IN THE SUPREME COURT, STATE OF NEVADA

JACK GAAL, an individual; and JACK'S PLACE BAR AND GRILL LLC, Appellants, vs. LAS VEGAS 101 INC., A NEVADA CORPORATION DOING BUSINESS AS FIRST CHOICE BUSINESS BROKERS, LAS VEGAS 101, Respondents.	Supreme Court No.: 83133 Case No. A-18-776982-C Department XXVII

APPEAL

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

APPELLANT REPLY BRIEF

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I. SUMMARY OF THE REPLY

This case deals with an agreement for the sale of Real Property under an Exclusive Right to Sell Listing Agreement which falls under NRS 645.320. The Appellee failed to meet the elements of NRS 645.320. The Appellee/Plaintiff ("Plaintiff") admits that the John A. Gaal Family Trust ("Trust") owns the real property and admits that the Trust is not a party to the Exclusive Listing Agreement. They also admit that the Trust never signed the listing agreement. The Plaintiff never sued for fraud or misrepresentation because there was no misrepresentation in this case.

The Plaintiff cannot argue apparent authority. First, the Trust is not a party to the Exclusive Listing Agreement so there is no apparent authority that someone signed on behalf of the Trust. Second, the argument of apparent authority fails because they cannot prove apparent authority. A party claiming an agency relationship based on apparent authority must prove (1) that he subjectively believed that the agent had authority to act for the principal and (2) that his subjective belief in the agent's authority was objectively reasonable. The Plaintiff failed to prove he subjectively believed the agent had authority. If he did, the Plaintiff's subject belief in the agent's authority was not objectively reasonable because the Plaintiff closed their eyes to warnings or inconsistent circumstances. The Plaintiff failed to do their duty under NRS 645.252(1). The Clark County Recorder's Office put the Plaintiff on notice who owns the real property. When drafting the listing agreement the Realtor failed to check with his office or the Clark County Recorder's Office which is standard practice. The agent was given a copy of an appraisal that listed the Trust as the owner of the Real Property and he still did not correct his error. The Realtor was informed by Mr. Gaal that the contract was incorrect. In addition, there was a letter from counsel for Mr. Gaal pointing out the error in the Listing Agreement and Asset Purchase Agreement.

The District Court incorrectly relied upon the Asset Purchase Agreement to

grant the judgment. The Broker never provided any evidence to establish that he did in fact, obtain a ready, willing, and able buyer for the real property. For all of the reasons stated above, the judgment in this case must be reversed.

II. ARGUMENT:

1. FACTS CONCEDED BY THE PLAINTIFF/APPELLEE.

a. The Real Property is owned by the John A. Gaal Family Trust

The Appellee/Plaintiff admits that the John A. Gaal Family Trust ("Trust") owns the Real Property, which is the subject of this lawsuit. The Appellee stated "...the District Court heard undisputed evidence from all parties that the Premises were owned by the Trust." (RAB, p. 48:2)[1]".....Title ownership to the premises was not a fact in dispute at trial. Further to this point, the District Court's FFCL are not based upon a finding of fact that the Trust was not the owner of the premises." (RAB, p. 48:4)

b. The Trust Never Signed the Listing Agreement

The Appellee admits that the owner of the real property never signed the listing agreement. In fact, they argue that a owner does not have to sign a listing agreement which is incorrect (RAB, p. 21-23).

2. THE PLAINTIFF/APPELLEE NEVER SUED FOR FRAUD NOR MISREPRESENTATION

The Plaintiff/Appellee (herein after "Plaintiff") never sued for fraud or misrepresentation. The Defendants/Appellants (hereinafter "Defendants") never misrepresented any facts to the Plaintiff. There is no finding of any intent to deceive or mislead the broker. The Defendants hired the Plaintiff and relied on them to do their job to sell the business as professionals. The Plaintiff specialized in selling businesses not real estate. The Plaintiff reviewed the Nevada Secretary of State records to see who owned the business. The Plaintiff also reviewed the County Recorder's Office records to get the APN number (AA Vol 2, 286). The Plaintiff then drafted the Listing

[1] Respondent Answering Brief (RAB) at p.48 paragraph 2

Agreement and did not include the Trust (AA Vol 2, 294:5). The documents were signed by the business and personally guaranteed by Jack Gaal. There is no agreement between the Trust and Broker (AA Vol 3, 386:7-9). The agent was asked at trial, "But you're not suing him for fraud or misrepresentation; are you?" The agent answered by saying, "But he still guaranteed performance of the contract." (AA, Vol 2, 300:3-6).

The Plaintiff was provided with documents to show that the real property was owned by the Trust (AA Vol 3, 437:15). Jack Gaal informed the Plaintiff that the real property was owned by the Trust. The Plaintiff did not want to change the paper work. He was afraid that the Defendants would not renew the Listing Agreement with them (AA, Vol 2, 323:15-19). So he did not correct his error. The agent stated that title/escrow would fix the problem. Escrow would not fix the problem with the Listing Agreement. They are only concerned about the title and who signs the documents. There was no finding of any fraud or misrepresentation in this case. The Defendants relied upon the professional broker to do his job.

3. THE TRUST IS NOT A PARTY TO THE EXCLUSIVE LISTING AGREEMENT.

The Plaintiff sued for breach of contract. The Plaintiff did not sue the Trust, the owner of the real property, for a commission because they did not have a contract with the owner of the real property (See NRS 645.320). It was the Plaintiff's own error to not name the owner of the real property in the Listing Agreement (AA, Vol 2, 286). The Plaintiff wants to be paid a commission for his error under a personal guarantee for breach of contract when no commission is due under NRS 645.320. The court erred in granting the commission.

The Plaintiff admits that the Trust is not a party to the Exclusive Listing Agreement. Under NRS 645. 320 (4), it states:

> 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 (NRS 645.320(4))

"Client" is defined by the NRS 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. (Added to NRS by 1995, 2072; A 2003, 932)

The Plaintiff does not have a brokers agreement with the Trust, so the Trust is not a client. If there is no signature from the client, there is no commission due under NRS 645.320(4). The Judgment must be reversed.

4. THE ARGUMENT OF APPARENT AUTHORITY FAILS

It is important to note that the Plaintiff did not argue apparent authority during the trial. The Plaintiff's argument was that Jack Gaal personally guaranteed the payment of a commission individually. The Plaintiff further relied upon a contract provision that stated the LLC had authority to enter into the contract and perform the contract. The LLC signed for the business and had authority for the business. The Plaintiff was attempting to stretch the interpretation of the statute to include the Trust. Now, on appeal, the Plaintiff is emphasizing the issue of apparent authority. We can look at the issue of apparent authority two ways. First, was there apparent authority to sign for the Trust? If not then second, was there apparent authority to sell the property? We will address apparent authority under both scenarios.

A. There is no Apparent Authority <u>to Sign</u> for and on Behalf of the Trust because the Trust is not a Party to the Contract

The Trust was not a party to the contract. The Plaintiff is arguing that based upon apparent authority the contract was signed. One cannot sign for and on behalf of the Trust under apparent authority, if the Trust is not a party to the contract. The broker testified as follows:

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

A. No. (AA, Vol 3, 386:7-9)

A contract must be signed by the Trustee or an agent of the Trustee that has written authority. The Trust requires both Trustees to sign the agreement (AA, Vol 3, 433:21-22). Both Trustees of the Trust did not sign the Listing Agreement as Trustees of the Trust. The Plaintiff cannot argue that there was apparent authority to sign on behalf of the Trust if the Plaintiff did not include the Trust in the contract, and both Trustees of the Trust did not sign the Listing Agreement (AA, Vol 3, 386:7-9).

The Respondent Answering Brief is the first time the alleged issue of reform or ratification of a contract has been raised. There is no evidence of ratification of the Listing Agreement by the Trustee's of the Trust.

B. The Elements of Apparent Authority Have Not Been Met Due to the Agent's Negligence and Refusal to Correct His Errors

Since the Plaintiff has failed to prove that the Plaintiff complied with NRS 645.320 by proving the Trust is a client, the Plaintiff is arguing the parties that signed the contract had "apparent authority". This argument fails too.

An essential element of an agency relationship "is a fiduciary obligation on the part of the alleged agents to act primarily for the benefit of [the principal] in matters connected with [their] undertaking." *Hunter Mining Labs., Inc. v. Mgmt. Assistance, Inc.*, 104 Nev. 568, 571, 763 P.2d 350, 352 (1988) (quotation marks omitted). A party claiming an agency relationship based on apparent authority "must prove (1) that he subjectively believed that the agent had authority to act for the principal and (2) that his subjective belief in the agent's authority was objectively reasonable." *Great Am. Ins. Ca. v. Gen. Builders, Inc.,* 113 Nev. 346, 352, 934 P.2d 257, 261 (1997). Reliance will not be reasonable if the party claiming apparent agency **"closed [her] eyes to warnings or inconsistent circumstances."** Id. (internal quotation marks omitted). *PetSmart, Inc. v. Eighth Judicial Dist. Court,* 499 P.3d 1182, 1188 (Nev. 2021)

a. The Realtor cannot prove that he subjectively believed that the agent

had authority to act for the principal.

The Plaintiff does not argue he subjectively believed that they had the authority. The Plaintiff states they relied on the provision of the contract where it states the entity that signed has the authority to sign the agreement and perform the agreement. The LLC signed with the authority to sell the business and signed for the business. The Plaintiff did not provide any evidence to support why they subjectively assumed there was apparent authority on behalf of the Trust. The Plaintiff just relied upon their own drafted contract when as a Realtor they had a duty to do their job correctly. (AA, Vol 2, 286:3)

b. The subject belief in the agent's authority was not objectively reasonable.

The subject belief in the agent's authority was not objectively reasonable for the following reasons. Because the Realtor or their office, when they obtained the APN number to fill out the forms should have known the owner of the property was not included in the contract (AA, Vol 2, 286). An apprisal of the property was provided to the Realtor or their office that listed the name of the owner of the property (AA Vol 3, 437-438). Mr. Gaal personally told the Realtor it was wrong and the agent did not want to change it for fear he would back out of the listing (AA Vol 3, 438:17). An attorney working with the agent informed them that it was incorrect and the agent still refused to correct it. This is objectively unreasonable and demonstrates the Realtor **"closed eyes to warnings or inconsistent circumstances**."

i. **The Realtor failed to uphold his duty under NRS 645.252(1).**

A Realtor has a duty under NRS 645.252 to learn the owner of the property. The Plaintiff should learn the owners of the real property if they are going to sell it. NRS 645.252 states:

NRS 645.252 Duties of licensee acting as agent in real estate transaction. A licensee who acts as an agent in a real estate transaction:

1. Shall disclose to each party to the real estate transaction as soon as is practicable:

(a) Any material and relevant facts, data or information which the licensee knows, or which by the exercise of reasonable care and diligence should have known, relating to the property which is the subject of the transaction.

If the Plaintiff was using reasonable care and diligence by looking at the County Recorder's Office records, the Plaintiff should have known the true owner of the Property. The Plaintiff's office did look it up so the agent did not know what happened to cause the true owner not be named in the Listing Agreement (AA Vol 2, 286). They should have known the true owner of the property with reasonable care and diligence. It takes two minutes. They have to list the owner on the MLS. They have to list the owner on the contracts. If they had used reasonable care this would not have happened. It is not reasonable care when they noticed who owned the real property and simply decided not to include them in the brokerage agreement. The Plaintiff had the information and the agent did not know what happened in his office that caused it to not be listed correctly on their contract. The subject belief in the authority to act was not objectively reasonable.

ii. The Clark County Recorder's Office Put the Plaintiff on Notice who Owns the Real Property.

The Plaintiff's office knew who the true owner was when they looked up the records.

Mr. Gaal testified:

Q: Okay. So you relied upon him [agent] to prepare the listing agreement?

A: Yes.

(AA, Vol 3, 416:20)

Q: And they [FCBB's office] pulled up the APN; isn't that correct?

A: Yes.

Q: And how did they research it, through the County Records Office?

A: Yes.

(AA, Vol 2, 282:19)

If the Plaintiff researched the Property correctly, they would have learned that the Trust is the owner of the real property. The subject belief in the agent's authority was not objectively reasonable.

iii. When drafting the Listing Agreement the Realtor failed to check with his office or the Clark County Recorder's Office which is standard practice.

The Plaintiff's office knew the true owner of the property. They looked up the APN number and included it in the listing agreement. If the Plaintiff did their proper job, they would have informed the agent of who really owned the real property. The contract is with the brokerage. The brokerage has to do their job. They failed to properly inform their agent of the owner. The Plaintiff's agent cannot hide behind the fact they did not tell the agent. Mr. Gaal testified:

Q: Okay. So you relied upon him [agent] to prepare the listing agreement?

A: Yes.

(AA, Vol 3, 416:20)

Q: And they [FCBB's office] pulled up the APN; isn't that correct?

A: Yes.

Q: And how did they research it, through the County Records Office?

A: Yes. (AA, Vol 2, 282:19)

The agent testified:

Q: So the office may have done it, but you were not informed; isn't that correct?

A. I'm not exactly sure how that went down. I really don't.

(AA, Vol 2, 286:3-10)

The Plaintiff' office should have known the true owner but they closed their eyes

to the facts.

iv. The Agent was Given a Copy of an Appraisal that Listed the Trust as the Owner of the Real Property and the Agent Still refused to Correct His Error.

The agent knew from the appraisal that the property was owned by a trust before the Asset Purchase agreement was executed. Even though he knew it was wrong, he chose not to make the change.

Q: On January 4th, 2018, at 4:03, you received a copy of the appraisal from Mr. Northup?

A: Yes.

Q: Let's have you turn to 511. Okay. And it says John A – it says it was prepared for John A. Gaal and Katherine B. Gaal, trustee of the John A. Gaal Family Trust; isn't that correct?

A. Yes.

Q. Did you make any effort to change the documents now that there was no question you knew that the trust owned the property?

A. I had no reason to. Jack represented himself as the authorized seller over, and over, and over again.

(AA, Vol 3, 437:15-438:6)

There was no question that before the Asset Purchase Agreement was executed, that the Plaintiff knew about the error. The Plaintiff admitted they were not willing to correct the error because they argued that Jack represented himself as the authorized seller. They still wanted a commission when they knew they did not have a listing with the owner of the real property but were still marketing the Property. How could the Realtor sell the property at that time when he knew that he did not have an agreement with the owner of the Property? The subject belief in the agent's authority was not objectively reasonable.

v. The Realtor was Informed by Mr. Gaal That the Contract was Incorrect.

The agent of the Plaintiff knew that the Listing Agreement was wrong. He refused to correct the error because he was afraid that the Seller may change his mind or back out of the deal.

The agent testified:

Q: Okay. So once it was an issue, why didn't you correct it?

A: Because they were asking for a new contract, which would have given them the backdoor to exit the current contract that he had already signed.

(AA, Vol 3, 438:17).

The subject belief in the agent's authority was not objectively reasonable when you know there is no contract signed by the owner of the Property. Escrow could not close on the Property without the owner.

vi. There was a Letter From Counsel for Mr. Gaal Pointing out the Error in the Listing Agreement and Asset Purchase Agreement.

The agent received a letter from counsel for the Trust explaining the error that had been made by the Agent. He still refused to make any changes. (AA, Vol 2, 258-259). The characterization of counsel in the answering brief is misleading, is not correct, and is part of confidential settlement discussions. For example, the brief points out that when the agent received the appraisal there was no question regarding who owned the property. This was before the attorney's letter. Even if escrow corrected the purchase agreement, they did not have a duty to correct the Listing Agreement

5. THE FEES ARE NOT OWED AT THIS TIME AND THERE IS AMBIGUITY IN THE CONTRACT REGARDING THE AUTHORITY TO SIGN AND PERFORM THAT SHOULD BE CONSTRUED AGAINST THE PLAINTIFF.

A. A Commission is Not Owed.

The Plaintiff drafted the Exclusive Listing Agreement (AA, Vol 2, 293:19). If

there is any ambiguity under the contract, it is to be construed against the Plaintiff. The contract reads:

> 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)

The payment of a commission is not due until the closing, disposition of the business, buyer possesses the property or the transfer of the business. None of this occurred.

The second ambiguity is the authority to sign the contract. Jack is signing on behalf of the LLC stating the LLC has the authority to enter into an perform the contract on behalf of the LLC.[2] Not the Trust. They are arguing it applies to the sale of the property. This ambiguity should be construed in favor of the Trust. Let's say the Plaintiff had the Trust sign. The Trust is not signing that it can perform for the LLC, nor is the LLC signing it has authority on behalf of the Trust. The contract is vague and inconsistent. It should be construed against the Plaintiff.

B. A Commission is Not Owed Under the Personal Guarantee.

One cannot circumvent the statute to get paid a commission by having a party

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[2]Seller warrants that Seller or the actual person who has signed on behalf of the entity has the legal right, power and authority to enter into and perform this Agreement... The natural persons or person who signing this Agreement personally guarantee performance of the Agreement and payment to FCBB-101 of the Commissions due. (AA, Vol 2, 203).

sign a personal guarantee. If the commission is not due under NRS 645.320, then the guarantee is meaningless because there is no commission due. That is our position.

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

A. No, he's personally guaranteed this contracts regardless of what his title is.

(AA, Vol 2, 296:22).

Q: But he didn't sign as the trustee; did he?

A: He signed and personally guaranteed performance of the listing agreement and asset purchase agreement.

(AA, Vol 2, 335:6).

The Plaintiff argues "when a contract consist of several agreements, one of which is illegal, the illegal portion can be severed if it does not destroy the symmetry of the contract." Id. (*Sprouse v. Wentz* 105 Nev. 597, 605, 781 P.2d 1136, 1140 (1989). (RAB p.36:2) The personal guarantee is to guarantee a real estate commission. The commission is the whole symmetry of the Listing Agreement. If the broker did not follow NRS 645.320, then the broker is not entitled to a commission even if a personal guarantee of a commission is signed. You cannot sever the claim for a commission.

6. THE DISTRICT COURT RELIED UPON THE PURCHASE AGREEMENT AND NOT JUST THE LISTING AGREEMENT

The Plaintiff states "Regardless, the District Court was correct in referencing both the Listing Agreement and the Purchase Agreement because they are intertwined by contractual terms and incorporated by reference." This is not correct. The Nevada Supreme Court has made it clear. A commission is based solely on the Listing Agreement. The problem we have is that the court intertwined various documents to make its decision. We do not know what the court relied upon. The court admits it used other documents. As a result, the findings of fact and conclusions of law are diluted and we do not know what facts the Judge relied upon. For example, you look at

the FFCL by the court, finds 1, 3, 4, and 7 incorporates by reference other documents to form her opinion. The court does the same thing under findings 8, 12 and 21 of the conclusions of law. (AA Vol 1, 23)

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

7. THE ISSUE OF QUALIFIED BUYER HAS BEEN AN ISSUE THROUGHOUT THE CASE BUT THE PLAINTIFF IS NOT SEEKING QUANTUM MERIT.

The Plaintiff also has to prove that it has obtained a qualified buyer for the Property. Part of the Plaintiff's burden of proof is that they performed under the contract. The allegation that this is the first time that this issue has been raised is incorrect. This issue has been disputed throughout the whole case. A deposition was taken of the potential buyer. Documents were subpoenaed. There was evidence presented by both sides at trial and it is included in the issues on appeal in the appeal statement. This is not the first time this argument has been raised. Mr. Gaal testified at trial regarding the qualification of the buyer. He had tried to assist the buyer get a loan.

A: Okay. What is you understanding of the 7000[00] and the bank loan on real estate [In the Asset Purchase Agreement]?

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

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).

You can get a loan on a real property with a loan to value of 95%. The Plaintiff never proved he could get the loan as required by the contract (AA Vol 1, 64).

III. 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 contract signed 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 Statues and the Exclusive Listing Agreement presented as evidence, the decision by the District Court MUST be reversed.

April 8, 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 NRAP 32(a)(7) (C), it is either: Proportionately spaced, has a typeface of 14 points or more and contains 5,582 words.

3. I hereby certify that I have read this Reply Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference 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 8th day of April, 2022

DAVID J. WINTERTON & ASSOC., LTD

By: *"S/" David J. Winterton Esq.*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of David J. Winterton & Assoc., Ltd., and that on the 8th Day of April, 2022, a true and accurate copy of the foregoing **APPELLANT'S REPLY BRIEF** was served by the Supreme Court Electronic Filing System. I further certify that counsel of record for all other parties to this appeal are either registered with the Court's electronic filing system or have consented to electronic service, and that electronic service shall be made upon and in accordance with the Court's Master Service List.

"S/" Autumn G. Wheeler
An employee of David J. Winterton & Associates, Ltd.