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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,

V.

JOHN LINDBERG, AN INDIVIDUAL; MICHAL LINDBERG, AN INDIVIDUAL; AND JUDITH L. LINDBERG, AN INDIVIDUAL,

Respondents/Cross-Appellants.

No. 78086

Electronically Filed
Sep 22 2020 12:00 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPELLANTS' PETITION FOR REHEARING

Appellants J.E. Johns & Associates (now deceased) and A.J. Johns, an individual ("Appellants"), respectfully submit this petition for rehearing of this Honorable Court's opinion pursuant to NRAP 40. This Petition is made in good faith and on the ground that this Honorable Court has overlooked and misapprehended material issues of facts and law because the trial court's finding is contrary to well-settled existing Nevada law.

On August 20, 2020, this Court issued its Opinion affirming the judgment of the district court. The majority of the Court's published opinion addresses the issue of offset of the judgment by the settlement amounts paid by other parties to the lawsuit and/or sales transaction. Appellants do not dispute the Court's well-reasoned analysis on this issue. However, Appellants respectfully submit that the Court misapprehended material issues of law and fact by affirming the trial court's finding that Appellants:

> should have known the septic system was too small for the residential property in its existing state at the time of the sale"; and (2) should not have listed the property as a "single family residence" and they violated NRS 645.252(1) and NRS 645.252(2) by failing to disclose the same to the Lindbergs. The district court further concluded the seller's agent

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> were liable under a second theory for "incorrectly list[ing] the property as 'single-family residential, when the property clearly contained three structures and the zoning for this area allowed one residential structure and one accessory structure (residential or non) for a total for two structures." (136 Nev. Ad. Opinion 55, Pg. 3-4).

In essence, the trial court's findings, affirmed by this Court, changes Nevada law and imposes on real estate agents a duty to investigate the condition of the property including septic system sizing and permitting for outbuildings. This finding is completely contrary to Nevada law.

Under existing Nevada law and as further discussed below, a real estate licensee has no such duty to investigate. This Opinion should be reconsidered because it will have far-reaching effects on all real estate agents and brokers in the State of Nevada. If the Opinion is not modified, it will have a chilling effect on real estate transactions across the State, especially in real estate sales, like this one, involving single family homes with septic systems or outbuildings. This opinion imposes on real estate a new duty to investigate the condition of the property that never existed before and is contrary to Nevada law.

A. A Real Estate Agent is Entitled to Rely on Information Provided by the Seller

In September 2012, the Reynolds were owners of certain real property in Washoe County, Nevada. The property consisted of a single-family residence, a two-bay garage, one bay which was converted into a mother-in-law quarters and outbuilding of office. (Appellant's Appendix "AA" 603). One of the Reynold's mother actually lived in the mother-in-law quarters at the time of the sale. (AA 598). The property was on a septic system. (AA 614-15). On the advice of Appellants, the Reynolds obtained an appraisal of the property. The appraiser noted the Washoe County Assessor's Records indicated the mother-in-law quarters was 1,460 square feet and ***may or may not be legal and therefore for appraisal purposes were given little value.*** (AA 614). The appraiser also noted that the Washoe County Assessor's office showed these improvements and dimensions had been reported to the County.

(AA 614).

Appellants met with the Reynolds and accepted the listing. The Reynolds reported the property was 3,880 square feet consisting of reported space of 2,180 square feet in the main house and 1,700 square feet in the mother-in-law unit. The Reynolds also advised her that the mother-in-law unit was permitted. (Trial Transcript ("TT") 93-102) The residential listing input form was prepared by Appellants and signed by the Reynolds. The Reynolds acknowledged that they read and understood the details of the listing and that it was true and correct to the best of their knowledge. (AA 189). Appellants had no reason to doubt the accuracy of the information provided by their clients and had no independent duty to investigate the condition of the property. The law is clear regarding the lack of a duty to investigate and **NRS 645.252(4)(c) states specifically that a licensee owes no duty to "[c]onduct an investigation of the condition of the property which is the subject of the real estate transaction" absent an agreement to do so.**

B. Real Estate Agents Are Not Lawyers

It is noteworthy the real estate agents are not lawyers. Appellants as real estate agents and brokers are trained in basic real property and contract principles and are required to become familiar with and use the legal forms created and approved by the Nevada Division of Real Estate. Matters of complex zoning, septic system size, and knowledge of the County's health regulations governing septic systems are well outside the realm of a real estate agent's area of expertise.

In fact, the Nevada Division of Real Estate's Information Form regarding septic system expressly states: ***"Real estate agents have no special training, knowledge, or expertise concerning these [septic] systems."*** The seller is required by law to disclose any problems with the septic system on the Seller's Real Property Disclosure Form. The septic system information form urges the buyer to obtain inspections. The Appellants' duty is limited to obtaining the information on the property from the seller and providing it to the buyer's agent. Undoubtedly, the

district court erred as a matter of law (1) in imposing on a real estate agent an onerous duty to investigate the septic system of the property; and (2) by imputing knowledge on Appellants regarding septic system sizing that they did not have. This finding is directly contrary to Nevada law.

C. Real Estate Agents Are Not General Contractors

NRS 645.254(1) imposes on a real estate agent a duty to act as a reasonably prudent licensee would exercise in similar circumstances. The licensee must not act incompetently or with gross negligence. NRS 645.633(1). NAC 645.605 further requires a licensee to have the knowledge required to obtain a current real estate license and act on that knowledge. Markedly absent in the NRS and the NAC is any duty for a licensee to have expertise in septic system sizing. The adequate size of a septic system would potentially be within the general knowledge of a person who designs or engages in the construction of a home, but a real estate agent cannot and should not be imputed with the knowledge of an architect or a general contractor. This is particularly true where all parties to the transactions are expressly advised to obtain independent inspections and also advised that real estate agents are not experts in septic systems.

D. Real Estate Agents Are Entitled to Rely on Information Provided by the Seller

Appellants had never lived at the property and had no reason to doubt the condition of the property as described by their clients. Appellants requested an appraisal be conducted to determine the listing price. Richard Lake conducted an appraisal of the property describing it as 2,180 square feet of gross living area with a 1,460 square foot of mother in law quarters which was shown in the Washoe County Assessor's records and described as "**may or may not**" be legal. (AA 614-15). *The Washoe County Assessor confirmed the zoning of the property was "single family residential" and that is how it was listed.* ***(AA 615).***

In providing all the information they knew about the property, Appellants went over and above their statutory duty. Appellants disclosed the appraisal of the property, obtained a septic system inspection report, and even offered to provide the buyers with blueprints of the septic system. (AA 653-659). This is a case of full disclosure of all known defects at the time of the sale. Appellants should not be held strictly liable for the subsequently discovered information that no one knew at the time of the sale-- that the septic system was undersized.

E. Real Estate Agents Are Entitled to Rely on the Designation Given to Property by the County Assessor and the Building Department

The Trial Court also erred in ruling that the Appellants breached a duty of care in listing the property as a single family residence. This ruling fails to recognize that Appellants have no discretion to alter or modify the designation of the property and must use the assessment set forth in the records of the assessor. Even in cases where there are outbuildings on the property, the listing agent has no discretion to change the Assessor's description of the property.

The Lindberg property was identified by the Washoe County Assessor as a single family residence. The Washoe County Building Department identifies the Lindberg property as zoned as a single family residence. (AA 232; RA 490-517). The property was listed as designated by the County as a Single Family Residence. While there were several outbuildings on the property, the Lindbergs expressly advised that the accessory structures or outbuildings *may or may not* be legal. Appellants had no power or discretion to change the legal description of the property as determined by the Washoe County Assessor. (AA 614). The trial court erred in concluding otherwise.

F. The Lindbergs Knew the Condition of the Property at the Time of Sale

The Respondents ("Lindbergs") knew the septic system was 1,000 gallons at the time the transaction closed on February 28, 2013. Over one month before the

closing, on January 4, 2013, the Lindbergs knew that the other buildings on the property **may not be legal** as indicated in the appraisal report provided to the buyer. Over one month before**,** on January 19, 2013, the Lindbergs received an inspection report of the septic system from Waters Vacuum Truck Service. (AA 187; 206-12). The report showed that the septic system was 1,000 gallons, not 1,500 gallons as represented by the Reynolds. (AA 206-12). The fact that the septic system was 1,000 gallons was reported in three separate places in the inspection form (AA 208, 209, 211). During escrow, the Lindbergs acknowledged, read and signed these pages documenting the septic system size. (III TT 9). On February 26, 2013, the Lindbergs signed the Walk Through and Property Condition Release and noted that the property was "Fine per Inspection."

Appellants are real estate licensees, not experts on septic systems, nor did Appellants ever indicate that they were. To the contrary, the information on septic system forms expressly advised the buyers in capital letters: "NEITHER THE SELLER, NOR THE SELLER'S AGENT WARRANT THE CONDITION OF THE …SEPTIC SYSTEM AND WILL NOT BE RESPONSIBLE FOR THE FUTURE PROBLEMS DISCOVERED AFTER CLOSE OF ESCROW." (AA 159).

Nonetheless, the Court found that Appellants "*should have know*n" the 1,000-gallon septic system was too small for the property. This Honorable Court affirmed this finding. However, the Court's finding begs the question: *how exactly were Appellants supposed to know the septic system was undersized*? Appellants are real estate licensees and are not experts on septic systems. They have no background in construction. They have never worked for the Health Department which governs septic system size. There was no evidence presented at trial that Appellants had any *actual* knowledge the septic system was too small. The only way they could have known the septic system was undersized was to conduct an investigation that the law does not require.

Appellants had no reason to know that was anything wrong with the home, including the septic system buried underground. Appellants satisfied their legal duty by providing the Sellers with the Seller's Real Property Disclosure and advising the sellers that they had a duty to disclose any known defect in the condition of the real property. (AA 598). It is noteworthy that 30 days before escrow, the Lindbergs knew the septic size was 1,000-gallons. The septic inspection was performed at the request of the buyer and given to the Buyers' Broker and Agent. The Buyer's own agent and broker, likewise, gave no warnings to the Lindbergs with respect to the 1,000-gallon septic system size because, again, ***the sizing of a septic system is well beyond their area of expertise of real estate agents.*** (AA 206-12).

The real estate form on information on septic systems expressly advises potential buyers that a septic system is not within a real estate licensee's expertise. (AA 189). There is, in fact, no applicable uniform standard regarding septic system sizing taught in real estate school. Determining whether the system was adequate for the premises would require Appellants to conduct an independent investigation that Nevada law does not require. The form notice on septic system states: "Real estate agents have no special training, knowledge or expertise concerning these [septic] system," but the trial court ignored the law and imposed a duty to know or investigate septic system size. (AA 189).

G. The District Court's Reliance on "Expert Testimony" was Misplaced

In making its finding, the trial court relied on the expert testimony of Ms. Cartinella, an expert in real estate who testified Appellants breached a duty of care. However, Ms. Cartinella did not have essential information on the transaction. She admitted that she did not know that the actual size of the 1,000-gallon septic system was, in fact, repeatedly disclosed to the buyers. (Trial Transcript ("TT") 35). She also did not review the appraisals and did not know that these appraisal disclosed

the fact that the outbuilding *may not be permitted.* (TT 37). The undisputed evidence in the case proves that all material facts concerning the septic system, and the fact that the outbuildings may not be permitted, were not only disclosed, but also expressly acknowledged by the buyers at the close of escrow. The undisputed evidence before this Court shows that Lindbergs purchased the property knowing the septic system was 1,000-gallons and the outbuildings may not be permitted.

H. The District Court's Finding is Fundamentally Flawed and Contrary to Nevada Law

The Court's finding that Appellants had a duty to further investigate after learning of the septic tank size runs completely contrary to Nevada law imposing no duty investigate. In cases where there is a discrepancy on the condition of the property that warrants further investigation that would serve as a "red light" to a reasonable purchaser, the ***buyer*** has a duty to investigate further and cannot just rely on the seller. Woods v. Label Investment Corp., 107 Nev. 419, 426; 812 P.2d 1293. The Appellants are entitled to rely upon the information provided by the seller and a real estate licensee is not required to search the public records to ensure the seller told the truth. The Nevada Law and Reference Guide, 3d. Edition (2012) (AA 308-495).

NRS 645.252(4)(C) expressly states that unless otherwise agreed upon in writing, a licensee owes no duty to: "Conduct an investigation of the condition of the property which is the subject of the real estate transaction." The trial court's finding that Appellants had a duty to further investigate or should have somehow known the 1,000-gallon septic tank was inadequate is not only supported by insufficient evidence but runs completely contrary to Nevada law. Respectfully, the trial court's finding that Appellants breached a duty of care is contrary to Nevada law and not supported by any reliable evidence. The buyers knew they were purchasing a single family residence with a 1,000-gallon septic tank with outbuilding that may or may not be permitted. All of this information was

disclosed and, therefore, the Appellants did not breach a duty of care.

The trial court relied on Ms. Cartinella's opinion about what she personally would have done. Mr. Cartinella's personal practices as a real estate agent do not establish a duty of care. Ms. Cartinella's opinion upon which the court relied is also fundamentally flawed because **she did not know** the information regarding the size of the septic tank and potential lack of permitting was actually disclosed to buyers 30 days before the close of escrow. Therefore, any duty to further investigate any potential issues with regard to the condition of the property is placed squarely on the purchaser by the Nevada Legislature, the Nevada Division of Real Estate, and this Court's Opinion in Wood.

If rehearing is not granted, licensees throughout the state of Nevada are left with inconsistent guidance on their duty of care. The Nevada Division of Real Estate forms advise the purchasers that licensees are not experts on septic systems. The Nevada Revised Statutes impose no duty to investigate. This Court's opinion changes the law and imposes on licensees a duty to further investigate and imputes on a licensee knowledge regarding septic system sizing despite statements in the forms that licensees have no such knowledge. Licensees are now strictly liable for defects discovered after the sale of property even in instances, like this one, where the condition of the property was fully disclosed. Appellants had no duty to advise the purchaser that the septic system was undersized because they did not know, nor should they have known of this fact. The trial court's finding otherwise is not supported by substantial evidence and is contrary to Nevada law.

Appellants respectfully request that this court reconsider whether the trial court erred in finding that Appellants "should have known" the septic system was undersized. This finding is contrary to Nevada law and imposes an onerous new duty on licensees to investigate septic system sizing. Further, Appellants respectfully request that this court reconsider whether the trial court erred in finding that Appellants should not have listed the property as a single family residence. The

court's finding is contrary to Nevada law because, in listing a property, a licensee has no discretion to alter or modify the property description designated by the Assessor, even when there are outbuildings on the property.

DATED: September 21, 2020

BURNHAM BROWN

/s/ Lynn V. Rivera

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I certify that I am an employee of Burnham Brown and that on September 21, 2020, 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:

John David Moore
3715 Lakeshore Drive, Suite A
Reno, NV 89509

Glade Hall
105 Mt. Rose Street, Ste. B
Reno, Nevada 89509

Dated this 21st day of September 2020.

/s/ Peggy Ortega
Peggy Ortega, an employee of
Burnham Brown

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