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' REPLY BRIEF ON CROSS-APPEAL

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RESPONDENTS' REPLY BRIEF ON CROSS-APPEAL

A. INTRODUCTION

In this Cross-Appeal, the Respondents do not contend that the District Court cannot change prior rulings made during litigation before the filing of a final judgment, as incorrectly asserted in Appellants' Amended Reply Brief and Answering Brief on Cross-Appeal. (*See* Appellants' Amended Reply Brief and Answering Brief on Cross-Appeal at p. 25). Rather, Respondents contend that the District Court's original decision when it considered and granted Respondents' Motion in Limine No. 2 in the underlying litigation was the correct decision and that no additional evidence or argument supported the District Court's later decision to reduce the original judgment by way of an offset of a proportionate amount of the settlement reached with the sellers of the real property, who were defendants in this case. The District Court erred in allowing this offset when the District Court granted Appellants' Motion to Amend Judgment because the issues presented against the sellers, who settled with the Respondents prior to trial, were based on separate statutes that do not form the basis of liability against the Appellants in this case. Quite plainly, Respondents contend that the District Court got it right the first time when it granted Respondent's Motion in Limine No. 2 in an order dated March 20, 2018, therein finding 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 [settlements reached with other Defendants in the underlying case]." (Respondents' Appendix Vol. 1 at RA 0216).

In Respondents' Opening Brief on Cross-Appeal, Respondents directed the Supreme Court to consider and review the Respondents' Motion in Limine No. 2 and the pleadings filed in support of and against that Motion. (Respondents' Opening Brief on Cross-Appeal at pp. 39-40). Respondents also outlined how the Appellants' Motion to Amend Judgment filed after the trial in this matter relied upon the same facts and arguments stated in opposition to Respondents' Motion in Limine No. 2, and that no new evidence or arguments supported Appellants' Motion to Amend Judgment. (Id. at 40-41). Rather than confront the nature of these two motions, in that they relied upon the same facts and arguments, but from which the District Court reached totally incongruent conclusions, Appellants simply stated in their Answering Brief on Cross-Appeal that "Appellants did cite additional authority and the issue was argued with different considerations than the order resulting from Motion in Limine #2." (Appellants' Amended Reply Brief and Answering Brief on Cross-Appeal at p. 25). Appellants, however, do not cite anything in the record that supports this conclusion.

Rather, the two motions from which the District Court reached two different conclusions each identified the same issues, the same evidence, and the same

arguments. As a result, there was no basis for the District Court to revisit the issue of whether the Appellants were entitled to an offset after the District Court entered its original judgment in this case because the District Court had already ruled on that issue. Nothing new was presented with the Appellants' Motion to Amend Judgment. Accordingly, the District Court should not have granted that Motion.

B. The District Court's Original Decision was Correct

In this case, Respondents sued the sellers of real property who sold a residence to Respondents without disclosing that two structures on the property were not permitted for their existing use.[1] Respondents were required to expend significant amounts upgrading the electrical system and other services at these two structures and reducing the amount of square footage for one of the structures by approximately 600 square feet to obtain permitting retroactively in or about 2015, after Respondents purchased the residence in 2012. Respondents sued the sellers under NRS 113.130

[1] In their Answering Brief on Cross-Appeal, Appellants incorrectly claim that the garage that was converted into living space (one of the two unpermitted structures) was originally permitted but that there was no final inspection and no certificate of occupancy on this garage. (Appellants' Amended Reply Brief and Answering Brief on Cross-Appeal at p. 25). The original construction of the garage *as storage space* in 1995 was permitted and inspected as shown in Exhibit 44 submitted at trial. (Appellants' Appendix Vol. II at pp. 301-308). The *conversion* of the garage *to living space* prior to 2012, however, was never permitted, as shown in Exhibit 43 submitted at trial. (Appellants' Appendix Vol. II at pp. 299-300). A shed also constructed at the property was never permitted, though the shed had a bathroom and electrical service installed.

and NRS 113.150 for their failure to disclose that these two structures were never permitted for their existing use.

The sellers are liable for failing to disclose the lack of permitting under NRS 113.150, which would entitle the Respondents to "recover from the seller[s] treble the amount necessary to repair or replace the defective part of the property." NRS 113.150(4). The "defective part" of the property conveyed to the Respondents from the sellers was that the two additional structures located at the property did not have necessary permits and that these structures could not be used for their existing purposes as a result. Respondents were required to expend significant amounts to remedy the lack of permitting and the sellers would have been required by statute to pay treble the amount spent to remedy the lack of permitting. Because Respondents settled with the sellers prior to trial, at trial, Respondents did not present any evidence about the damages that the Respondents were seeking from the sellers, focusing the presentation at trial instead on damages they sought from the Appellants and on the things that the Appellants knew or should have known about the property.

Appellants have disclaimed any knowledge of the lack of permitting. As a realtor and broker, the Appellants have asserted that their clients, the sellers, told them that all the structures at the property were permitted. *Respondents did not dispute this assertion at trial.* Rather, Respondents presented substantial evidence at trial, supported by uncontroverted expert testimony and testimony from fact

witnesses, that Appellants knew or should have known that the septic tank serving the property was too small for the existing use of the property with multiple structures. (Appellants' Appendix Vol. 1 at p. 187, pp. 192-193, pp. 206-212, Vol. III at pp. 656-659) (Respondents' Appendix at Vol. II at RA 302 and RA 367, Vol. III at RA 0453 – RA 0468, RA 0488 – RA 0490, and RA 0550 – RA 0551). Respondents also presented substantial evidence at trial that Appellants knew the zoning requirements for this property and that, as used at and before the sale to Respondents, the property would have required a variance for its existing use as multi-family when the property was zoned single family. The evidence supporting this alternate theory of liability is supported by the expert testimony of Sherrie Cartinella, Appellant A.J. Johnson's own trial testimony, and the testimony of Ron Cohen regarding the requirement for a variance. (Respondents' Appendix Vol. III at RA 0453 – RA 0468, RA 0488 – RA 0490, RA 0490 – RA 0517 and RA 550 – RA 0551). These two theories of liability raised against the Appellants had nothing to do with the lack of permitting. Instead, these theories focused on what the Appellants knew or should have known about the property during this transaction and that Appellants failed to disclose these issues, which violated NRS 645.252, NRS 645.257 and NAC 645.600, which hold realtors and brokers responsible for damages that flow from their failure to disclose things that they knew or should have known regarding real property that they list for sale.

NRS 113.150 does not create joint liability between the sellers in this case and the sellers' realtor, the Appellants, for the sellers' known failure to disclose the lack of permitting for existing structures on real property. The sellers who violate NRS 113.150 are solely responsible for the treble damages that flow from a violation of that statute. Appellants are not responsible for these damages, how could they be, especially when they disclaimed any knowledge of a lack of permitting. Additionally, the sellers of real property in this case are not jointly liable with their realtor or broker who failed to disclose to Respondents things that the realtor or broker knew or should have known about the property. Appellants' knowledge of the adequacy of the septic system and of the zoning requirements for the property in question is not something the sellers are charged with knowing. Sherrie Cartinella, the Respondents' expert in this case, did not assert in her expert report or during her testimony at trial that the sellers knew or should have known that their septic system was inadequate for the existing use of the property. Instead, Ms. Cartinella testified that the Appellants, as a licensed realtor and broker, knew or should have known that the septic system was too small for this property as it existed. (Respondents' Appendix Vol. III at RA 0453 – RA 0468, RA 0488 – RA 0490). The sellers did not violate NRS 645.252, NRS 645.257 and NAC 645.600 when their realtor and broker, the Appellants, failed to disclose things that the realtor and broker knew or should have known about the property. Accordingly, the statutory obligations that

bind the sellers and that bind the Appellants in this case cannot form the basis of an offset under NRS 17.245 that is based on joint tort liability, because there is no joint liability stemming from the different violations of these different statutes. The sellers violated NRS 113.150 when they failed to disclose the lack of permitting for two structures at the property. The Appellants violated NRS 645.252, NRS 645.257, and NAC 645.600 when they did not disclose things that they knew or should have known about the septic tank and the zoning at the property. The damages that flowed from these violations of separate statutes are distinct and different and therefore cannot be used as an offset for liability under each distinct statute. Accordingly, the District Court should not have reduced the original judgment in this case by any amount resulting from the settlement with the sellers.

To be entitled to an offset under NRS 17.245, Appellants must show that they and the sellers are liable to Respondents "in tort for the same injury. . ." As outlined above, there is no tort liability arising in this case and the injury to Respondents caused by the sellers' violation of NRS 113.150 are distinct from the injury Respondents suffered as a result of Appellants' violation of NRS 645.252, NRS 645.257 and NAC 645.600. Because these statutes do not create joint liability between the sellers and the Appellants, the District Court's decision to reduce the original judgment in this case by any amount was incorrect. NRS 17.225 drives this point home, where we read 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. . .” Here, there is no joint or several tort liability and no single injury, thereby meaning that no right of contribution exists between the sellers and the Appellants in this case. Respondents would not be unjustly enriched by proceeding with statutory liability against the sellers and different statutory liability created against the Appellants for different statutory injuries arising from different facts and circumstances that resulted in different injuries to the Respondents.

Appellants’ citation to Black’s Law Dictionary’s definition of “tort” and to *Grosjean v. Imperial Palace*, 125 Nev. 349, 373, 212 P. 3d 1068 (2009) and the cases cited therein does not change this analysis. In the definition of “tort,” liability for misconduct is premised on “a private or civil wrong or injury. . .” that is distinguished from contract law because its involves a “duty imposed by general law or otherwise upon all persons occupying the relation to each other which is involved in a given transaction. . .” (Appellants’ Amended Reply Brief and Answering Brief on Cross-Appeal at p. 31). In this case, sellers do not occupy toward the Respondents the same position that the Appellants occupy under the statutes that sellers and Appellants violated in this case. As noted above, the statute that Appellants violated does not impose liability upon the sellers, and vice versa. The damages that Appellants are required to pay as a result of a violation of these statutes are also not the same as those damages that sellers would be required to pay

stemming from a violation of NRS 113.150.

Moreover, under *Imperial Palace*, this Court concluded that the same plaintiff could not recover the same damages from the same defendant under two separate theories of liability, one theory presented as the common law tort claim of wrongful imprisonment and the other theory arising under §1983 because both claims arose from "the Imperial Palace security guards' actions of detaining and searching" a casino patron. 125 Nev. at 373. Under this case, the concern associated with double recovery arose from the fact that both the common law tort claim and the §1983 claim required "virtually the same proof, both as to the prima facie elements and damages. . ." and that, even though a plaintiff may make a separate claim under common law tort and under §1983, that plaintiff "is not entitled to a separate compensatory damage award under each legal theory." *Id.*

Here, Respondents forwarded a single legal theory of liability against the sellers under NRS 113.150, with set damages available for a violation of that statute of treble the amount it cost Respondents to repair the non-disclosure of permitting on two structures at the property. Appellants are not and cannot be responsible for these damages. Appellants did not violate NRS 113.150. At the same time, Respondents forwarded a single legal theory of liability against the Appellants under NRS 625.252, NRS 645.257, and NAC 645.600, that arose from different facts surrounding the Appellants' failure to disclose things that the Appellants knew or

should have known about this property that related to the size of the septic system at the property. Sellers are not liable for the Appellants' violation of these statutes. The damages arising from these two statutes are distinct, related to different facts, cover different issues and damages, and arose under different circumstances. Accordingly, the District Court should not have reduced the original judgment and this Court should restore the original judgment in the amount of $75,780.79, with the additional amount of $19,121.48 in pre-judgment interest, with post-judgment interest accruing on the judgment from the date it was entered until the present.

C. 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 No. 2, the District Court got it right. Nothing changed between the time the District Court granted Motion in Limine No. 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. The statutory claims raised against Appellants and the sellers of the property in question are distinct, do not create liability against the other defendants, and permit different damages to be awarded against sellers and the Appellants. As such, the Appellants are not entitled

to an offset and the District Court's contrary ruling should be overturned.

DATED: November 1, 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 2016 in 14 point Times New Roman font; or

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

DATED: November 1, 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 November 1, 2019, I caused the foregoing document to be served on all parties to this action by:

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to the following:

Glade Hall, Esq.

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