 645.253, or 645.254, or the regulations adopted to carry out these sections. . ." (NRS 645.257(1)) and these damages did not relate to the lack of permitting, but to the needed enlargement of the septic system at the property and to the failure to list the property correctly.

Under these two separate statutes, the sellers' liability and damages that may be assessed against the sellers are not the same as those that may be assessed against the Appellants, meaning that there is no "single injury" that would entitle the Appellants to contribution or an offset in this case under NRS 17.225 through NRS 17.305. There is also not a right to contribution or an offset in this case because the injury is not to the Respondents' person or property. The liability of the seller (for

possibly treble damages) and the liability of the Appellants (for actual damages) were statutory in nature. Because the damages that Respondents may recover from each group of defendants in this case are different and are based in different statutes, there is no "joint and several liability of two or more joint tortfeasors" from which a "single injury" to "person or property" has been sustained, meaning that there is no right of contribution or to an offset in favor of the Appellants against any other defendant in this dispute. NRS 17.225, et seq. Without such a right of contribution or to an offset, the Appellants cannot offset any amounts paid in settlement by any other defendant who paid to settle statutory claims that include statutory damages payable by that defendant only.

D. ARGUMENT

i. Standard of Review

When reviewing an order disposing of a motion to amend a judgment, the Nevada Supreme Court will review the order for an abuse of discretion. *See AA Primo Builders LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010)(citing 11 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2810.1, at 119 (2d Ed. 1995); *Arnold v. Kip*, 123 Nev. 410, 168 P.3d 1050 (2007)). An abuse of discretion is found when a District Court rules in an irrational manner. *Chang v. United States*, 327 F.3d 911, 925 (9th Cir. 2003).

///

ii. The District Court's Decision to overturn its Prior Ruling regarding Contribution and an Offset is Irrational and not Supported by Existing Law.

As outlined above, the District Court got it right the first time when it granted the Respondents' motion in limine number 2, holding that the Appellants were not entitled to an offset or to contribution in this case. Rather than fall back on its prior ruling, the District Court inexplicably changed its course following trial, and ruled the complete opposite, holding that the Appellants were entitled to an offset and to contribution, though the law suggests otherwise.

The Appellants' assertion that they claim to be entitled to a credit, contribution or an offset for settlements from defendants who have resolved their statutory liability already in this case represents a fundamental misunderstanding of the right of contribution in Nevada. For a party to be entitled to contribution or to offset a settlement from another defendant in any case, it must be shown that "two or more persons [became] jointly or severally liable *in tort* for the *same injury to person or property or for the same wrongful death*. . ." NRS 17.225. Absent from this case are any allegations that any party to this dispute is a joint tortfeasor, as the claims are statutorily based and are unique to each defendant, or that there has been a single injury to person or to property resulting from any defendants' violation of the specific statutes referenced in this matter.

The sellers of the property in this case knew that the improvements to two

structure on their property were not permitted. The cost to obtain these permits included installing additional electrical capacity, removing various items from the two structures, altering more than 400 square feet of one structure into storage space, and obtaining inspections of work completed, as testified to at trial by Ron Cohen. (Respondents' Appendix Vol. II pp. RA 0490 – RA 0517). These damages were not asserted against the Appellants at trial because they were more appropriately asserted against the sellers and related to the lack of permitting at the property. On the other hand, the Appellants knew or should have known that the septic tank was inadequate for this property and the Appellants incorrectly listed the property as "single family residential," and the damages flowing from the Appellants' failure to disclose these issues consisted of improvements that Washoe County required to the septic system at the property.

This is not, therefore, a "single injury," but consists of separate injuries that resulted in different damages arising under different statutes based on different facts against different defendants. The Respondents have not claimed that the Appellants knew that the structures were not permitted. There simply is no right of contribution between the Appellants and any defendant that settled its statutory liability to the Respondents. Accordingly, the District Court committed plain error when it reduced the original judgment in this case by any amount. The District Court acted irrationally when it changed its prior ruling made prior to trial and reduced the

original judgment after trial. This Court should overturn the District Court's plain error and should order that the original judgment be reinstated by the District Court. The Appellants are not entitled to any contribution or an offset.

E. CONCLUSION

The District Court irrationally changed its prior ruling regarding the Appellants' right to an offset or to contribution after trial. When the District Court originally granted Respondents' motion in limine number 2, the District Court got it right. Nothing changed between the time the District Court granted motion in limine number 2 and the conclusion of the trial in this matter to support the District Court's order permitting an offset of settlement amounts reached with other Defendants. There is no "single injury to person or property" in this case, no joint tortfeasors, and no tort claims raised against the Appellants. As such, the Appellants are not entitled to an offset and the District Court's contrary ruling should be overturned.

DATED: August 8, 2019. MOORE LAW GROUP, PC

By: /s/ John D. Moore
JOHN D. MOORE, ESQ.

Attorney for Respondents/Cross-Appellants John Lindberg, Michal Lindberg, and Judith L. Lindberg

CERTIFICATE OF COMPLIANCE

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:

[X] This brief has been prepared in a proportionally spaced typeface using Word 2013 in 14 point Times New Roman font; or

[ ] This brief has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of 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 either:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains 11,938 words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

[ ] Does not exceed _____ pages.

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

DATED: August 8, 2019. MOORE LAW GROUP, PC

By: /s/ John D. Moore
JOHN D. MOORE, ESQ.

Attorney for Respondents/Cross-Appellants John Lindberg, Michal Lindberg, and Judith L. Lindberg

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I certify that I am an employee of Moore Law Group, PC, and that on August 8, 2019, I caused the foregoing document to be served on all parties to this action by:

_X_ E-service via Nevada Supreme Court eflex filing system

to the following:

Glade Hall, Esq.

/s/ Genevieve DeLucchi
An employee of Moore Law Group, PC