

## 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-18-77698 Department XXVII  Electronically Filed Sep 20 2022 04:06 p.m. Elizabeth A. Brown Clerk of Supreme Court
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### **PETITION FOR REHEARING**

COMES NOW, JACK GAAL, an individual, and JACK'S PLACE BAR AND GRILL LLC, by and through their attorney, David J. Winterton, of the law firm David J. Winterton & Associates, Ltd., hereby files this Petition for Rehearing under NRAP 40, regarding the Order of Affirmance. This case involves the listing of a commercial property as defined under 645.8711. The Commercial Property Brokerage Agreement is governed by NRS 645.8701 through 645.8741. The Court in its decision applied the Residential definition of a Brokerage Agreement under NRS 645.005, instead of the Commercial definition of a Brokerage Agreement under NRS 645.8705. NRS 645. 8705 requires that the owner sign the brokerage agreement. In this case, the owner did not sign a brokerage agreement so there is no valid brokerage agreement. Since they did not sign, there is not a valid contract to award a real estate commission for breach of contract. Since there is no brokerage agreement, you can not award fees under NRS 645.320. We are asking the Supreme Court to reconsider their ruling based upon the statutes and reverse the commission awarded by the District Court.

**I. Under the Commercial Definition, There was no Brokerage Agreement, so the Award for Breach of Contract by the District Court must be Reversed.**

**1. THIS MATTER DEALS WITH A COMMERCIAL PROPERTY NOT A RESIDENTIAL PROPERTY.**

There has been no dispute that this matter involves a commercial piece of property. It is a commercial property in which the Defendant operated a bar and grill. (See AA 78 - 84) The bar and grill was the alleged property that was being sold. Commercial real estate is defined as follows:

NRS 645.8711 “Commercial real estate” defined. “Commercial real estate” means any real estate located in this State. The term does not include:

1. Improved real estate that consists of not more than four residential units;
  2. Unimproved real estate for which not more than four residential units may be developed or constructed pursuant to any zoning regulations or any development plan applicable to the real estate; or
  3. A single-family residential unit, including a condominium, townhouse or home within a subdivision, if the unit is sold, leased or otherwise conveyed unit by unit, regardless of whether the unit is part of a larger building or parcel that consists of more than four units.
- (Added to NRS by 1999, 1174)

This matter is related to a commercial property. As per the definition, this is not a real property consisting of more than four residential units. This is improved real estate so section 2 does not apply. It is not a single-family residential unit as described by statute. Since it is not one of the three items listed as per the statute, it is considered “Commercial Real Estate.”

**2. THERE IS NO BROKERAGE AGREEMENT TO SELL THE COMMERCIAL PROPERTY.**

Since this is “Commercial real estate” as defined by NRS 645.8711, the

definition as stated under the Commercial Section for licensee under NRS 645.8701 through 645.8741 must be applied. The definition of a brokerage agreement under “Commercial Property” is as follows:

**NRS 645.8705 “Brokerage agreement” defined. “Brokerage agreement”** means a written contract between an **owner** and a **real estate broker** in which the owner agrees to pay a commission to the real estate broker for services provided by the broker relating to the disposition of commercial real estate as specified in the agreement. (Added to NRS by 1999, 1174) (emphasis added)

**NRS 645.8735 “Owner” defined. “Owner”** means a person who holds legal title to or any interest in any commercial real estate that is described in a brokerage agreement, including, without limitation, any assignee in interest and any agent of a person. The term does not include a mortgagee, trustee under or beneficiary of a deed of trust, or an owner or holder of a claim that encumbers any real estate or any improvement on that real estate. (emphasis added)

As evidenced in the trial and the briefs in this appeal, there was no signed contract between the owner and the broker. There were no claims for unjust enrichment, nor for quantum merit. This is a simple contract case. There is also no dispute that the Brokerage Agreement for the Commercial Real Estate was not signed by the owner. Since there is no brokerage agreement (contract) because it is not signed by the owner under NRS 645.8705, you cannot have a claim for breach of contract because there is no contract as per the statute. Since there is no contract, you also cannot have a claim of breach of covenant of good faith and fair dealing under contract. There is no claim and so the judgment must be reversed.

## **II. THE SUPREME COURT INTERPRETATION IS CONTRARY TO THE LEGISLATIVE INTENT OF THE STATUTES.**

First, there needs to be a brokerage agreement. Once there is a valid

brokerage agreement then you apply NRS 645.320 addressing exclusive agency agreements. It is explained as follows:

**1. Various Types of Brokerage Agreements are defined as follows:**

In Nevada, the brokerage agreement is a contract between the owner and the Brokerage under NRS 645.8705. There are three types of brokerage agreements.

1. Exclusive Right-to-Sell Listing - A contractual agreement under which the listing broker acts as the agent or as the legally recognized non-agency representative of the seller(s), and the seller(s) agrees to pay a commission to the listing broker, regardless of whether the property is sold through the efforts of the listing broker, the seller(s), or anyone else; and a contractual agreement under which the listing broker acts as the agent or as the legally recognized non-agency representative of the seller(s), and the seller(s) agrees to pay a commission to the listing broker regardless of whether the property is sold through the efforts of the listing broker, the seller(s), or anyone else, except that the seller(s) may name one or more individuals or entities as exemptions in the listing agreement and if the property is sold to any exempted individual or entity, the seller(s) is not obligated to pay a commission to the listing broker. (Amended 5/06)
2. Exclusive Agency Listing - A contractual agreement under which the listing broker acts as the agent or as the legally recognized non-agency representative of the seller(s), and the seller(s) agrees to pay a commission to the listing broker if the property is sold through the efforts of any real estate broker. If the property is sold solely through the efforts of the seller(s), the seller(s) is not obligated to pay a commission to the listing broker. (Amended 5/06)Right to Sell
3. Open Listing: A contractual agreement under which the listing broker acts as the agent or as the legally recognized non-agency representative of the seller(s), and the seller(s) agrees to pay a commission to the listing broker only if the property is sold through

the efforts of the listing broker. (Amended 5/06)  
(Definitions of Listing Brokerage Agreements by the National Association of Realtors Section 3 Handbook)

**2. THERE IS NO BROKERAGE AGREEMENT FOR A COMMISSION FOR COMMERCIAL PROPERTY.**

The statute states the requirements for a brokerage agreement. If the brokerage agreement contains an exclusive agency representation then there are additional requirements. The statute reads: “Every brokerage agreement which includes a provision for exclusive agency representation must: .....” (NRS 645.320) In this case, we do not have a Brokerage Agreement because it is not signed by the owner under NRS 645.8705. For commercial real estate, it has to be an agreement between the owner and the Brokerage. In order to meet the requirements of NRS 645.320, you must have a brokerage agreement first. Once you have a brokerage agreement and it contains the exclusive agent language, then you go through the four elements. There is no brokerage agreement as per the statute, so the decision by the state court must be reversed.

**3. The Application of NRS 645.320.**

The application of NRS 645.320 only applies when you have a valid brokerage agreement. When you have a valid brokerage agreement that has an exclusive agency agreement signed by the owner for “Commercial Property” then you apply NRS 645.320. The prerequisite is that you must first have a valid brokerage Agreement which they do not have in this case. If they did have the owner sign, it will meet the following requirements:

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 court applied the definition of when applying NRS645.320.

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)

In the commercial definition of a brokerage agreement, because this is a commercial property, you need to have the owner sign. If the owner did not sign, then you do not have a brokerage agreement for the commercial property. The person is not a client because they do not have a brokerage agreement. This interpretation makes it clear and how the statutes work together.

If you follow the interpretation stated by the decision from the Supreme Court, you are negating the statutory intent of NRS 645.8705. The intent of the legislative drafters is to have them work together as explained above. What this court is ruling is that NRS 645.320 negates NRS 645.8705 because it does not require the owner to sign in a “Commercial Property” to have an exclusive agency. In order to have it work together, you need to have the owner sign the brokerage agreement to have and have a valid agreement under NRS 645.8705. Once you have the agreement, then you apply NRS 645.320 if you want to have an exclusive

agency.

As a result, the clear understanding is there is no brokerage agreement in this case. You do not even need to apply NRS 645.320. The District Court ruling regarding the commission must be reversed because there is no valid commercial brokerage agreement.

**4. THE DECISION DESTROYS THE LEGISLATIVE INTENT OF NRS 645.8705 FOR COMMERCIAL PROPERTY.**

The way it is explained in this reconsideration all of the statutes work together. Based upon the decision of this court, they are ruling NRS 645.320 negates the definition of NRS 645.8705 regarding “Commercial Property” in that you can have an exclusive agency for Commercial property without having the owner sign as required under NRS 645.8705.

That is not the legislative intent. You need to have a brokerage Agreement for Commercial Property signed by the owner to be valid under NRS 645.8705. If you have an exclusive agency representation in the commercial brokerage agreement, you must then also meet the provisions in the brokerage agreement under NRS 645.320. This does not negate the NRS 645.8705 nor does it conflict.

This court stated in the decision “[W]hen the [L]egislature has employed a term or phrase in one place and excluded it in another, it should be imposed where excluded.” *Coast Hotel & Casino Inc. V. Nev. State Labor comm’n*, 117 Nev. 835, 841, 34 P.3d 546, 550 (2001). This is not what we are doing. We are saying there is no brokerage agreement because it does not meet the elements of NRS 645.8705 for “Commercial Property.” So you do not get to NRS 645.320 to get a commission.

The next question then, why the language under NRS 645.320. It was the intent to separate Non-Commercial real estate transactions (residential) from commercial transactions. Under a residential agreement you do not need the

contracts to be signed by the owner. This is clear from the Supreme Court's interpretation. It however does not fit with the commercial definition and the sale of commercial property. Under commercial property, you have to have it signed by the owner to have a valid brokerage agreement. Once you have a valid Commercial brokerage agreement, then you need to meet the elements of NRS 645.320 to have an exclusive agency agreement for "Commercial Property.". If it is signed by the owner, there is no problem with NRS 645.320 (4). In this case, NRS 645.8705 was not met; so there is no brokerage agreement so you never get to apply NRS 645.320 because you need a brokerage agreement first. Based upon this analysis, the decision must be reversed to comply with the interpretation of the NRS governing Licensee/Realtors.

**4. There are Additional Requirements to obtain a commission under "Commercial Property" that were not followed by the Appellant so they must be denied a commission.**

There are additional procedures that must be followed under a commercial contract before a broker can obtain a commission under "Commercial Property." The broker has seven (7) days after a commission is earned to give written notice. This was not done. There is no evidence that the Broker gave notice within seven (7) days that he has earned a commission. There never has been any notice provided to the court as required by law. The law reads as follows:

**NRS 645.8705 Requirements for broker to enforce claim:  
Written notice to owner and escrow agent; effect of failure to provide notice; exceptions.**

1. Except as otherwise provided in subsection 3, if a real estate broker wishes to enforce a claim pursuant to the provisions of



NRS 645.8701 to 645.8811, inclusive, the real estate broker shall, within 7 days after a commission is earned by the real estate broker pursuant to a brokerage agreement, provide a written notice of the claim to:

(a) The owner of the commercial real estate specified in the brokerage agreement; and

(b) The escrow agent closing the transaction for the commercial real estate.

2. A real estate broker who fails to provide a notice of a claim within the period specified in subsection 1 may not enforce the claim pursuant to the provisions of NRS 645.8701 to 645.8811, inclusive.

3. A real estate broker is not required to provide a written notice of a claim to an escrow agent pursuant to this section if the identity of the escrow agent is unknown to the real estate agent at the time the notice is provided by the real estate broker to the owner pursuant to paragraph (a) of subsection 1.

(Added to NRS by 1999, 1176)

**NRS 645.8771 Requirements for broker to enforce claim: Information required in notice; verification by oath; acknowledgment.**

1. A notice of claim specified in NRS 645.8705 must include:

(a) The name of the owner of the commercial real estate;

(b) The name of the person who executed the brokerage agreement, if other than the owner;

(c) The name, business name, if any, and the license number of the real estate broker;

- (d) The amount claimed by the real estate broker;
- (e) A detailed description of the commercial real estate; and
- (f) A copy of the brokerage agreement pursuant to which the real estate broker claims a commission.

2. The notice must:

- (a) Be verified by the oath of the real estate broker who provides the notice; and
- (b) Include an acknowledgment by the real estate broker.

(Added to NRS by 1999, 1176)

We know for a fact that the Plaintiff failed to comply with these requirements because they NEVER stated nor acknowledged the true owner of the real property. They were not even a party to the lawsuit. They are not entitled to a commission as per the statutes.

There is no brokerage agreement as required under NRS 645.8705. Since there is no contract, there cannot be a claim for breach of contract nor a breach of the covenant of good faith and fair dealing under the non-existing contract. The decision by the District Court must be reversed as per the statute.

September 20, 2022

DAVID J. WINTERTON & ASSOCIATES LTD.

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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 9,815 words.

3. I hereby certify that I have read this respondent 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 20th day of September, 2022

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## **CERTIFICATE OF ELECTRONIC SERVICE**

I HEREBY CERTIFY that I am an employee of David J. Winterton & Assoc., Ltd., and that on the 20th Day of September, 2022 I electronically served a true and accurate copy of the foregoing PETITION FOR REHEARING as follows:

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