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

APPELLANTS' PETITION FOR EN BANC RECONSIDERATION

Appellants J.E. Johns & Associates (now deceased) and A.J. Johns, an individual ("Appellants"), respectfully submit this Petition for En Banc Reconsideration of the panel's Order Denying Rehearing, filed on November 3, 2020, pursuant to NRAP 40A. This Petition is made in good faith, in compliance with NRAP 40(b)(4), on the grounds that the panel misapprehended material issues of law and its opinion will have a far-reaching and substantial, precedential effects on licensees. The decision carves out new duties of care for Nevada real estate licensees which run completely contrary to well-established existing Nevada law and the Nevada Division of Real Estate disclosure forms. The Court ought not to change the law in an area where the Legislature has already spoken on the issue.

On August 20, 2020, this Honorable Court issued its Opinion affirming the judgment of the district court. The Panel affirmed the trial court's findings even though the trial court's findings are contrary to Nevada law. Specifically, the Court found that Appellants, who are real estate licensees:

> *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 buyers]. The district court further concluded the seller's agent 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 a panel of this Honorable Court, fundamentally changes existing 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.

Under existing Nevada law, a real estate licensee has no duty to investigate the condition of a property to uncover hidden defects. This Opinion should be reconsidered by the En Banc Court 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 agents the following new duties: (1) a new duty to have actual knowledge and expertise in septic system sizing; (2) if cases where such information is not actually known, the licensee also has a new duty to investigate the adequacy of septic system sizing. Moreover, the licensee must now stand in the shoes of the assessor and second guess whether a property is properly zoned and listed for sale as a single family residence in cases, like this one, where there are multiple out buildings on a property. If the panel's Opinion is not corrected, the Division of Real estate will have no choice but to modify its septic system disclosure forms and educate its licensees on the new rules for licensees inadvertently created by this Opinion.

A. A Real Estate Agent is Entitled to Rely on Information Provided by the Seller and Has No Duty to Investigate

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 the Appellants 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 licensee's duty to investigate. **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.**

Licensees are not imputed with the knowledge of lawyers or general contractors. It is noteworthy that 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 system size are well outside the realm of a real estate agent's area of expertise.

In fact, the Nevada Division of Real Estate's Disclosure 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 Division's septic system disclosure form also urges the buyer to obtain inspections. The licensees' 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 adequacy of the septic system for the size of the property; and (2) by imputing knowledge on Appellants regarding septic system sizing that they did not have the Court essentially imposed on the licensees a duty to investigate the issue. This finding is directly contrary to Nevada law, specifically, NRS 645.252(4)(c).

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 such knowledge. This is particularly true where all parties to the transactions are expressly advised of such in Nevada's standardized disclosure forms that: ***"Real estate agents have no special training, knowledge, or expertise concerning these [septic] systems."*** Therefore expert knowledge on

septic system sizing cannot be imputed on a licensee.

B. Real Estate Licensees Are Entitled to Rely on Information Provided by Appraisers, Inspectors and the Assessor

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 actual 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.

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 multiple outbuildings on the property, the listing agent cannot and should not deviate from the Assessor's description of the property.

The property that was the subject of the sale 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. The Appellants had no discretion to disagree with the assessor and list the residence as a multi-family unit. While there were several outbuildings on the property, the buyers were expressly and properly 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 and the Panel misapprehended a material issue of law in upholding this ruling. This Court's Opinion leaves licensees guessing whether they are left to wonder if they breached a duty of care by listing real property as it described by the assessor or have some further duty to investigate the assessor's designation.

C. There Was Full Disclosure of the Condition of the Property Prior to the Time of Sale

The Buyers knew and were expressly advised that the septic system was 1,000 gallons. At the time the transaction closed on February 28, 2013 the buyers had known for over 30 days that the septic system was 1000 gallons as indicated in the septic system inspection report provided to them. Over one month before the closing, on January 4, 2013, the Buyers likewise 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 the closing**,** on January 19, 2013, the Buyers 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 Sellers. (AA 206-12). The fact that the septic system was 1,000 gallons was known to the buyers and reported in three separate places in the inspection form (AA 208, 209, 211). During the close of escrow, the Buyers repeatedly acknowledged, read and signed these pages documenting the septic system size. (III TT 9). On February 26, 2013, the Buyers signed the Walk Through and Property Condition Release and noted that the property was "Fine per Inspection."

Appellants are real estate licensees, and not experts on septic systems, nor

are they required to be. To the contrary, the information on septic system disclosure forms expressly advises 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. A panel of this Honorable Court affirmed the trial court's 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 investigatio*n on the adequacy of the septic system sizing for the property that the law expressly advises licensees is not required.

Appellants had no reason to know that anything wrong with the home, including the septic system, which is 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 Buyers 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 so no party to this transaction knew the septic system was undersized.*** (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 actually know or investigate septic system sizing. (AA 189).

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

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 the trial court and this Court shows that Buyers purchased the property knowing the septic system was 1,000-gallons and the outbuildings may not be permitted. The law mandates full disclosure of all conditions of the property. *But is does not mandate investigation and licensees are required to be experts on septic system sizing and the Real Estate Division Required Forms, in fact state to the contrary.*

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

The Court's finding, and the Panel's decision denying rehearing carves out a new duty of care for licensees that is contrary to those identified by the Legislature and even this Court's prior case law. A holding that appellants had a duty to further investigate the adequacy of the septic tank size runs completely contrary to Nevada law imposing no duty investigate. This Court has, in fact, held 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 duty to investigate falls on the ***buyer***. 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: "[c]onduct 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 any evidence and runs completely contrary to Nevada law. Respectfully, the only evidence before the trial court shows the Buyers knew they were purchasing a single family residence with a 1,000-gallon septic tank with outbuildings 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, however, change Nevada law and 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. They could have walked away and they elected not to do so. 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 of the panel's decision 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 going forward imposes on licensees a duty to further investigate to determine the adequacy of the septic system for the size of the property. The Panel's opinion essentially imputes on a licensee knowledge regarding septic system sizing despite statements in the Division of Real Estate forms that licensees have no such knowledge and are not expected to know about these systems.

If the Panel's opinion is allowed to stand, licensees are now essentially 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 and no party to the sale knew there was anything wrong with it. Appellants had no duty to advise the purchaser that the septic system was undersized because they did not know, nor does the law require them to investigation to ascertain knowledge 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 that, is in fact, contrary to well-settled Nevada law. Further, Appellants respectfully request that this court

reconsider whether the trial court erred in finding that Appellants should have listed the property as a multi-family residence where it is undisputed the assessor designated 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 modify or overrule the property description designated by the Assessor, even when there are outbuildings on the property.

Certificate of Compliance Pursuant to NRAP 40(A)

I hereby certify that this petition for en banc reconsideration 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: 1) It has been prepared in a proportionally spaced typeface using Times New Roman 14 point font using Microsoft Word. I further certify that this brief complies with the page- or type-volume limitations of NRAP 40 or 40A because it does not exceed 10 pages of substantive argument

DATED: November 16, 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 November 17, 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 17th day of November 2020.

/s/ Peggy Ortega
an employee of Burnham Brown

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