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### Summary of Betsinger v. D.R. Horton, Inc., et al., 126 Nev. Adv. Op. No. 17

Mark Hesiak  
*Nevada Law Journal*

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**TORT LAW - DECEPTIVE TRADE PRACTICES and EMOTIONAL DAMAGES**

**Summary**

An appeal and cross appeal from a jury verdict in favor of prospective home buyer who prevailed in a deceptive trade practice action against a home builder and its financing division.

**Disposition and Outcome**

The court affirmed the jury's verdict finding defendants liable for deceptive trade practices, reversed the damage award for emotional distress, and reversed and remanded the punitive damage award.<sup>2</sup>

**Facts and Procedural History**

Steve Betsinger contracted to purchase a D.R. Horton ("DRH") home in Las Vegas. He secured the transaction with a \$4,900 earnest money deposit. DRH's financing division, DHI Mortgage ("DHI"), offered him a "primary residence" rate of 4.625%. After Betsinger prepared his family to move, DHI's branch manager, Callahan, informed him that he did not qualify for the "primary residence" rate because he did not plan to seek full-time employment in Las Vegas. The best rate Callahan could offer at that point was 6.5%. Betsinger refused the higher rate, cancelled the contract, and sought the return of his deposit. According to Betsinger's testimony, Callahan and two DRH managers, Martinez and Ward, told him DRH would refund his money. Betsinger never received his refund.

Betsinger brought suit for three claims: (1) the defendants committed fraud by telling him DRH would refund his earnest money; (2) Callahan had committed fraud through a "bait and switch" offer; and (3) all defendants had committed deceptive trade practices.

**Discussion**

*Deceptive Trade Practice Claims Must be Proven by a Preponderance of the Evidence*

Respondents claimed the district court's instructions to the jury that some deceptive trade practices must be proven by a preponderance of the evidence and others by clear and convincing evidence were in error. The district court's instructions did not specify which standard applied to which claim. In Nevada, unless the legislature clearly indicates otherwise, a civil claim must generally be proven by a preponderance of the evidence.<sup>3</sup> Although common law fraud must be

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<sup>1</sup> By Mark Hesiak.

<sup>2</sup> Appellants had challenged the constitutionality of NEV. REV. STAT. § 42.005 which caps punitive damage awards, but the court refused to address the issue in light of its reversal and remand of the punitive award in this case.

<sup>3</sup> Mack v. Ashlock, 112 Nev. 1062, 1066, 921 P.2d 1258, 1261 (1996).

proven by clear and convincing evidence,<sup>4</sup> Nevada statutes do not specify a burden of proof for deceptive trade practices that sound in fraud.<sup>5</sup> In deciding the issue, the Court adopted the reasoning of the Arizona Court of Appeals, which found that statutory fraud and common law fraud are distinct.<sup>6</sup> The mere presence of the word “fraud” in the statute does not demonstrate clear legislative intent to apply a higher burden of proof.<sup>7</sup>

As there was no clear legislative directive to the contrary, the Court held that Nevada’s deceptive trade practice laws require proof by a preponderance of the evidence. As such, even though the instructions were unclear, the court affirmed the verdict because the jury found guilt under the even higher standard.

#### *Emotional Damage awards in the Absence of Physical Manifestation of Emotional Distress*

Respondents also claimed the emotional damages award should be reversed because Betsinger presented no evidence of physical manifestations of emotional distress. Nevada law has generally required such evidence in support of an emotional damage award.<sup>8</sup> In certain cases where there is little chance for an illusory emotional damages claim, such as assault, the Court has made an exception.<sup>9</sup> Here, the Court refused to extend the presumption of emotional harm to a claim arising from a failed real estate transaction and reversed the emotional damages award. This reversal reduced the compensatory award by 80%.

#### *Punitive Damages*

The Court next considered whether the amount of punitive damages was appropriate in light of the drastically reduced compensatory damages. Punitive damages are not available in the absence of compensatory damages.<sup>10</sup> As the voided emotional damages were the only compensatory damages Betsinger recovered from Callahan, the Court struck the entire punitive award against him. The Court then remanded the punitive damages award against DHI because it was uncertain what the jury would have awarded in light of the substantially lower compensatory award.*Conclusion*

Statutory deceptive trade practices claims must be proven by a preponderance of the evidence. Additionally, a plaintiff must present evidence of physical manifestation of emotional distress to support an emotional damages award in deceptive trade practice claims. Finally, the court will not determine the appropriateness of a punitive damage award when the compensatory award is substantially reduced on appeal.

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<sup>4</sup> *Bulbman, Inc. v. Nev. Bell*, 108 Nev. 105, 110-11, 825 P.2d 588 (1992).

<sup>5</sup> NEV. REV. STAT. § 598.0903-.0999 (2007).

<sup>6</sup> *Dunlap v. Jimmy GMC of Tucson, Inc.*, 666 P.2d 83, 88-89 (Ariz. Ct. App. 1983).

<sup>7</sup> *Id.*

<sup>8</sup> *Bartmettler v. Reno Air, Inc.*, 114 Nev. 441, 448, 956 P.2d 1382, 1387 (1998); *Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 482-83, 851 P.2d 459, 462 (1993).

<sup>9</sup> *Olivero v. Lowe*, 116 Nev. 395, 400, 995 P.2d 1023, 1026 (2000).

<sup>10</sup> *City of Reno v. Silver State Flying Serv*, 84 Nev. 170, 180, 438 P.2d 257, 264 (1968).



Cite as: Betsinger v. D.R. Horton, Inc.

126 Nev. Adv. Op. No. 17

May 27, 2010

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 50510

STEVEN M. BETSINGER,

Appellant/Cross-Respondent,

vs.

D.R. HORTON, INC., A NEVADA CORPORATION; JEFF WARD; DEBRA MARTINEZ;  
DHI MORTGAGE COMPANY, LTD., A TEXAS LIMITED PARTNERSHIP F/K/A CH  
MORTGAGE COMPANY I, LTD., A NEVADA LIMITED PARTNERSHIP; AND DANIEL  
CALLAHAN, INDIVIDUALLY,

Respondents/Cross-Appellants.

Appeal and cross-appeal from a district court final judgment in an action based on fraud and deceptive trade practices. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

Affirmed in part, reversed in part, and remanded with instructions.

Bailey Kennedy and Dennis L. Kennedy and Sarah E. Harmon, Las Vegas; Feldman Graf, P.C., and David J. Feldman and J. Rusty Graf, Las Vegas, for Appellant/Cross-Respondent.

Lionel Sawyer & Collins and David N. Frederick and Todd E. Kennedy, Las Vegas; Wood, Smith, Henning & Berman, LLP, and Joel D. Odou and Tod R. Dubow, Las Vegas, for Respondents/Cross-Appellants.

BEFORE THE COURT EN BANC.

OPINION

By the Court, PARRAGUIRRE, C.J.:

In this opinion, we consider the proper burden of proof that should apply for a cause of action brought under NRS Chapter 598's deceptive trade practices statutory scheme. We conclude that any cause of action for deceptive trade practices under NRS Chapter 598 must be proven by a preponderance of the evidence. We further conclude that a substantial portion of Steven Betsinger's compensatory damage award must be reversed because he failed to present evidence of any physical manifestation of emotional distress. As a consequence of this decision, we reverse the punitive damages award against Daniel Callahan because Betsinger failed to recover any general damages against Callahan aside from damages for emotional distress. Additionally, we remand for a new trial on punitive damages against DHI Mortgage Company, Ltd., because we are unable to adequately review the jury's punitive damages award in light of our decision to substantially reduce the compensatory damages award.

FACTS AND PROCEDURAL HISTORY

This appeal and cross-appeal arise out of a lawsuit filed by appellant/cross-respondent Steven Betsinger against respondents/cross-appellants (respondents) D.R. Horton, Inc. (DRH), DHI Mortgage Company, Ltd., Daniel Callahan, Jeff Ward, and Debra Martinez for fraud and deceptive trade practices involving the sale of a house built by DRH with financing from DHI Mortgage.

In this case, Betsinger contracted to buy a DRH-built house in Las Vegas. He sought a mortgage loan from DRH's financing division, DHI Mortgage, and made a \$4,900 earnest-money deposit to secure the purchase.

After making final preparations to relocate his family to Las Vegas, Betsinger was informed by Callahan, a DHI Mortgage branch manager, that DHI Mortgage could not offer him the low mortgage interest rate that had been originally suggested. Instead of the originally suggested "primary residence" rate of 4.625%, Callahan told Betsinger that DHI Mortgage could only offer him a rate of 6.5% under the premise that the Las Vegas house could not qualify as Betsinger's "primary residence" because he did not intend to seek full-time employment in the Las Vegas area.

Unwilling to accept the higher rate of interest, Betsinger canceled the purchase contract. Before doing so, Betsinger inquired as to whether his deposit would be refunded. Although the

unsigned purchase contract provided that the deposit was nonrefundable, Betsinger testified that Callahan, Ward (the Director of Sales and Marketing for DRH), and Martinez (a DRH salesperson) all informed him that his \$4,900 deposit would be returned. DRH never refunded Betsinger's deposit.

Betsinger subsequently commenced this action, alleging that (1) DRH, Ward, and Martinez had engaged in fraud by telling him that his earnest-money deposit would be returned after he canceled his purchase contract; (2) Callahan had engaged in fraud by "baiting" him with a 4.625% mortgage rate so that he would place a \$4,900 earnest-money deposit, then "switching" the rate to 6.5%; and (3) all defendants had engaged in deceptive trade practices.

After a five-day trial, the jury returned a special verdict finding that DHI Mortgage and Callahan had engaged in fraud, that all the defendants had engaged in deceptive trade practices, and that punitive damages should be awarded against DHI Mortgage and Callahan. The jury awarded Betsinger \$53,727 in compensatory damages: actual damages in the amount of \$10,727 (\$5,190 from DRH and \$5,537 from DHI Mortgage); and consequential damages for emotional distress, mental anguish, embarrassment, and loss of peace of mind in the amount of \$43,000 (\$11,000 from DRH, \$22,000 from DHI Mortgage, and \$10,000 from Callahan).[1] The jury also awarded Betsinger \$1,542,500 in punitive damages (\$1,500,000 from DHI Mortgage and \$42,500 from Callahan), which was later reduced to \$300,000 pursuant to NRS 42.005's statutory cap. This appeal and cross-appeal followed.[2]

## DISCUSSION

### A cause of action for deceptive trade practices must be proven by a preponderance of the evidence

Respondents allege on cross-appeal that the district court failed to appropriately instruct the jury as to the correct burden of proof for a deceptive trade practices claim against them. They allege that the district court imprecisely instructed the jury that some deceptive trade practices must only be proven by a preponderance of the evidence while others require proof by clear and convincing evidence, and that the district court did not specify which burden of proof was required for which particular deceptive trade practice. While we agree that the district court improperly instructed the jury on both burdens of proof, reversal on this ground is unnecessary because deceptive trade practices must only be proven by a preponderance of the evidence, which is a lesser evidentiary standard than clear and convincing evidence.

Generally, a preponderance of the evidence is all that is needed to resolve a civil matter unless there is clear legislative intent to the contrary. See Mack v. Ashlock, 112 Nev. 1062, 1066, 921 P.2d 1258, 1261 (1996) ("[A]bsent a clear legislative intent to the contrary . . . the standard of proof in [a] civil matter must be a preponderance of the evidence.").

NRS Chapter 598 is silent as to the plaintiff's burden of proof for deceptive trade practices. See NRS 598.0903-.0999. Thus, while some deceptive trade practices defined in NRS Chapter 598 sound in fraud, see, e.g., NRS 598.0923(2), which, under common law, must be proven by clear and convincing evidence, see Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110-

11, 825 P.2d 588, 592 (1992), we cannot conclude that deceptive trade practices claims are subject to a higher burden of proof absent a legislative directive. See Mack, 112 Nev. at 1066, 921 P.2d at 1261.

This accords with the approach taken by many other jurisdictions that have enacted similar consumer protection statutes. See Hanson-Suminski v. Rohrman Motors, 898 N.E.2d 194, 203 (Ill. App. Ct. 2008) (“[T]he appropriate standard of proof for a statutory fraud claim [under the Illinois Consumer Fraud Act] is preponderance of the evidence.”); Dunlap v. Jimmy GMC of Tucson, Inc., 666 P.2d 83, 88-89 (Ariz. Ct. App. 1983); State Ex. Rel. Spaeth v. Eddy Furniture Co., 386 N.W.2d 901, 903 (N.D. 1986).[3]

In Dunlap, the Arizona Court of Appeals recognized that a plaintiff has the burden of proving common law fraud by clear and convincing evidence. 666 P.2d at 88. However, because statutory fraud is separate and distinct from common law fraud, the Court stated that “[t]he mere fact that the word ‘fraud’ appears in the title of [Arizona’s] consumer protection statute does not give rise to an inference that the legislature intended to require a higher degree of proof than that ordinarily required in civil cases.” Id. at 89. The court further concluded that the purpose of the consumer protection statute was to provide consumers with a cause of action that was easier to establish than common law fraud, and therefore, statutory fraud must only be proven by a preponderance of the evidence. See id.

We agree with the Arizona Court of Appeals’ reasoning in Dunlap. Statutory offenses that sound in fraud are separate and distinct from common law fraud. Therefore, we conclude that deceptive trade practices, as defined under NRS Chapter 598, must only be proven by a preponderance of the evidence.

Having concluded as such, we do not need to disturb the jury’s verdict because the jury found all defendants liable for deceptive trade practices even though the district court improperly instructed the jury that some deceptive trade practices must be proven by the higher standard of clear and convincing evidence. Accordingly, we affirm the district court’s judgment in this respect.[4]

#### Compensatory damages award—damages for emotional distress

Respondents next contend on cross-appeal that the jury’s compensatory award relating to emotional distress damages must be reversed because Betsinger failed to demonstrate any physical manifestation of emotional distress. We agree, and therefore reverse the jury’s \$43,000 emotional distress damages award.

We have previously required a plaintiff to demonstrate that he or she has suffered some physical manifestation of emotional distress in order to support an award of emotional damages. See, e.g., Barnettler v. Reno Air, Inc., 114 Nev. 441, 448, 956 P.2d 1382, 1387 (1998) (“[I]n cases where emotional distress damages are not secondary to physical injuries, but rather, precipitate physical symptoms, either a physical impact must have occurred or, in the absence of physical impact, proof of ‘serious emotional distress’ causing physical injury or illness must be presented.”); Chowdhry v. NLVH, Inc., 109 Nev. 478, 482-83, 851 P.2d 459, 462 (1993). While

we have relaxed the physical manifestation requirement in a few limited instances, see Olivero v. Lowe, 116 Nev. 395, 400, 995 P.2d 1023, 1026 (2000) (explaining that the physical manifestation requirement is more relaxed for damages claims involving assault), we cannot conclude that a claim for emotional distress damages resulting from deceptive trade practices in connection with a failed real estate and lending transaction should be exempted from the physical manifestation requirement.

Unlike in Olivero, where we stated that “the nature of a claim of assault is such that the safeguards against illusory recoveries mentioned in Barnettler and Chowdhry are not necessary,” 116 Nev. at 400, 995 P.2d at 1026, there is no guarantee of the legitimacy of a claim for emotional distress damages resulting from a failed real estate and lending transaction without a requirement of some physical manifestation of emotional distress.

Thus, because Betsinger failed to present any evidence that he suffered any physical manifestation of emotional distress, we reverse the jury’s award of \$43,000 in emotional distress damages. Accordingly, Betsinger’s compensatory damages award should be reduced to \$10,727, the amount of Betsinger’s actual damages, as determined by the jury.

#### The punitive damages must be reversed and remanded

In light of our decision to reduce Betsinger’s compensatory damages award by more than 80%, we must now consider the appropriateness of his punitive damages award against Callahan and DHI Mortgage.

As against Callahan, the punitive damages award must be stricken in its entirety because Betsinger did not recover any compensatory damages from Callahan other than those relating to emotional distress. See Bongiovi v. Sullivan, 122 Nev. 556, 582-83, 138 P.3d 433, 451-52 (2006); City of Reno v. Silver State Flying Serv., 84 Nev. 170, 180, 438 P.2d 257, 264 (1968) (“Punitive damages cannot be awarded by a jury unless it first finds compensatory damages.”).

As against DHI Mortgage, the punitive damages award must be remanded for further proceedings because we cannot be sure what the jury would have awarded in punitive damages as a result of the substantially reduced compensatory award. Because of our uncertainty, we are unable to meaningfully review the excessiveness of the current punitive damages award, and we refuse to arbitrarily reduce the amount. See Bongiovi, 122 Nev. at 582-83, 138 P.3d at 452 (explaining that we review whether punitive damages are excessive de novo to “ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered” (quoting State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 426 (2003))).

Accordingly, we affirm the district court court’s judgment in part, reverse in part, and remand this matter to the district court for proceedings consistent with this opinion.

HARDESTY, DOUGLAS, CHERRY, SAITTA, GIBBONS, and PICKERING, JJ., concur.

\*\*\*\*\*FOOTNOTES\*\*\*\*\*

[1] The jury awarded \$48,000 in emotional distress damages, but \$5,000 of that amount was against an individual who settled and is not a party to this appeal.

[2] Having concluded that the punitive damages award against DHI Mortgage must be remanded to the district court for additional proceedings, we decline to address Betsinger's only issue on appeal challenging the constitutionality of NRS 42.005's statutory cap on punitive damages in this instance. We also reject respondents' other challenges to the district court's judgment on cross-appeal that are not specifically addressed in this opinion.

[3] Similar consumer fraud legislation carries a variety of titles, such as "unfair trade practices," "consumer fraud," and "deceptive trade practices." See Dunlap, 666 P.2d at 89 n.1.

[4] Respondents tangentially argue that NRS Chapter 598's statutory scheme does not regulate the deceptive sale of real property; therefore, DRH could not be held liable for a deceptive trade practice. Having reviewed this issue, we reject respondents' narrow interpretation of NRS Chapter 598 and conclude that this argument is without merit.