IN THE SUPREME COURT OF THE STATE OF NEVADA

JE JOHNS & ASSOCIATES; A. J. JOHNSON, Appellants, vs. JOHN LINDBERG; MICHAL LINDBERG; and JUDITH LINDBERG, Respondents.	Supreme Court Case No. 78086 Dist. Ct. Case No. CV15-00281

APPELLANT'S AMENDED REPLY BRIEF AND ANSWERING BRIEF ON CROSS APPEAL

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DISCLOSURE STATEMENT

There are no parent corporation or publicly held companies owning that own 10% or more of the parties' stock

C. Nicholas Pereos represented the Appellants in the district court.

Glade L Hall represented the Appellants in the district court and on appeal.

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Some general comments regarding context.

In this case, we are dealing with reality. The parcel of land and the structures that generate the issues presented by this appeal are not comprised of X's and O's in electronic cyber space. They are real structures made of wood, sheetrock and other materials, located on the surface of the earth with identified boundaries. One can, and the Lindberg parties did, go to that location on more than one occasion to see and measure what was there.

The phrase "the septic system was not adequate for this property" or "the septic tank was too small for the property" are used sixteen times in the Answering Brief. At page 28, of the brief the Lindbergs state emphatically, "This is the issue."

The fallacy in their arguments becomes apparent when we examine what is described by the words "the property." At no time or place do Appellants describe the property as anything but a three-bedroom property. At no time do Appellants or their inspectors state that the zoning applicable to the land is anything other than Low Density Suburban, (Its Regulatory Zone) and/ Single Family Residential (Its Residential use type). (Tr. 181, 192). The building department confirms this regulatory zone. (App. 232).

Further clarification: The witness, Ron Cohen, used correct wording to describe the elements of building construction. (Tr. 41 to 67) His testimony is summarized as follows:

To comply with the requirements for construction of a building in Washoe County, there is first an application for a building permit, which discloses what will be constructed by plans and specifications. (App. 236 and 277) When the plans and specifications are approved, including approvals of the planning commission and the health department, the County then issues a building permit; (App. 301) which, has a matrix for each of the inspections of the elements of construction that must occur during the process of construction. (Example, App. 241). This permit must be posted on the construction site. When a phase of the construction is completed, the appropriate inspector is notified to come to the site and inspect the construction to that point in time. If the construction has been done in compliance with the authorized plan, the inspector signs off and construction continues. Once all elements have been completed, the builder calls for a final inspection. For residential property, if the inspector finds that the construction has been completed in compliance with the authorized plan the County issues a Certificate of Occupancy, meaning that the property may then be used for residential purposes. (Tr. 41- 6).

In the instant case, a building permit was in fact issued for the accessory structure with the mother-in-law area and the construction progressed, apparently up to final inspection. However, the final inspection was never called for or made, so the Certificate of Occupancy was never issued. Accordingly, the construction may or may not have been completed in compliance with the authorized plan. A Certificate

of Occupancy was never issued.

Accordingly, when Reynolds advised A. J. that he had his building permits in place, this was true. However, he did not obtain a certificate of occupancy, and the permit expired. of the accessory structures was not lawful.

REPLY TO "STATEMENT OF ISSUES"

1. Knowledge of the Septic Tank: The "statement of the issue" designated s number 1, is not a statement of an issue but an argument. The apparent issue being referred to by this argument is "when the Appellants knew or should have known of the actual size of the septic tank." There is no dispute as to this issue. The district court held that no one could have known the size of the existing tank until it was inspected, measured, and reported by the Waters septic tank report, circa January 18, 2013. Waters never applied the health department's regulations to the size to conclude the septic tank was too small for the property. After that point in time, no one disputed the size. However, reaching the conclusion that the septic tank was too small for the property required a knowledge of the health department regulations and also knowledge that the permitting that had been issued for the construction of the accessory structure had not been complied with by reason of the failure of a prior owner doing the construction to order the final inspection of the construction. One could not reach this conclusion without doing an investigation of the property. NRS 645.252 (4) states specifically that a licensee is not required to make an investigation

of the property unless there is an agreement in writing that the licensee will make an investigation.

By specific provisions of the offer and acceptance agreement, the Lindbergs acknowledged and agreed, "Both parties acknowledge Brokers will not be investigating the status of permits, location of property lines and/or code compliance." (App. 185, ln 53). A second time in the offer and acceptance agreement the parties are advised that "Broker are not obligated to investigate the status of permits, zoning, or code compliance. BUYER to satisfy any concerns with conditions that are important or critical element of the purchase decision." (Appl 188, ln. 13-15). Again, on that same page, "Due to the uncertain effects of land use and environmental regulations that may apply to the property, and may affect a BUYERS intended use of the property, the broker makes no representations or warranties regarding the existing permissible uses or future revisions to the land use regulations." (App. 188, ln. 58 - 60)

Also, after January 4, 2013, the Lindbergs had been made aware that the accessory structures may or may not be legal by receipt of the appraisal that made that disclosure. (App. 614)

2. Damages: Again, "statement of the issues" numbered "2," is not a statement of an issue, but an argument. The issue being addressed is whether or not the Lindbergs were damaged because Appellants did not advise them that the septic

tank was too small for the property. Facts needed to conclude that the property was in violation of health department regulations were disclosed to and known by the Lindbergs. Knowledge of the law and application of that law as to the facts was outside the duties of the Appellants, by agreements in the documents quoted above, the applicable statutory provisions and Nevada case law, (*Woods v. Label*). Rather the Lindbergs had the duty and/or burden to investigate when they learned that the septic tank capacity was 1000 gallons, not 15,000 gallons and that the accessory structure "may or may not be legal." Lindbergs were not justified in relying on the information provided by the sellers. *Id*. Appellants submit that any reasonable buyer would want to investigate why the appraiser warned the ancillary structures were possibly in violation of law.

More importantly on the issue of damages, the evidence is clear that the Lindbergs were purchasing a three-bedroom home in a single-family residential zone. The 1000-gallon tank was adequate to serve that property. The expenditures to add additional sewer capacity increased the utility of the property by making residential use of the auxiliary structure lawful. This would have increased the value of the property by the expenditures incurred. Therefore, the expenditures were not an injury or loss to Lindbergs.

3. Lindbergs released and waived their cause of action against Appellants.

The argument here presents the issue of whether the language "without

recourse" in NRS 113.110-150 creates a waiver and release of claims against only the seller in a transaction or does the waiver and release of claims apply also to the sellers' agents in the transaction. Clearly, the phrase "without recourse" is centered on and applies to the buyers. The language operates to relinquish a power to sue that the buyers would have, but for the effect of the release and waiver they were being asked to sign as a part of the escrow. There is nothing in this language or the context of this language limiting the effect of the release by the Lindbergs to any particular party in the transaction. Accordingly, the release and waiver must be construed as applicable to all actors in the transaction. This is the plain effect of the language of release and waiver. Having waived and/or released that power, the Lindbergs could not assert that power in a separate lawsuit.

4. Lindbergs were not damaged:

The evidence is clear that the Lindbergs were purchasing a three-bedroom home in a single-family residential zone. The 1000-gallon tank was adequate to serve that property. The property, so described, was valued by two appraisers, one on each side of the transaction. The Reynolds appraiser noted clearly that he gave little value to the auxiliary structures because they may or may not be legal. The second appraisal mirrored the Reynolds appraisal. The expenditures to add additional sewer capacity, therefore, would necessarily increase the utility of the property by making residential use of the auxiliary structures lawful. This would

have increased the value of the property by the expenditures incurred. Therefore, the expenditures were not a loss or injury and, as such were not damages.

5. Proper Offset Amount:

Here, the Lindbergs fail to identify an issue. Appellants believe the issue is at what point in time and with what numbers does the District Court make the comparison prescribed by NRCP 68 of amount offered with the amount recovered.

A second issue under this heading is whether the amount of offset by settlements of joint tort feasor is reduced by two thirds when the settling joint tort feasor was subject to a claim of punitive damages. The plain language of NRS 245 provides that the offset is "any amount stipulated by the or in the amount of consideration paid for it, whichever is greater." There is no ambiguity in this language.

This Court's holding in *The Doctors Company v. Vincent* 120 Nev. 644, 98 P.3d 681(2004) construes the Rule to require the offset to be the full "amount of the settlement." There is no ambiguity in this language. Accordingly, by direct statutory provision and by case law holding that the offset should be the full settlement applied to the amounts plaintiffs eventually are awarded as damages.

However, when the damages include attorney's fees that will be incurred after rejection of the offer of judgment, the attorney fee amount should be fixed as it existed at the time of the offer. Otherwise, the offeree has the incentive to run up the

costs and fees. The exact opposite of what NRCP 68 is designed to accomplish.

6. Interest on attorney's fees. Appellants submit the issue presented is whether interest on attorney's fees in accordance with existing case law is just and fair under the factual setting in this case. Appellants respectfully submit that the Court should revisit this issue in light of the application of the holding *Albio*s to the facts in this case. Additional facts and law are set forth hereinafter.

7. The claimed incorrect listing of the zoning of the property:

Appellants addressed the claim that was the actual basis selected by the District Court to award judgment. However, the points and authorities set forth in sections 3, 4, 5, and 6, hereinabove would serve to negate Lindbergs claim based on the zoning issue.

RESPONSE TO FACTS

Pg. 9: the recitation of facts is correct that the listing accurately set forth the zoning district as single family residential. The recitation also set forth the structures on the property. There was no failure to disclose these facts.

As noted above, the property was real and observable by the parties. The existence of the accessory structures on the property meant that they had been constructed with a building permit which required authorization by zoning and health agencies. This proved to be true, but the authorizations had become ineffective because a final inspection had not been ordered and residential occupancy had not

been authorized and the permit had expired. The property was being used by the Reynolds with the MilQ occupied. The Lindbergs continued that occupancy.

Pg. 10: The appraisal that disclosed that the auxiliary structures may or may not be legal, was delivered to the Lindbergs by AJ Johnson (hereinafter "AJ") on January 4, 2013. Ms. Johnson testified that she did not read the appraisal, which is her standard practice. There was no evidence that contradicted her testimony.

Pg. 11: This discussion of the appraisal makes clear that the Lindbergs had the appraisal at the time they were making the offer to purchase the property. Mr. Lindberg so testified. Thus, they were on notice of the actual square footage of the residence and the accessory structures. They were further aware that those structures may or may not be legal. Appellants submit that these disclosures were sufficient to invoke the requirement that the buyer has the duty to take care and investigate on his own. This duty arises by case law and statutory provisions cited herein.

Pg. 12: Lindbergs assert that by reason of the typographical error in disclosing the capacity of the septic tank AJ, "Ms. Johnson did not investigate the actual size of the tank." This assertion is clearly false.

A. J. is the person who recommended that the sellers obtain an appraisal to verity information. (App.) This recommendation was followed, resulting in the appraisal which was delivered to Lindbergs during the exchange of offers. A. J. was involved in the negotiations that produced the Offer and Acceptance for the sale. The

Offer and Acceptance Agreement requires the sellers to arrange and pay for an inspection of the septic system. (App. 177, ln. 43). The inspection provides all the material information to satisfy the Lindbergs' questions. The Lindbergs read and signed off on that inspection.

The District Court concludes that after the Waters report was received, A.J. did not further investigate the septic system after learning of its true size. There is no reference to any facts about the system that further investigation by A.J. would have disclosed or that would have affected Lindbergs' decision to accept the facts Waters had discovered and complete the transaction, approving and accepting the Waters report as a part of the escrow procedure.

As to the claim that A.J. knew or should have known that the septic tank served two residential structures, the record is clear, and it is uncontroverted that A.J. did disclose that the septic tank served two residential structures, "Both houses." (App. 657, 663, 665).

This portion of the Lindbergs' brief is labeled Statement of the Facts Determined at Trial. However, this page in particular is reciting conclusions of law rather than facts.

Pg. 14: In fact, the appraisal used by both parties during the transaction disclosed the gross living area to be 2180 square feet. Therefore, the value of the property was based on 2180 square feet. This is the description of the property being

sold to the Lindbergs. The Lindbergs' brief at this point refers to the "living space found at the property" as being what the Lindbergs were paying for. Taken as a whole, the evidence makes clear that the asking price of the property was arrived at by this appraisal and the necessary disclosures were contained in this appraisal and the Waters septic report. The amount paid by the Lindbergs was based on 2180 square feet.

The Lindbergs' claimed failures in disclosure are conclusions made after applying law to the facts. These are conclusions that can only be made after an investigation.

Pg. 15: With regard to the testimony of Ms. Cartinella, having been challenged by the Johnson side of the litigation, Appellants submit that the district court erred in allowing Ms. Cartinella to testify as an expert as demonstrated by the myriad of deficiencies in her testimony pointed out in Appellants' opening brief.

Pg. 16: This Motion in Limine was directed at disclosure of settlements during the upcoming jury trial. Exclusion of settlements during such a trial is clearly appropriate.

Whatever the district court's decision on Motion in Limine No. 2, this issue is now on appeal to this Court and the full facts of settlements and Lindbergs' judgment is known and disclosed. Authority for the offset provided by NRCP 68 was set forth by Appellants in their Motion to Alter or Amend. The District Court followed the law

but for the reducing of the offset to 1/3 of the amount received from the Reynolds.

ARGUMENTS

Ms. Cartinella's testimony:

Lindbergs assert that Appellants do not ascribe any error to the District Court for admitting and relying on the testimony of Ms. Cartinella. The error is accepting, admitting, and relying on Ms. Cartinella's conclusions, which are not based on the standard of care that the legislature has proscribed for a finding of "should have known," and, therefore, should have been disclosed

C. The district court's Findings of Fact "12" recites as follows:

". . .the court finds that a real estate broker and/or agent should have known that the zoning code infraction - two dwellings on a single-family lot including two living dwellings would indicate that the tank capacity was too small– . . ." The only facts relied on by the District Court to make the conclusion that the tank capacity was too small were that the property was in a single-family zoning district and there were two living dwellings. These two facts were obvious, disclosed, and known by all the parties from the start of negotiations. Therefore, the District Court did, in fact, hold that A.J. should have known the septic tank was too small before the tank was measured and disclosed by the Water's report. The invalid reasoning contained in the District Court's quoted findings is obvious. An irrational finding by a court is arbitrary and capricious. The argument set forth in Appellants Opening Brief

completely disposes of the zoning code violation issue, the secondary basis for the District Courts' judgment. This issue is addressed by Appellants.

The same invalid reasoning is employed in the District Court finding that "Appellants knew the acreage size of the property upon which two residential structures with four total bedrooms were located." This is the issue of what "the property" being sold at an appraised price actually consisted of and what value the Lindbergs paid for, i.e., a three-bedroom home with 2180 square feet of living space and accessory structures that may or may not be legal and were given little value.

The assertion that the Appellants knew zoning requirements of the property and that only one septic tank could be constructed on the property is of no consequence. A. J. was confronted by a seller who claimed to have all permits for the auxiliary structures and with these structures completed, existing, and in active use. In this state, the property could be lawful if an owner completed the process of obtaining a variance or special use permit the septic tank could have been of a size 1500 or larger, which would have been adequate to support the auxiliary structures. No one knew until the Waters report.

Note that the arguments on this page rely on there being more than three bedrooms on the property. Note also the complete reliance of the Lindbergs' arguments on the conclusions in the testimony of Ms. Cartinella. Appellants submit that the arguments set forth in their opening brief are sufficient to show that Ms.

Cartinella was not an expert, had to conduct an investigation to come to the conclusions she reached, did not address and did not testify in relation to the standard of care plainly set forth in the statute upon which the Lindbergs' claims were based, and that she was unaware that the appraisal, which disclosed that the auxiliary structures may or may not be legal, was supplied to the Lindbergs 40 days prior to the close of escrow. These deficiencies in the foundation for her testimony render her opinions unfounded.

Pg. 26: Note that the district court, in reliance on Ms. Cartinella's testimony, held that the Appellants "must know the relevant state laws, zoning requirements, and health regulations." This is plain error of law. NAC 645.605(5) provides the standard of care that must be violated to constitute a claim for damages under NRS 645.252 and states the standard as "the licensee is expected to have the knowledge required to obtain a then current real estate license and to act on that knowledge.

Page 26: The District Court's finding that because the septic tank capacity was disclosed to be much smaller than previously disclosed should have caused A. J. to investigate the septic system further again ignores the provision of NRS 645.252 (4)(c) states that a licensee owes no duty to investigate the condition of the property. Further, at the point in time when the disclosure of the actual size of the tank, Lindbergs had been put on notice that the auxiliary structures may or may not be legal. Lindbergs made no effort to investigate the basis for the possible unlawfulness

of these structures. "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. Lagel Investment Corp.,* 107 Nev. 419, 426, 812 P.2d 1293 (1991)

Pg. 27: Under the law set forth in *Woods*, it was clearly the buyer who had the duty to investigate, not the seller's agent. The statutory provisions of NRS 645.252 (4.) provides that the seller's agent did not have a duty to investigate.

With regard to waiver of claims, the purchase and sale documents contain the following agreement. "Both parties acknowledge brokers will not be investigating the status of permits, location of property lines, and/or code compliance." (App. 185, line 63). Buyer shall have the right to a final walk-through inspection and no later than 5 days prior to close of escrow to ensure compliance with the terms of this Agreement. (App. 187 line 50). Brokers are not obligated to investigate the status of permits, zoning or code compliance. (App. 188 ln. 13). ". . . the Broker makes no representations or warranties regarding he is existing permissible use or future revisions to the land use regulations." (App. 188, ln. 60).

Given the foregoing, it is beyond belief that Appellants have been found to be the party responsible for investigating of the septic system or the zoning compliance. As to the waiver of claim argument, please refer to the opening general arguments

hereinabove.

Pg. 27 D. Once again, the Lindbergs relied on Ms. Cartinella for their conclusion that Appellants should have been aware that the septic system was not adequate for the property. As shown previously, Ms. Cartinella's conclusion was based on her standard of care which, according to the District Court would require the licensee to have acquired the knowledge of "relevant state law, health department regulations, and zoning law" The District Court did not specify what state law is relevant, leaving this standard uncertain and ambiguous. Also, her standard is not the standard specifically designated to determine when a violation of NRS 645.252 has occurred

As shown hereinabove, Ms. Cartinellas' testimony is unfounded and wrong as a matter of law.

Also note that the claim that the septic system was not adequate for the property in question is false, based on the appraiser's description of the property. The property in question is a 3-bedroom residence of a size of 2180 square feet. The septic system was adequate for that property.

It is nonsense to argue that Lindbergs are not complaining about the size of the septic tank. A determination of whether or not the septic tank was adequate for the property requires an accurate measure of the septic tank size.

The existence of a blueprint for the leach field is disclosed by the handwritten

answers to Lindbergs' questions about the septic tank at App.657 and the type written answers at App. 665. The obvious purpose for disclosing that the blueprint exists, is to provide it to the Lindbergs if they wished to see it. It makes no sense to think that a blueprint of a leach field would not start with the septic tank. A leach field of a length of 200 feet located down the west side of the house would take up the whole dimension of the property. There could not be a distance of several hundred feet between the tank and the leach field.

Lindbergs argue that the construction of the septic system and a knowledge of its construction are not the issue in this case." However, the District Court clearly held that "The problem was when it was discovered that the mother-in-law quarters had its sewer pipe connected to the main house sewer which then poured into the 1000 gallon tank which was inadequate without a variance from the Washoe County Health Department" (App. 90).

Pg. 29, E: To be clear Appellants' point that Lindbergs could have only made use of the property as described by the Appellants, 3 bedrooms, 2180 square feet which is the property as valued by the appraisers and accepted by the Lindbergs at closing, and not been in violation of either health or zoning regulations. Lindbergs received what the paid for as determined by both appraisers and their own negotiations.

Had they only made lawful use of the property there would have been no expenditure

to provide additional living space. Accordingly, no damages flowed from the sale of the Reynolds' property. The expense incurred by the Lindbergs to add sewer capacity was an enhancement of the property.

Lindbergs' assertion that they expected to use all three of the structures as residences is without citation to the record. However, if they did so intend, it is inconceivable that they would not be motivated to investigate the lawfulness of such occupation when they were advised through the appraisal report they received one month and eleven days before close of escrow which stated that the auxiliary structures may or may not be legal.

Lindbergs do not contest the plain facts that they reached settlements in 2017, with the Reynolds and their own agents. They do not cite to evidence that these settlements included any amount for punitive damages. Lindbergs do not dispute that on November 3, 2017, Appellants made an offer of judgment in the amount of $5,000, which was rejected. Lindbergs do not dispute that, at that point in time, Lindbergs had incurred attorney's fees in the amount of $13,820.85. Finally, Lindbergs do not dispute that the District Court found that the Lindbergs had suffered damages of $27,663.95. Accordingly, at the point in time when Johns made their offer of judgment, the Lindbergs total of damages plus the attorney's fees were $41,484.80. Acceptance of the Johns' offer would have brought the amount of settlement received by Lindbergs to $62,500,00. The Lindbergs rejected this offer.

Appellants properly 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). After hearing, the Court ordered that only one-third of the Reynolds settlement was appropriate to be offset. Lindbergs argue that there is no basis in law for adding the prior settlements to Appellants' offer of judgment. However, the Lindbergs make no effort to distinguish the holding of this Court in *The Doctors Company v. Vincent*, 120 Nev. 644, 98 P3d. 681 (2004), that Appellants were entitled to a setoff 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 setoff.

The Lindbergs likewise to not cite any law to overcome the clear and certain language of the NRS 17.245. "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.

Note finally neither NRS 17.245 nor the *Doctors* opinion support special rules

pertaining to punitive damages. Also note that the comparison to be made by the trial court is between the damages found and the amount of the offer of judgment made, reduced by the amount of the settlements previously received. There is no law supporting a comparison between the settlement offered and the **claims** of the plaintiff, which is what Lindbergs are contending for.

Pg. 32:

6. Appellants submit the issue presented is whether interest on attorney's fees in accordance with existing case law is just and fair under the factual setting in this case. Appellants respectfully submit that the Court should revisit this issue in light of the application of the holding in this case

Pg. 33 - 38: Lindbergs argue that "Appellants incorrectly listed the property as 'single family residential' when the Appellants knew that the property had more than one residential structure thereon." This argument demonstrates a profound misunderstanding of zoning.

Zoning is a designation of allowed uses of a property. It is imposed on every parcel of real property by a planning commission to accomplish land use compatibility. In Washoe County, planning and development is under the jurisdiction of the Community Services Department. The Washoe County zoning code consists of 816 single spaced pages of complex and intricate provisions. (Most universities in this country offer a four-year degree in land use planning.)

The subject property is located in a zone classification of LDS ("Low Density Suburban") and a residential type use of Single Family Residential ("SFR"). When the various forms used in the instant action called for a disclosure of the zoning applicable to 20957 Eaton Road, both the appraiser and A.J. contacted the Washoe County Assessors' office which disclosed these zoning classifications. (App. 615, 577). There was nothing "incorrect" about that information.

Further, the Lindbergs are precluded from asserting a claim based on the zoning having agreed the broker has made no representations or warranties regarding land use regulations. "Due to the uncertain effect of land use and environmental regulations that may apply to the property, and may affect BUYER'S intended use of the property, the Broker makes no representations or warranties regarding the existing permissible uses or future revision to the land use regulations. (App. 188, lns. 55 - 60). This issue, therefore, does not support a second basis for an award of damages.

Not only is this misunderstanding of the reporting of the applicable zoning not a basis for liability, but the Lindbergs' claim for damages against Appellants has been released and waived by the provisions of NRS 113.120-150 under any theory of liability. Lindbergs are without recourse as a result of having closed the escrow with knowledge of the zoning category applicable to the property. The lack of proximate cause of the claimed damages, as argued hereinabove, is equally applicable to this claimed second basis for liability. Appellants did not ignore this issue.

ANSWERING BRIEF ON CROSS APPEAL

Pg. 38 - 41: It is clear from the record that the Motion in Limine #2 was at a different stage of the litigation and the facts had changed. Appellants did cite additional authority and the issue was argued with different considerations than the order resulting from Motion in Limine #2. Also, a district court judge may reconsider and change any decision he or she has made prior to filing of final judgment. *Gibbes v. Giles*, 98 Nev. 243, 6076 P.2nd 118 (1980).

The issue on cross appeal is solely whether the Amended Judgment was correct in its decision on the offset required by NRS 17.245.

REPLY TO STATEMENT OF FACTS

First sentence: We now understand the construction of the accessory garage was pursuant to a permit, (App. 301), which was Lindbergs' exhibit 44 in the district court) but there was no final inspection and, therefore, no Certificate of Occupancy issued.

Lindbergs have now clarified that there are two bases for the Amended Judgment. 1. That Appellants knew or should have known that the septic system at the property was undersized; and 2. That the listing of the property as a single-family residence was improper. As demonstrated hereinabove, the second bases are utterly without merit. The points in the record below where the zoning is referred to are the filling in of blanks on forms calling for the zoning designation set by the Washoe

County Planning Commission.

The logic employed by the District Court is patently invalid and unsupportable for all the reasons set forth hereinabove.

The District Court's Amended Judgment should be ordered vacated, leaving no need to address the issues concerning damages and offsets presented by the cross appeal.

In the event this Courts does address damages and offsets, the following observations are decisive.

The Lindbergs' Second Amended Complaint alleges at paragraph 14, that the Lindbergs read and relied on information that the Appellants provided. That the property living space was 3880 square feet and included an in-law quarters or guest house. The district court rejected the claim of 3880 square feet of living space and the Lindbergs have not challenged that rejection on appeal. The description of the accessory structure as in-law quarters were disclosed as "may or may not be lawful", which invokes the rule of law set forth in *Woods v. Label Investment Corp*, 107 Nev. 419, 426, 812 P.2d 1293 (1991), when facts become known that 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 sellers' description of the property.

Accordingly, after learning that the use they claim to have intended for the property may or may not be lawful, it then became the Lindbergs' duty to investigate

further and they could not rely on the Appellants for their information.

Lindbergs begin their damage allegations in paragraph 22 of the Second Amended Complaint. They allege their damages arise from "statements and other conduct of the defendants," They list their damages as having to engage contractors , inspectors, and other professionals to assess and determine the true status and condition of the property, and to remediate and correct aspects of the conditions of the Property. They allege they have incurred other damages and injuries subject to proof at trial.

In paragraphs 22 through 26, Lindbergs attribute their damages to "statements and other conduct of the Defendants". Each of these allegations refer to the defendants as a whole group having caused these damages. Lindbergs' second cause of action alleges damages against the Reynolds as more fully described herein. (Para. 33). There are no specifications of damages elsewhere in this pleading other than those described above. The third cause of action repeats this description of damages. The fourth cause of action describes the damages as "actual damages," but there are no specific damages enumerated.

Lindbergs base their arguments on different language in the statutes. There is nothing in these different descriptions of damages that distinguishes the loss or injury covered by the different language. The base loss or injury is the same. Here the claimed damages are the costs involved in expanding the sewer capacity and

downsizing the in-law quarters to reduce the square footage to a lawful size, that is, the size mandated by the zoning controls applicable to the property. This is the single injury and it is the claim that generates the claimed damages that are in the record. There are no damages other than these claimed damages that are supported by the record.

The bald assertion that "the injury is not to the Respondents person or property" is not supported by a reference to the facts or law. The injury had to be to the person or property of the Lindbergs. There was nothing else that the claimed injury could act upon.

Again, referring to the Second Amended Complaint, paragraph 22, Lindbergs' damages were generated by the need to engage contractors, inspectors and other professionals to remediate and correct aspects of the condition of the property. Paragraph 23 claims Lindbergs will be required to incur costs to repair or replace defective portions of the property.

Appellants properly 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). After hearing, the court ordered that only one-third of the Reynolds settlement was appropriate to be offset. Lindbergs argue that there is no basis in law for adding the prior settlements to Appellants' offer of judgment. However, Lindbergs make no effort to distinguish the holding of this Court in *The Doctors Company v. Vincent*,

120 Nev. 644, 98 P3d. 681 (2004), 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 Lindbergs likewise do not cite any law to overcome the clear and certain language of the NRS 17.245. "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.

Note finally neither NRS 17.245 nor the *Doctors* opinion support special rules pertaining to punitive damages. Also note that the comparison to be made by the trial court is between the damages found and the amount of the offer of judgment made, reduced by the amount of the settlements previously received. There is no law supporting a comparison between the settlement offered and the **claims** of the plaintiff, which is what Lindbergs are contending for.

Nowhere in NRS 17.245 is there a requirement that the parties be "joint tortfeasors." The statute specifically provides that the liability may be joint or several. NRS 17.245(1). The key and essential condition that invokes the provisions of NRS 17.245 are that the persons become liable in tort for the same injury to person or property. The clear objective of this provision is to prevent unjust enrichment by a plaintiff who attempts to take more than his full damages when he settles then recovers more than his actual damages. In *Evans v. Dean Witter Reynolds, Inc.*, 116 P.2d 588, 610 (2000) the Nevada Supreme Court held that "The act provides that 'where two or more persons become jointly or severally liable in tort for the **same injury** to person or property . . . there is a right of contribution among them."

Lindbergs assert that the Johns defendants did not claim an offset in the pleadings. It can clearly be seen that the affirmative defenses set forth in the Johns' Answer, do, in fact, claim off-sets. Defendants' Second Affirmative Defense states: "Plaintiffs have resolved its claim with regard to the remaining Defendants and these defendants is entitled to a credit, therefore. Defendants' Fourth Affirmative Defense states: "Plaintiffs received compensation for the losses alleged to have been sustained in the purchase of the property and claim have been satisfied." Defendants' Eleventh Affirmative Defense states: The claims of the Complaint are barred by unjust enrichments.

Defendants twelfth affirmative defense states: “Plaintiffs received compensation for the losses alleged to have been sustained in the purchase of property and the claims has been satisfied.”

Clearly the claim for off-set and/or contributions have been made by the defendants Black’s Law Dictionary defines “tort” as “A private or civil wrong or injury. A wrong independent of contract. . . A violation of a duty imposed by general law or otherwise upon all persons occupying the relation to each other which is involved in a given transaction. . . There must always be a violation of some duty owning to plaintiff, and generally such duty must arise by operation of law and not be mere agreement of the parties. The three elements of every tort action are; Evidence of legal duty from defendant to plaintiff, breach of that duty, and damages as a proximate result.” (Deluxe Fourth Edition, pg. 1660). Note that this definition puts no limitation on the source of the duty that is breached

This Supreme Court has confronted the issue of whether liability for damages caused by an act that was prohibited by both statutory law and by tort case law supports a claim for recovery of more than the actual damages. In *Grosjean v. Imperial Palace* 125 Nev. 349, 373 (2009), the Court held as follows:

> While preclusion principles are not a bar to Grosjean's state law claims here, the prohibition against double recovery for a single injury operates to foreclose any further recovery against Imperial Palace. His tort claims and his § 1983 claims are alternative theories for recovering damages resulting from the Imperial Palace security guards' actions of detaining and searching

him. See Zarcone, 434 N.Y.S.2d at 441 (noting that the plaintiff's causes of action for, among other things, false arrest and intentional infliction of emotional and physical harm, required "virtually the same proof, both as to the prima facie elements and damages, which a cause of action under section 1983 comprehends"); compare Marschall v. City of Carson, 86 Nev. 107, 110, 464 P.2d 494, 497 (1970) (noting that to establish false imprisonment, a plaintiff must prove that he was "restrained of his liberty under the probable imminence of force without any legal cause or justification therefore"), with Camara v. Municipal Court, 387 U.S. 523, 528 (1967) (explaining that the Fourth Amendment's purpose is to "safeguard the privacy and security of individuals against arbitrary invasions by governmental officials"). Although a plaintiff may assert both a § 1983 claim and tort-based claims, he or she is not entitled to a separate compensatory damage award under each legal theory. See Clappier v. Flynn, 605 F.2d 519, 529 (10th Cir. 1979); Zarcone, 434 N.Y.S.2d at 444. Instead, if liability is found, the plaintiff is entitled to only one compensatory damage award on one or both theories of liability. Clappier, 605 F.2d at 529 (concluding that the district court erred in awarding judgment under both negligence and deprivation of civil rights theories of liability on the claims because the interest protected by the common law of negligence, as applied to the facts, closely paralleled the interest protected by the constitutional amendment on which the plaintiff was relying, such that the relief afforded under the common law of torts and § 1983 were identical); Woodward & Lothrop v. Hillary, 598 A.2d 1142, 1148 (D.C. 1991) (explaining that in cases grounded on both § 1983 and tort liability theories, the jury must be explicitly instructed that the plaintiff may be compensated only for damages that fairly compensate for actual injuries in the aggregate).

The omission of a statutory duty and common law negligence may together give rise to what is but a single cause of action in tort. 74 Am. Jur. 2d, Torts, Section 17.

The statutes in question in this instant case 645.251 et seq., set forth standards of care for licensees involved in a real estate transaction. The breach of any of those

duties gives rise to an action. The elements of that action are: Evidence of legal duty from defendant to plaintiff: A breach of that duty; and damages as a proximate result. This is exactly the definition of a tort as defined in Black's Law Dictionary.

CONCLUSION

Both the applicable case law and the statutory language of NRS17.245, provides a clear and consistent rule of law that it is the full amount of the settlements the plaintiffs have received that is to be added to the offer of the remaining parties that is to be compared to the recovery finally achieved by the offeree to determine whether the combined offers of judgment exceeds the amount finally recovered to determine the whether the sanctions of NRCP 68 to be imposed.

Cross claimants have not cited any authority to the contrary.

Accordingly, the cross claim should be dismissed and the matter of determining the whether, and in what amount, the Cross-respondents are entitled to attorney's fees and costs.

Respectfully submitted this 17th day of October 2019.

//*Glade L Hall*//

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ATTORNEY'S CERTIFICATE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(A)(40, the typeface requirement of NRAP 32(a)(5) 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 excepted by NRAP32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points, and contains 8,064 words.

3. Finally, I hereby certify that I have read the brief to which this certificate is affixed: that to the best of my knowledge, information, and belief, the brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay of needless increase in the cost of litigation: and that the brief complies with all applicable Nevada Rules of Civil Procedure, including the requirements 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 the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellant procedure.

Dated this 17th day of October 2019.

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CERTIFICATE OF SERVICE

Pursuant to the Nevada Rules of Civil Procedure (5) (b) I certify that on the date listed below, I caused to be served a true copy of the foregoing pleading on all parties to this appeal by filing the foregoing to the clerk of the court by using the CM/ECF system which served the following parties electronically:

JOHM DAVID MOORE
3715 Lakeshore Drive, Suite A
Reno Nevada 89509

Dated this 17th day of October 2019

/Glade L Hall/