

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2 J.E. JOHNS & ASSOCIATES, A
3 NEVADA BUSINESS ENTITY; AND
4 A.J. JOHNSON, AN INDIVIDUAL,

5 Appellants/Cross-Respondents,

6 V.

7 JOHN LINDBERG, AN
8 INDIVIDUAL; MICHAL
9 LINDBERG, AN INDIVIDUAL;
10 AND JUDITH L. LINDBERG, AN
11 INDIVIDUAL,

12 Respondents/Cross-Appellants.

No. 78086

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AMENDED APPELLANTS
PETITION FOR EN BANC
RECONSIDERATION
Clerk of the Supreme Court

13 Appellants J.E. Johns & Associates (now deceased) and A.J. Johns, an
14 individual (“Appellants”), respectfully submit this Petition for En Banc
15 Reconsideration of the panel’s Order Denying Rehearing, filed on November 3,
16 2020, pursuant to NRAP 40A. This Petition is made in good faith, in compliance
17 with NRAP 40(b)(4), on the grounds that the panel misapprehended material issues
18 of law and its opinion will have a far-reaching and substantial, precedential effects
19 on licensees. The decision carves out new duties of care for Nevada real estate
20 licensees which run completely contrary to well-established existing Nevada law
21 and the Nevada Division of Real Estate disclosure forms. The Court ought not to
22 change the law in an area where the Legislature has already spoken on the issue.

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

27
28 ¹ This amended version merely corrects typographical errors in the original petition and does not add any additional substantive argument.

1 *should have known the septic system was too small* for the residential
2 property in its existing state at the time of the sale”; and (2) *should not*
3 *have listed the property as a “single family residence”* and they
4 violated NRS 645.252(1) and NRS 645.252(2) by failing to disclose
5 the same to the Lindbergs [the buyers]. The district court further
6 concluded the seller’s agent were liable under a second theory for
7 “incorrectly list[ing] the property as ‘single-family residential, when
8 the property clearly contained three structures and the zoning for this
9 area allowed one residential structure and one accessory structure
10 (residential or non) for a total for two structures.” (136 Nev. Ad.
11 Opinion 55, Pg. 3-4).

12 In essence, the trial court’s findings, affirmed by a panel of this Honorable
13 Court, fundamentally changes existing Nevada law and imposes on real estate agents
14 a duty to investigate the condition of the property including septic system sizing and
15 permitting for outbuildings.

16 Under existing Nevada law, a real estate licensee has no duty to investigate
17 the condition of a property to uncover hidden defects. This Opinion should be
18 reconsidered by the En Banc Court because it will have far-reaching effects on all
19 real estate agents and brokers in the State of Nevada. If the Opinion is not modified,
20 it will have a chilling effect on real estate transactions across the State, especially in
21 real estate sales, like this one, involving single family homes with septic systems or
22 outbuildings. This Opinion imposes on real estate agents the following new duties:
23 (1) a new duty to have actual knowledge and expertise in septic system sizing; (2)
24 if cases where such information is not actually known, the licensee also has a new
25 duty to investigate the adequacy of septic system sizing. Moreover, the licensee
26 must now stand in the shoes of the assessor and second guess whether a property is
27 properly zoned and listed for sale as a single family residence in cases, like this one,
28 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.

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

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

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

28 Licensees are not imputed with the knowledge of lawyers or general
contractors. It is noteworthy that real estate agents are not lawyers. Appellants as

1 real estate agents and brokers are trained in basic real property and contract
2 principles and are required to become familiar with and use the legal forms created
3 and approved by the Nevada Division of Real Estate. Matters of complex zoning,
4 septic system size, and knowledge of the County's health regulations governing
5 septic system size are well outside the realm of a real estate agent's area of expertise.

6 In fact, the Nevada Division of Real Estate's Disclosure Form regarding
7 septic system expressly states: "***Real estate agents have no special training,***
8 ***knowledge, or expertise concerning these [septic] systems.***" The seller is required
9 by law to disclose any problems with the septic system on the Seller's Real Property
10 Disclosure Form. The Division's septic system disclosure form also urges the buyer
11 to obtain inspections. The licensees' duty is limited to obtaining the information on
12 the property from the seller and providing it to the buyer's agent. Undoubtedly, the
13 district court erred as a matter of law (1) in imposing on a real estate agent an
14 onerous duty to investigate the adequacy of the septic system for the size of the
15 property; and (2) by imputing knowledge on Appellants regarding septic system
16 sizing that they did not have the Court essentially imposed on the licensees a duty
17 to investigate the issue. This finding is directly contrary to Nevada law, specifically,
18 NRS 645.252(4)(c).

19 NRS 645.254(1) imposes on a real estate agent a duty to act as a reasonably
20 prudent licensee would exercise in similar circumstances. The licensee must not act
21 incompetently or with gross negligence. NRS 645.633(1). NAC 645.605 further
22 requires a licensee to have the knowledge required to obtain a current real estate
23 license and act on that knowledge. Markedly absent in the NRS and the NAC is any
24 duty for a licensee to have expertise in septic system sizing. The adequate size of a
25 septic system would potentially be within the general knowledge of a person who
26 designs or engages in the construction of a home, but a real estate agent cannot and
27 should not be imputed with such knowledge. This is particularly true where all
28 parties to the transactions are expressly advised of such in Nevada's standardized

1 disclosure forms that: *“Real estate agents have no special training, knowledge, or*
2 *expertise concerning these [septic] systems.”* Therefore expert knowledge on
3 septic system sizing cannot be imputed on a licensee.

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

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

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

21 The Trial Court also erred in ruling that the Appellants breached a duty of
22 care in listing the property as a single family residence. This ruling fails to recognize
23 that Appellants have no discretion to alter or modify the designation of the property
24 and must use the assessment set forth in the records of the assessor. Even in cases
25 where there are multiple outbuildings on the property, the listing agent cannot and
26 should not deviate from the Assessor’s description of the property.

27 The property that was the subject of the sale was identified by the Washoe
28 County Assessor as a single family residence. The Washoe County Building

1 Department identifies the Lindberg property as zoned as a single family residence.
2 (AA 232; RA 490-517). The property was listed as designated by the County as a
3 Single Family Residence. The Appellants had no discretion to disagree with the
4 assessor and list the residence as a multi-family unit. While there were several
5 outbuildings on the property, the buyers were expressly and properly advised that
6 the accessory structures or outbuildings *may or may not* be legal. Appellants had no
7 power or discretion to change the legal description of the property as determined by
8 the Washoe County Assessor. (AA 614). The trial court erred in concluding
9 otherwise and the Panel misapprehended a material issue of law in upholding this
10 ruling. This Court's Opinion leaves licensees guessing and they are left to wonder
11 if they breached a duty of care by listing real property as it is described by the
12 assessor or have some further duty to investigate the assessor's designation.

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

15 The Buyers knew and were expressly advised that the septic system was
16 1,000 gallons. At the time the transaction closed on February 28, 2013 the buyers
17 had known for over 30 days that the septic system was 1000 gallons as indicated in
18 the septic system inspection report provided to them. Over one month before the
19 closing, on January 4, 2013, the Buyers likewise knew that the other buildings on
20 the property **may not be legal** as indicated in the appraisal report provided to the
21 buyer. Over one month before the closing, on January 19, 2013, the Buyers
22 received an inspection report of the septic system from Waters Vacuum Truck
23 Service. (AA 187; 206-12). The report showed that the septic system was 1,000
24 gallons, not 1,500 gallons as represented by the Sellers. (AA 206-12). The fact
25 that the septic system was 1,000 gallons was known to the buyers and reported in
26 three separate places in the inspection form (AA 208, 209, 211). During the close
27 of escrow, the Buyers repeatedly acknowledged, read and signed these pages
28 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

1 property was “Fine per Inspection.”

2 Appellants are real estate licensees, and not experts on septic systems, nor
3 are they required to be. To the contrary, the information on the septic system
4 disclosure form expressly advises in capital letters: “NEITHER THE SELLER,
5 NOR THE SELLER’S AGENT WARRANT THE CONDITION OF THE
6 SEPTIC SYSTEM AND WILL NOT BE RESPONSIBLE FOR THE FUTURE
7 PROBLEMS DISCOVERED AFTER CLOSE OF ESCROW.” (AA 159).

8 Nonetheless, the Court found that Appellants “*should have known*” the
9 1,000-gallon septic system was too small for the property. A panel of this
10 Honorable Court affirmed the trial court’s finding. However, the Court’s finding
11 begs the question: *how exactly were Appellants supposed to know the septic*
12 *system was undersized?* Appellants are real estate licensees and are not experts on
13 septic systems. They have no background in construction. They have never
14 worked for the Health Department which governs septic system size. *There was no*
15 *evidence presented at trial that Appellants had any actual knowledge the septic*
16 *system was too small.* The only way they could have known the septic system was
17 undersized was *to conduct an investigation* on the adequacy of the septic system
18 sizing for the property that the law expressly advises licensees is not required.

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

1 *agents so no party to this transaction knew the septic system was undersized.*
2 (AA 206-12).

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

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

14 The trial court relied on the expert testimony of Ms. Cartinella, an expert in
15 real estate who testified Appellants breached a duty of care. However, Ms.
16 Cartinella did not have essential information on the transaction. She admitted that
17 she did not know that *the actual size of the 1,000-gallon septic system* was, in fact,
18 repeatedly disclosed to the buyers. (Trial Transcript ("TT") 35). She also did not
19 review the appraisals and did not know that these appraisal disclosed the fact that
20 the outbuilding *may not be permitted*. (TT 37). The undisputed evidence in the case
21 proves that all material facts concerning the septic system, and the fact that the
22 outbuildings may not be permitted, were not only disclosed, but also expressly
23 acknowledged by the buyers at the close of escrow. The undisputed evidence before
24 the trial court and this Court shows that Buyers purchased the property knowing the
25 septic system was 1,000-gallons and the outbuildings may not be permitted. The
26 law mandates full disclosure of all conditions of the property. *But it does not*
27 *mandate investigation and licensees are not required to be experts on septic system*
28 *sizing and the Real Estate Division Required Forms, in fact, state to the contrary.*

1 **E. The District Court’s Finding is Fundamentally Flawed and**
2 **Contrary to Nevada Law**

3 The Court’s finding, and the Panel’s decision denying rehearing carves out a
4 new duty of care for licensees that is contrary to those identified by the Legislature
5 and even this Court’s prior case law. A holding that appellants had a duty to
6 further investigate the adequacy of the septic tank size runs completely contrary to
7 Nevada law imposing no duty investigate. This Court has, in fact, held in cases
8 where there is a discrepancy on the condition of the property that warrants further
9 investigation that would serve as a “red light” to a reasonable purchaser, the duty
10 to investigate falls on the *buyer*. Woods v. Label Investment Corp., 107 Nev. 419,
11 426; 812 P.2d 1293. The Appellants are entitled to rely upon the information
12 provided by the seller and a real estate licensee is not required to search the public
13 records to ensure the seller told the truth. The Nevada Law and Reference Guide,
14 3d. Edition (2012) (AA 308-495).

15 NRS 645.252(4)(C) expressly states that unless otherwise agreed upon in
16 writing, a licensee owes no duty to: “[c]onduct an investigation of the condition of
17 the property which is the subject of the real estate transaction.” The trial court’s
18 finding that Appellants had a duty to further investigate or should have somehow
19 known the 1,000-gallon septic tank was inadequate is not only supported by any
20 evidence and runs completely contrary to Nevada law. Respectfully, the only
21 evidence before the trial court shows the Buyers knew they were purchasing a
22 single family residence with a 1,000-gallon septic tank with outbuildings that may
23 or may not be permitted. All of this information was disclosed and, therefore, the
24 Appellants did not breach a duty of care.

25 The trial court relied on Ms. Cartinella’s opinion about what she personally
26 would have done. Mr. Cartinella’s personal practices as a real estate agent do not,
27 however, change Nevada law and establish a duty of care. Ms. Cartinella’s opinion
28 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

1 was actually disclosed to buyers *30 days* before the close of escrow. They could
2 have walked away and they elected not to do so. Therefore, any duty to further
3 investigate any potential issues with regard to the condition of the property is placed
4 squarely on the purchaser by the Nevada Legislature, the Nevada Division of Real
5 Estate, and this Court's Opinion in Wood.

6 If rehearing of the panel's decision is not granted, licensees throughout the
7 state of Nevada are left with inconsistent guidance on their duty of care. The Nevada
8 Division of Real Estate forms advise the purchasers that licensees are not experts on
9 septic systems. The Nevada Revised Statutes impose no duty to investigate. This
10 Court's opinion changes the law and going forward imposes on licensees a duty to
11 further investigate to determine the adequacy of the septic system for the size of the
12 property. The Panel's opinion essentially imputes on a licensee knowledge
13 regarding septic system sizing despite statements in the Division of Real Estate
14 forms that licensees have no such knowledge and are not expected to know about
15 these systems.

16 If the Panel's opinion is allowed to stand, licensees are now essentially strictly
17 liable for defects discovered after the sale of property, even in instances like this
18 one, where the condition of the property was fully disclosed and no party to the sale
19 knew there was anything wrong with it. Appellants had no duty to advise the
20 purchaser that the septic system was undersized because they did not know, nor does
21 the law require them to investigation to ascertain knowledge of this fact. The trial
22 court's finding otherwise is not supported by substantial evidence and is contrary to
23 Nevada law.

24 Appellants respectfully request that this court reconsider whether the trial
25 court erred in finding that Appellants "should have known" the septic system was
26 undersized. This finding is contrary to Nevada law and imposes an onerous new
27 duty on licensees to investigate septic system sizing that, is in fact, contrary to well-
28 settled Nevada law. Further, Appellants respectfully request that this court

1 reconsider whether the trial court erred in finding that Appellants should have listed
2 the property as a multi-family residence where it is undisputed the assessor
3 designated the property as a single family residence. The court's finding is contrary
4 to Nevada law because, in listing a property, a licensee has no discretion to modify
5 or overrule the property description designated by the Assessor, even when there are
6 outbuildings on the property.

7 **Certificate of Compliance Pursuant to NRAP 40(A)**

8 I hereby certify that this petition for en banc reconsideration complies with
9 the formatting requirements of NRAP 32(a)(4), the typeface requirements of
10 NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: 1) It
11 has been prepared in a proportionally spaced typeface using Times New Roman 14
12 point font using Microsoft Word. I further certify that this brief complies with the
13 page- or type-volume limitations of NRAP 40 or 40A because it does not exceed
14 10 pages of substantive argument
15

16 DATED: November 19, 2020

BURNHAM BROWN

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28

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:

**AMENDED APPELLANTS' PETITION FOR EN BANC
RECONSIDERATION**

X E-service via Nevada Supreme Court Eflex filing system to the following:

John David Moore
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Glade Hall
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Dated this 19th day of November 2020.

/s/ Peggy Ortega
an employee of Burnham Brown

4839-8115-3234, v. 1