

IN THE SUPREME COURT, STATE OF NEVADA

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| <p>JACK GAAL, an individual; and JACK'S PLACE BAR AND GRILL LLC,</p> <p style="text-align: center;">Appellants,</p> <p>vs.</p> <p>LAS VEGAS 101 INC., A NEVADA CORPORATION DOING BUSINESS AS FIRST CHOICE BUSINESS BROKERS, LAS VEGAS 101,</p> <p style="text-align: center;">Respondents.</p> | <p>Supreme Court No.: 8133 Case No. A-18-776982-C Department XXVII</p> <p>Electronically Filed Feb 07 2022 10:23 a.m. Elizabeth A. Brown Clerk of Supreme Court</p> |
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APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable Nancy Alf, District Judge
D.C. Case No. A-18-776982-C

APPELLANT OPENING BRIEF

DAVID J. WINTERTON, ESQ.
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Attorneys for Appellants

NRAP 26.1 DISCLOSURE

Pursuant to NRCP 26.1, the Appellant hereby certifies that there are no persons or entities that must be disclosed, other than the appellants and his undersigned counsel, as set forth therein. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Jack Gaal
2. Jack's Place Bar and Grill, LLC - The members of the Limited Liability Company are as follows:
 - a) Jack Gaal
 - b) Kathrine B. Gaal
3. David J. Winterton, Esq. Attorney of Record for the Appellant

Dated this 7th day of February, 2022

DAVID J. WINTERTON & ASSOC., LTD.

By: "S/" David J. Winterton Esq.
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Attorneys for Appellants

I. JURISDICTIONAL STATEMENT

An appeal was taken from a final order in the Eighth Judicial District Court in Clark County, Nevada. The appeal was taken pursuant to NRAP 3A(b)(1). The Notice of Entry of Order was filed on June 21, 2021 (AA, Vol. 1, 28). The Notice of Appeal was timely filed on June 23, 2021(AA, Vol. 1, 37). It was an appeal from a final order entered in an action or proceeding commenced in the court in which the judgment was rendered so this court has appellate jurisdiction over this matter.

II. ROUTING STATEMENT

This appeal deals with a contract dispute over \$75,000.00 and is presumptively not assigned to the Court of Appeals. Under NRAP 17(b)(6), it states that any contract dispute less than \$75,000.00 are presumptively assigned to the Court of Appeals. This is a contract dispute regarding an Exclusive Listing Agreement in the amount of \$212,725.00; therefore, the presumption does not arise. This case also deals with the interpretation of the Nevada Revised Statutes, (NRS 645.320) which could affect all real estate commissions in the State of Nevada.

III. ISSUES PRESENTED

1. Whether or not the elements of NRS 645.320 were met.
2. Whether or not a Realtor can circumvent NRS 645.320 by stating they are guaranteed a commission when the owner of the real property never signed a Listing Agreement nor an Asset Purchase Agreement. (Can you contract around the statute?)

3. Whether or not the Realtor is barred from receiving a commission for failing to comply with NRS 645.320.
4. Whether or not the Court erred by not taking Judicial Notice of the ownership of the real property when the records of the county were provided to the court.
5. Whether or not the Listing Agreement and the Asset Purchase Agreement were ambiguous and the interpretation by the court was incorrect.
6. Whether or not there is a ready, willing, and able buyer when the buyer could not get 100% financing as per the terms of the Asset Purchase Agreement.
7. Whether or not the court erred by not allowing the Realtor Gene Northup to testify.

IV. STATEMENT OF THE CASE

This case is about a real estate broker seeking a real estate commission pursuant to NRS 645. 320. A lawsuit was filed on June 29, 2018. There are only two claims; a claim for breach of contract, and a claim for breach of the covenant of good faith and fair dealing. Discovery was conducted in the case. The trial commenced on June 4, 2021. At the end of the trial, the court granted a judgment in favor of the Plaintiff/Broker in the amount of \$212,725.70. This case was timely appealed on June 23, 2021(AA Vol.1, 43). Appellant Appendix is referenced as (“AA”) and referenced throughout the brief.

V. STATEMENT OF RELEVANT FACTS

The Appellant is the owner of a business known as Jack’s Place Bar and Grill, LLC (“Business”). Jack Gaal is the managing member of the Business. The Business

rents the building in which it operates from an entity known as the “John A. Gaal Family Trust,” an irrevocable trust ("Trust"). There are two trustee's of the Trust, Jack Gaal and Kathrine Gaal. Both trustees are required under the terms of the Trust Agreement to sign to any documents to sell any real property owned by the Trust (AA, Vol 3, 433). The land and building owned by the Trust is located at 544 Nevada Highway, Boulder City, Nevada 89005 (“Real Property”).

On October 9, 2017, the Business only signed an Exclusive Right To Sell Listing Agreement with the First Choice Business Brokers (“Broker”) to sell the Business (AA, Vol 1, 78). The Broker never entered into an Exclusive Right to Sell Listing Agreement with the Trust to sell the Real Property (AA, Vol 1, 78). The Broker erred by not listing the Real Property. The error was pointed out to the Broker but the Broker did not want correct the error because he was afraid that the owners of the Business would not want to sign a new Exclusive Listing Agreement (AA, Vol 2, 323:15-19). The Broker found a buyer for the Business and the Real Property.

The Trust that owned the Real Property, never entered into an Asset Purchase Agreement with the potential buyer (AA, Vol 1, 66). There was also an issue as to whether or not the potential buyer could even qualify for a loan to acquire the Real Property. The deal did not go forward due to the errors of the Broker's Agent and other factors. The Broker sued for a commission. The District Court granted a Judgment in favor of the Broker for a commission, fees, and costs under NRS 645.320 in the amount of \$212,725.00. (AA, Vol 1, 43) This commission included a sale of the Business and the Real Property.

VI. SUMMARY OF THE ARGUMENT

This case deals with an Exclusive Right to Sell Listing Agreement under NRS 645.320. There are four (4) requirements to obtain an Exclusive Right to Sell Agreement pursuant to NRS 645.320. They are as follows: (1) Be in writing; (2) Have set forth in its terms a definite, specified and complete termination; (3) Contain no provision which requires the client who signs the brokerage agreement to notify the real estate broker of the client's intention to cancel the exclusive features of the brokerage agreement after the termination of the brokerage agreement; (4) the agreement must be signed by both the client or his or her authorized representative and the broker or his or her authorized representative in order to be enforceable.¹

The Broker failed to comply with NRS 645.320 (1), (2), and (4); thus, the Broker is not entitled to a commission. First under NRS 645.320 (1), there is no written contract to sell the Real Property with the owner of the land and building. The evidence that the Broker is not entitled to a commission is based upon the Exclusive Listing Agreement presented to the court and the testimony of the Broker, the Agent, and the Trustee of the Trust. The Trust is not a party to the Exclusive Listing Agreement. The Broker, the Agent, and the Trustee of the Trust all admit that the Trust owns the Real Property and that the Trust never signed the Exclusive Listing Agreement.

Second, the Broker failed to comply with NRS 645.320 (2) in that the terms and conditions are not clear and definite. It did not properly identify the parties. It did not

¹See NRS 645.320.

have a clear description of the property being sold. It did not cover if there were any contingencies, items to be included, title of the property and so on.

Third, the Broker failed to comply with NRS 645.320 (4). The Trust that owns the Real Property never signed the Exclusive Listing Agreement. The evidence of this is established by the Exclusive Listing Agreement document presented to the court and the testimony of the Broker, Agent and Trustee of the Trust. They all admit that the owner of the Real Property never signed the Exclusive Listing Agreement.

Since the Broker failed to comply with NRS 645.320, the Broker is not entitled to a commission and the judgment must be reversed. NRS 645.320 acts as a Statute of Frauds and the statute bars any rights to receive a commission. The Plaintiff/Appellee argues and the District Court ruled that the principle signed a personal guarantee and the individual is liable under the guarantee. This argument circumvents NRS 645.320 and renders the statute unenforceable, so their argument must fail.

The District Court relied upon the Asset Purchase Agreement to grant the judgment. The right to determine if a real estate commission is due is limited to the Exclusive Listing Agreement and not to the Asset Purchase Agreement. The Realtor did not act with reasonable care or this issue would not have come up. The evidence also establishes that the commission is not owed until the transaction closed. In this case the transaction has never closed. The Broker never provided any evidence to establish that he did in fact, obtain a ready, willing, and able buyer for the Real Property.

There are also some procedural issues such as the failure to take judicial notice

of the title to the real property and excluding a witness that are also discussed.

VII. ARGUMENT:

1. This Case is About an Exclusive Agency Agreement Under NRS 645.320

This case is about an exclusive agency agreement under NRS 645.320. First Choice Business Brokers (“Broker”) sued Jack Gaal individually and Jack’ Place Bar and Grill for a real estate commission under an Exclusive Right to Sell Listing Agreement (Exclusive Listing Agreement) pursuant to NRS 645.320. The Broker entered in to Exclusive Listing Agreement with the Business. The Broker did not enter into a Exclusive Listing Agreement with the Trust to sell the Real Property. The Broker did not name the Trust in the Exclusive Listing Agreement and the Broker did not have the Trust sign the Exclusive Listing Agreement. The Broker sued for a commission for a potential sale of the Business and the Real Property even though the Broker did not have a properly signed Exclusive Listing Agreement. The District Court granted a judgment in favor of the Broker for a real estate commission under NRS 645.320 for the Business and the Real Property even though there was no contract with the Trust to list the Real Property. This appeal was then filed because the Appellants believe there is no commission due pursuant to NRS 645.320.

There were only two causes of action filed against the Defendants/Appellants. The first cause of action was for Breach of Contract (Exclusive Listing Agreement) and the second cause of action was for Breach of the implied Covenant of Good Faith and Fair Dealing of the Exclusive Listing Agreement. There is no claim for fraud,

concealment, misrepresentation, unjust enrichment, or quantum merit. This case is strictly about an Exclusive Listing Agreement under NRS 645.320.

2. NRS 645.320 Outlines Four (4) Requirements That Must be Met in a Brokerage Agreement to Establish a Valid Exclusive Agency Agreement.

NRS 645.320 outlines four (4) requirements for an Exclusive Agency Agreement. If the broker does not meet the four (4) requirements, the broker is not entitled to a commission. The statute reads as follows:

NRS 645.320 Requirements for exclusive agency representation. Every brokerage agreement which includes a provision for an exclusive agency representation must:

1. Be in writing.
2. Have set forth in its terms a definite, specified and complete termination.
3. Contain no provision which requires the client who signs the brokerage agreement to notify the real estate broker of the client's intention to cancel the exclusive features of the brokerage agreement after the termination of the brokerage agreement.
4. Be signed by both the client or his or her authorized representative and the broker or his or her authorized representative in order to be enforceable.

[28.5:150:1947; added 1955, 18] — (NRS A 1995, 2075; 2003, 932)

The Broker at trial, has the burden of proof to establish that the elements have

been met.

3. The Judgment by the District Court Must be Reversed Because the Broker Failed to Comply with NRS 645.320 (1), (2), and (4); and Thus, the Broker is Not Entitled to a Commission.

The Broker failed to comply with NRS 645.320(1), (2), and (4); thus, the Broker is not entitled to a commission and the judgment must be reversed. As you review the exhibits and the transcripts of the witnesses, you will not find any evidence that the Broker complied with all of the above requirements of an Exclusive Listing Agreement under NRS 645.320.

The Broker sued for breach of contract of the Exclusive Listing Agreement and for breach of the implied covenant of good faith and fair dealing of the Exclusive Listing Agreement. The District Court did not make any findings that there was a written contract with the owner of the Real Property pursuant to the requirements of NRS 645.320. If the Trust, the owners of the Real Property, never signed the Exclusive Listing Agreement, there can be no breach of contract nor breach of a covenant of good faith and fair dealing. There are no findings by the District Court to support the position that the Broker complied with NRS 645.320. The court erred by making the following Conclusions of Law.

3. The Exclusive Listing Agreement satisfies the requirements of NRS 645.320, and the statutory definition of “client” under NRS 645. (AA, Vol 1, 34:21).

This was an error by the District Court because the Broker failed to comply with

the 1, 2, and 4 requirements under NRS 645.320. The evidence is as follows:

1. Be in writing. (NRS 645.320 (1))

There is no written agreement between the Broker and the owner of the Real Property. The Property is owned by JOHN A. GAAL FAMILY TRUST (“Trust”). The Trust was NEVER a party to the Exclusive Listing Agreement due to the error of the Broker (AA, Vol 1, 78).

The best evidence is the Exclusive Listing Agreement itself. If you review the contract, you will note that the John A. Gaal Family Trust is NOT a party to the Exclusive Listing Agreement. (AA, Vol 1, 78). The Trust owns the Real Property and if the Trust is not a party to the Exclusive Listing Agreement, then there is no writing that would allow the Broker to sell and receive a commission.

There is no dispute that the Trust owns the Real Property (AA, Vol 2, 287:4-6). It is supported by oral testimony, written documents, and the fact that the Broker never even attempted to refute the ownership by the Trust. Mr. Gaal testified as follows:

Q: What type of entity did they put the building in?

A: The attorney that I was using to set up the LLC, okay, was doing all the paperwork that’s required for a new business, okay. The land and the building just automatically went into my trust.

Q: Okay. So when the land and the building went into the trust, has it changed since that time or is it still in the trust?

.....

A: Nothing has changed.

(AA, Vol 3, 410:11-23)

The Broker knew or should have known the Real Property was owned by the Trust. The Broker should have checked with the tax assessor or the county recorder's office to determine who owned the Real Property. When the agent was asked what happened and why the paperwork was not done right, he states "I really don't know" (AA, Vol 2, 286:3-10).

Prior to obtaining a buyer for the Business and the Real Property, the Agent for the Broker obtained a copy of an appraisal on the Real Property (AA, Vol 1, 127). It identified who was the true owner of the Real Property. The appraisal was turned over to the Agent prior to entering into an Asset Purchase Agreement with a buyer. The evidence is as follows:

Q: And what was the – who was the entity or person that it was prepared for?

[Appraisal]

A: It was prepared for me. It says John A. Gaal and Katherine B. Gaal, trustees of the John A. Gaal Family Trust dated such and such.

Q: Okay. And so it was prepared as – on your behalf as trustees of the trust?

A: That what it says on page 1.

(AA, Vol 3, 420:18).

The agent testified about the appraisal, and stated

Q: Now we've been going through all of these documents that were signed.

Have you seen any documents signed by Jack Gall, trustee?

A: No. Like I said, he represented himself as the authority to sell and he never

even gave me any documents or you relating to any trust.

(AA, Vol 2, 328:21).

2. The Agreement was Not Definite (NRS 645.320 (2))

The Listing Agreement is not Definite. It does not describe the terms and conditions that relate to the Real Property. It only relates to the sale of the Business (AA, Vol 1, 78). The Broker failed to comply with NRS 645.320 (2) in that the terms and conditions are not clear and definite. It did not properly identify the parties. It did not have a clear description of the property being sold. It did not cover if there would be contingencies, items to be included, title of the property and so on.

3. The Agreement was Never Signed by the Trust. (NRS 645.320 (3))

If you review the Exclusive Listing Agreement, you will note that it was never signed by the Trust that owns the Real Property (AA, Vol 1, 78). The Broker (Appellee), the Broker's agent, and the Trustee of the Trust all admit that the Exclusive Listing Agreement was not signed by the owner of the Real Property. The Broker is not entitled to a commission for failing to comply with NRS 645.320(4).

The evidence is clear that the John A. Gaal Family Trust owned the Real Property and that the Trustee of the Trust never signed the Exclusive Listing Agreement. A client is defined under NRS 645.009. The statute reads as follows:

NRS 645.009 "Client" defined. "Client" means a person who has entered into a brokerage agreement with a broker or a property management agreement with a broker. [NRS 645.009].

The owner of the Real Property never entered into and signed a brokerage

agreement (Exclusive Listing Agreement), so the owner of the Real Property is not a client of the Broker. If the Broker does not have a brokerage agreement with the client, the Broker does not have an Exclusive Listing Agreement under NRS 645.320 and is not entitled to a commission.

First, the strongest evidence is to the Exclusive Listing Agreement itself. As you can see from the evidence, the owner of the Real Property did not sign the Exclusive Listing Agreement (AA, Vol 1, 78).

Second, the testimony of the parties proves that the owner of the Property never signed the Exclusive Listing Agreement. The testimony of the Broker, the Agent, and Trustee of the Trust all agree that the Exclusive Listing Agreement was not signed by the owner of the Property.

The testimony of the Broker is as follows:

Q: Now we've been going through all of these document that were signed.

Have you seen any documents signed by Jack Gaal, trustee?

A: No. Like I said, he represented himself as the authority sell and he never even gave me any documents or you relating to any trust.

(AA, Vol 2, 328:21).

The Broker further testified:

Q: Okay. So you would agree that if the statute outlines certain requirements, you are to comply with those requirements?

A: We – absolutely. We comply.

Q: Okay. Now I would like to have you turn to Exhibit 10. (Exclusive Listing

Agreement)

A: Okay.

Q: Do you see the signature of the Jack [John] Gaal Trust in this exclusive right listing agreement?

A: No.

The Agent for the Broker testified:

Q: No, my question is did he sign as trustee?

A: No, he did not.

(AA, Vol 2, 335:12).

The Trustee of the Trust testified:

Q: Okay. Now what I would like to do is Exhibit 10, and go to the very bottom in the middle, and it says, page 35. Okay. Is there anywhere in this agreement where you signed as the trustee of the trust?

A. No.

(AA, Vol 3, 415:12).

The owner of the Real Property was NEVER a client of the Broker. The owner of the Real Property NEVER signed an brokerage agreement to enter into an exclusive right to sell agreement. If the Broker does not have a brokerage agreement with the client under NRS 645.320; then the Broker is not entitled to a commission.

4. The Broker is Not Entitled to a Commission in this case; Therefore, the Judgment for a Commission Must be Reversed.

The Broker failed to comply with NRS 645.320. The owner of the Real Property never signed a brokerage agreement with the Broker. The owner of the Real Property is not a named party to this lawsuit. There is no claim for quantum merit nor a claim of fraud and misrepresentation.

NRS 645.320 acts as a **statute of frauds** limiting a Broker's right to receive a commission. Chapter 645 of the Nevada Revised Statutes governs the professional conduct and activities of real estate brokers and salesmen. NRS 645.320 declares that every "exclusive listing" agreement shall be in writing. A promise to pay the reasonable value of services may be implied, and a real estate agent may recover under the theory of quantum meruit, unless the parties have executed an exclusive listing agreement which is invalid under NRS 645.320. *Bangle v. Holland Realty Investment Company*, 80 Nev. 331, 335-36, 393 P.2d 138, 140 (1964). Applying *Bangle v. Holland* the Nevada Supreme Court decided that a broker acting under an insufficient exclusive listing agreement cannot recover from the property owner with whom he has allegedly contracted, either on the agreement, or in quantum meruit. *Led--Mil of Nev. v. Skyland Realty & Ins.*, 90 Nev. 72, 73, 518 P.2d 606, 608 (1974). This limitation acts as a **statute of frauds** barring a broker from any commission.

When a Broker (Appellee) has an insufficient exclusive listing agreement, the Broker cannot recover from the property owner with whom he has allegedly contracted, whether on the agreement or in quantum meruit. The Broker in this case sued under breach of contract and Breach of Covenant of Good Faith and Fair Dealing under the Exclusive Listing Agreement. Since the criteria of NRS 645.320 was not

met, the Broker cannot recover any type of commission under the insufficient Exclusive Listing Agreement. In *Bangle v. Holland*, The Nevada Supreme Court stated:

Before the enactment of NRS 645.320 we recognized that a property owner could be found liable upon quantum meruit for the commission of a real estate broker to whom an oral exclusive listing was given. *Close v. Redelius*, 67 Nev. 158, 215 P.2d 659. Relying upon that opinion Holland [the broker] contends that, should we declare his exclusive listing agreement with Bangle [the owner with whom broker Holland contracted] unenforceable (which we have done), nonetheless quantum meruit relief is available to him. He should be treated simply as a broker who had performed services for Bangle and should be compensated. On the other hand, Bangle argues that, by passing the exclusive listing law in 1955, the legislative intent was to forbid any recovery by a broker who had been granted an exclusive right to sell, unless the statutory requirements are fully met. Each argument is persuasive. However, the weight of case authority construing similar statutes precludes a quantum meruit recovery reasoning that, if the broker were entitled to obtain the value of services, the statute would not have the effect intended and the legislative purpose would be frustrated. *Restatement, Agency*, 2d § 468(2); Annot., 41 A.L.R. 2d 905; *Restatement, Contracts* § 355(3). We choose to adopt this view. It seems to us that the purpose of NRS 645.320 is best served by denying

any relief to a broker or salesman, who claims an exclusive agency to sell, unless the requirements of the statute are complied with." 80 Nev. at 335-336, 393 P.2d at 140-141.

Led--Mil of Nev. v. Skyland Realty & Ins., 90 Nev. 72, 73 n.1, 518 P.2d 606, 607 (1974)

With this understanding, NRS 645.320 acts as a **statute of frauds** limiting the recovery of a broker under an exclusive listing agreement. In *Gifford v. Straub*, 172 Wis. 395, 179 N.W. 600, the court in considering a similar statute -- one more sweeping in scope than NRS 645.320 -- stated: "The statute was doubtless enacted for reasons similar to those which led to the enactment of the statute of frauds. It was to prevent frauds and perjuries. Its enforcement will sometimes protect brokers who have rendered valuable services too little appreciated. More often it will protect owners from unfounded claims. It will tend to prevent the flood of litigation arising out of misunderstandings between well-meaning persons." *Gifford v. Straub*, 172 Wis. 395, 179 N.W. 600 (Wis. 1920)

In this case, the Broker's failed to comply with the statute so the broker has forfeited a claim against the Appellants in this case. (*Gifford v. Straub, supra; Elbinger Co. v. Meyer Mfg. Co.*, 3 Wis.2d 202, 87 N.W.2d 807). *Led--Mil of Nev. v. Skyland Realty & Ins.*, 90 Nev. 72, 73 n.1, 518 P.2d 606, 607 (1974)

5. The Attempt to Circumvent the Statute Must Fail.

The Broker argued and the District Court agreed, that the Broker could

circumvent the statute by saying Jack Gaal personally guaranteed payment of the commission. The District Court erred in that a Broker cannot not circumvent NRS 645.320 by obtaining a personal guarantee. There is no commission due and the judgment must be reversed.

The Broker argued that Mr. Gaal personally guaranteed performance under the contract so the Broker is entitled to a commission. The Broker's argument must fail because it circumvents the statute. The evidence is as follows:

Q: Under NRS 645.320, it states that every exclusive listing agreement need to be signed by the owner; isn't that correct?

A: Yes, and he signed as the authorized seller.

Q: You're saying he signed as the authorized seller. My question to you is, did he sign as trustee of the Trust?

A: No, but he personally, personally guaranteed performance of the contract², regardless of what his title was.

(AA, Vol 2, 300:3-6).

The right to get a commission under an exclusive listing agreement is a form of statute of frauds. If it is not in writing, you cannot get a commission. The owner of the property never signed a brokerage agreement with the broker, which would preclude any recovery.

²The contract they are referring to is the asset purchase agreement not the listing agreement. Q: But this is the agreement (Exclusive Listing Agreement) you're using to enforce in court to get him his permission; isn't that correct? A: No, we're also using the asset purchase agreement. Page 132 line 24

NRS 645.320 provides, in part, that "[e]very exclusive listing shall . . . have set forth in its terms a definite, specified and complete termination." (Emphasis added). NRS 645.320 is a **statute of frauds** limited to exclusive listing agreements for the sale of real property. *Bangle v. Holland Realty Investment Company, Inc.*, 80 Nev. 331, 334, 393 P.2d 138, 139 (1964). [*Morrow v. Barger*, 103 Nev. 247, 250 n.1, 737 P.2d 1153, 1155 (1987) footnote 1]

The Broker argues he is entitled to a commission based upon a personal guarantee.

Q:You're not suing Jack for fraud or misrepresentation; are you?

A: No, but he's guaranteed performance of the contracts –

(AA, Vol 2, 288:15-17)

Q: But you're not suing him for fraud or misrepresentation; are you?

A: But he still guaranteed performance of the contract.

(AA, Vol 2, 296:7-9)

Q: Okay. So when Jack signs it [Exclusive Listing Agreement] as a managing member, he's also signing it as trustee. Is that your position?

A: No, he personally guaranteed these contracts regardless of what his title is.

(AA, Vol 2, 296:22-25).

Just because there was a personal guarantee to pay a commission does not mean the Broker is entitled to a commission when the do not comply with NRS 645.320. When a statute is clear on its face, a court may not go beyond the language of the statute in determining the legislature's intent. *Thompson v. District Court*, 100 Nev.

352, 354, 683 P.2d 17, 19 (1984); *Robert E. v. Justice Court*, 99 Nev. 443, 664 P.2d 957 (1983). *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986) The Broker (Appellee) argues that it does not matter what the statute (NRS 645.320) states, money is owed because their contract states that they personally guaranteed a commission. You cannot use a personal guarantee to circumvent the statute. It would render the statute worthless. What the Broker is arguing, is that all you have to do is obtain a personal guarantee and then you do not need to comply with the statute. The District Court agreed. There is an error by the District Court, you cannot use a personal guarantee to circumvent the purpose of the statute. The judgment must be reversed.

6. The Broker Failed to Do His duty as a Realtor and Refused to Correct the Error When it was Pointed Out to Him.

A. Realtor Violated his Duty. Under NRS 645. 252(1)(a) the realtor is to use care and diligence. He should have checked who owned the land. The Broker and the Agent, if they had exercised reasonable care and diligence, should have known who owned the Property. It was part of the public record that should have been checked.

B. The Agent for the Broker had a Copy of the Appraisal that Stated the Property was in the Trust.

As stated above, the Agent is to use reasonable care and diligence. He was provided with a copy of the appraisal prior to the signing of a Purchase Agreement. If he was using reasonable care and diligence, he would have corrected the error.

C. The Seller Pointed Out the Error to the Broker's Agent But the

Agent Refused to Correct the Error.

The Error was pointed out to the Agent. The agent stated he did not want to correct the error because he was afraid the client would back out of the contract. The agent has a duty to use due diligence and reasonable care. (NRS 645.252(1)) (AA, Vol 2, 323:2-19).

7. The District Court Erred in Applying the Terms of the Asset

Purchase Agreement to Determine if a Commission Should be Paid.

The Supreme Court has made it clear that where a broker's action to recover a commission for the sale of real property is based upon a listing agreement. The terms of the agreement govern the broker's right to compensation. *See Reese v. Utter*, 92 Nev. 377, 379, 551 P.2d 1099, 1100 (1976); *Nollner v. Thomas*, 91 Nev. 203, 207, 533 P.2d 478, 480-81 (1975). *See also Di Gregorio v. Marcus*, 86 Nev. 674, 677, 475 P.2d 97, 99 (1970). The Nevada Supreme Court has previously stated that a seller's liability to a broker is defined by the terms of the listing agreement. *Redfield v. Estate of Redfield*, 101 Nev. 24, 27, 692 P.2d 1294 (1985); *Ivanhoe v. Strout Realty*, 90 Nev. 380, 528 P.2d 700 (1974). *Summa Corp. v. DeSure Corp.*, 103 Nev. 144, 147, 734 P.2d 715, 717 (1987).

Based upon the Findings of Fact and Conclusions of Law, the District Court erred by relying upon the Asset Purchase Agreement and not limiting their decision to the brokerage agreement as stated by the Nevada Supreme Court. The findings of fact of the District Court are as follows:

Plaintiff's entered into two written agreements, the Exclusive Listing Agreement and the Asset Purchase Agreement. (AA, Vol 1, 24:7-10). The only relevant issue is the Exclusive Listing Agreement.

The findings by the court state "Under the terms of the Asset Purchasing Agreement, Defendants again and again indicated they had the power and authority to complete the sales transaction which include the real estate, the business operations. (AA, Vol 1, 24:16-19)

8. The Exclusive Listing Agreement States There is to be No Commission Paid Until the Property Closes; In Addition, the Broker has Never Established that there was a Qualified Buyer for the Real Property and the Business.

The Broker has never established with the court that a commission is owed. The contract reads as follows:

A. There are no fees due to be paid as per the contract.

The Exclusive Listing Agreement states as follows:

8. WHEN FEES ARE OWED: All Fees owed to FCBB-101, regardless of whether it is owed of the sale of the Business, land, improvements on the land or for leasing arrangements, will be fully earned at the time of acceptance by Seller of any type of Purchase Agreement. Payment is due to FCBB-101 without demand upon the earlier of (1) the Closing of the Transaction; (2) upon the occurrence of a Disposition of the Business; (3) upon Buyer's possession of the property; (4) upon transfer of the

Business. (AA, Vol 1, 78: ¶ 8)

According to the contract no fees are due to be paid. The transaction never closed. There has been no Disposition of the Business. The Appellant is still in possession of the Real Property and the Business. There has been no transfer of the Business. The fees are not owed as per the terms of the contract. (AA, Vol 1, 78: ¶ 8).

Where a broker's action to recover a commission for the sale of real property is based on a listing agreement, the terms of the agreement govern the broker's right to compensation. *See Reese v. Utter*, 92 Nev. 377, 379, 551 P.2d 1099, 1100 (1976); *Nollner v. Thomas*, 91 Nev. 203, 207, 533 P.2d 478, 480-81 (1975). *See also Di Gregorio v. Marcus*, 86 Nev. 674, 677, 475 P.2d 97, 99 (1970). The Nevada Supreme Court is not bound to the lower court's interpretation when the decision arise solely from the four corners of the written instrument rather than from any extrinsic evidence as to the meaning of the terms used. *See Cord v. Neuhoff*, 94 Nev. 21, 573 P.2d 1170 (1978); *Clarkin v. Reimann*, 638 P.2d 857, 863 (Hawaii App. 1981). Any ambiguity in a written contract is to be construed against the party who prepared the agreement or selected the language used; where a broker has used a form listing agreement, as in the instant case, the contract shall be strictly construed against the broker as the author of the instrument. *See Morgan v. Golder*, 446 P.2d 948, 949 (Ariz.App. 1968); *Sherman Agency v. Carey*, 577 P.2d 759, 761 (Colo. 1978); *Boutelle v. Chrislaw*, 150 N.W.2d 486, 492 (Wis. 1967); *McCartney v. Malm*, 627 P.2d 1014, 1020 (Wyo. 1981). *See generally Annot.*, 51 A.L.R.3d 1149, 1161-65 (1973). *Caldwell v. Consol. Realty & Mgmt. Co.*, 99 Nev. 635, 638, 668 P.2d 284, 286 (1983).

The contract states when a commission is earned, and it then states when a commission is owed. In this case and based upon the Broker's own contract, no commission is owed at this time.

B. The Broker Failed to Obtain a Qualified Buyer.

The Broker never found a qualified buyer for the Real Property. The Asset Purchase Agreement stated the buyer was going to obtain a loan for \$700,000.00 to buy the Real Property. (AA, Vol 1, 64) The appraisal on the Real Property was \$715,000.00 (AA, Vol 1,129). That means that the buyer would have to qualify for a loan to value ratio of 97%. There is no evidence the buyer could qualify for such a loan with that loan to value ratio. In addition, the Seller/Appellant testified it could not happen. The testimony is as follows:

A: Okay. What is your understanding of the 7000[00] and the bank loan on real estate?

A: Well if the land and building appraised at \$715,000, and were asking for \$700,000, that's never going to happen.

Q: Why?

A. Well you can't borrow 95 plus percent. Who's going to loan it to you? (AA, Vol 3, 425:8-15).

Q: Okay. Now did you give references to try to help Mr. Soto to get financing on the property?

A: He called the Boulder Dam Credit Union. I thought he was going to visit the credit union, but he made one or two phone calls to my knowledge and

told to some loan officers without a very favorable response from what I learned.

(AA, Vol 3, 426-427).

9. The District Court Never stated There was Any Bad Faith nor a Claim of the Breach of Covenant of Good Faith and Fair Dealing.

There is no finding by the court of bad faith nor a breach of the covenant of good faith and fair dealing.

10. The District Court Erred by Refusing to Take Judicial Notice of the Title Owner in the Clark County Records of the Property.

There was testimony that the Trust owned the Property. There are documents that show that the Trust is the owner of the Property. In order to support the evidence counsel asked the court to take judicial notice of the records in the county recorder's office. The property documents were submitted to the court, but the court still denied the fact (AA, Vol 3, 423-424). The statute regarding judicial notice reads as follows:

47.130. Matters of fact.

1. The facts subject to judicial notice are facts in issue or facts from which they may be inferred.
2. A judicially noticed fact must be:
 - (a) Generally known within the territorial jurisdiction of the trial court; or
 - (b) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that

the fact is not subject to reasonable dispute.

NRS § 47.130

11. Whether or not the District Court Erred by not Allowing the Real Estate Agent to Testify.

The Defendants in this case first contacted Mr. Gene Northup about selling the Business and Real Property. Mr. Northup suggested Mr. Neuenswander be the agent since he specialized in the sale of Businesses and you need a Business Broker's license under NRS 645. Mr. Northup was involved in the transaction. Mr. Northup participated in the settlement conferences because Mr. Neuenswander had stated that he would pay a commission /finding fee to Mr. Northup. The Plaintiff knew about Mr. Northup's involvement, had the contract information, and was active in trying to get this matter resolved. In preparing for the close of discovery, the Defendants noticed that Mr. Northup was not listed as a potential witness and therefore supplemented the 16.1 disclosure before the close of discovery. The Defendants added Mr. Northup as a potential witness. There is no question all parties were aware of Mr. Northup's involvement, address and his knowledge regarding the case. He was listed as a witness prior to the close of discovery. The Plaintiff never objected to Mr. Northup being listed as a potential witness until he was called at trial. The purpose of having Mr. Northup testify was to clarify some of the facts. A party is under a duty to supplement at appropriate intervals its disclosures under Rule 16.1(a) . . . if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known" NRCP

26(e)(1). If a party fails to comply with the disclosure requirements of NRCP 16.1 or NRCP 26(e)(1), the party cannot use any witness or information not so disclosed unless the party shows a substantial justification for the failure to disclose or unless the failure is harmless. NRCP 37(c)(1); see also NRCP 16.1(e)(3)(B). *Capanna v. Orth*, 134 Nev. 888, 894, 432 P.3d 726, 733 (2018)

In this case all parties knew of the witness and the knowledge that the witness possessed. The purpose of this witness was to rebut incomplete or incorrect information and to correct some of the errors that were mentioned. It was not until later in the case that the decision and the need to use the testimony Mr. Northup was known. Based upon these facts, the witness should not have been excluded.

VII. CONCLUSION

The decision by the District Court MUST be reversed for the following reasons. 1) The Broker failed to comply with NRS 645.320. There is no written agreement to sell the Real Property. 2) The terms of the contract to sell the Real Property were not definite. 3) There is no signed contract by the owner of the Real Property. In other words the owner of the Real Property was not a client of the Broker, and the Broker cannot get a commission under a Exclusive Listing Agreement.

The decision must be reversed because NRS 645.320 is a Statute of Fraud for the Exclusive Listing Agreement and the Broker's failure to comply, bars any recovery. There is no finding of a bad faith by the Seller nor a finding of a breach of covenant of good faith and fair dealing. The Judge wrongfully relied upon the Asset Purchase Agreement and should have relied upon the Exclusive Listing Agreement. Based upon

the contract no commission is owed. Based upon the foregoing facts, the Nevada Revised Statutes and the Exclusive Listing Agreement presented as evidence, the decision by the District Court MUST be reversed.

February 7, 2022

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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 requirement of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Corel Wordperfect 8, Times, 14 points.

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 exempted by NRAP32(a)(7) (C), it is either: Proportionately spaced, has a typeface of 14 points or more and contains 7,940 words.

3. I hereby certify that I have read this opening 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 N.R.A.P. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference 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 Procedures.

Dated this 7th day of February, 2022

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I HEREBY CERTIFY that I am an employee of David J. Winterton & Assoc., Ltd., and that on the 7th Day of February, 2022 I electronically served a true and accurate copy of the foregoing APPELLANT'S OPENING BRIEF follows:

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