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Poole v. Nev. Auto Dealership Inv.'s, LLC, 135 Nev. Adv. Op. 39 (Sept. 5, 2019)

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Poole v. Nev. Auto Dealership Inv.'s, LLC, 135 Nev. Adv. Op. 39 (Sept. 5, 2019)[1]

CONSUMER PROTECTION: DECEPTIVE TRADE PRACTICES

Summary

The Court determined that under the Nevada Deceptive Trade Practices Act ("NDTPA") , (1) "knowingly" means that "the defendant is aware that the facts exist that constitute the act or omission", and (2) that a fact is "material" if either (a) "a reasonable person would attach importance to its existence or nonexistence in determining a choice of action in the transaction in question," or b) "the defendant knows or has reason to know that the consumer regards or is likely to regard the matter as important in determining a choice of action, although a reasonable person may not so regard it."[2]

Background

Derrick Poole purchased a "certified pre-owned" ("CPO") vehicle from Nevada Auto. Per Nevada Auto's own advertisement, its CPO vehicles are subject to a rigorous inspection aiming to ensure that only the highest-quality vehicles would receive such certification.

The vehicle that Poole purchased had previously been involved in a collision, but it was repaired prior to being sold to Nevada Auto. Nevada Auto received a detailed report from the then-owner's insurance company, which listed all damaged, repaired, or replaced parts. Before purchasing the vehicle, Poole test-drove it along with a Nevada Auto salesperson. The salesperson informed Poole that the vehicle had been in a "minor" collision, but assured him that Nevada Auto would not be selling the vehicle, if it had suffered significant damage. Additionally, Poole was given a Carfax report which included the collision, but did not reveal specific damages or the cost of repairs.

Two years later Poole attempted to refinance the loan on his vehicle, but his application was denied after the lender discovered that the vehicle's value was substantially reduced due to frame damage caused by the prior collision. At that point, Poole filed suit against Nevada Auto alleging several violations of NDTPA, and seeking equitable relief for consumer fraud.[3] The district court, finding that each of Poole's claims failed, granted summary judgment for Nevada Auto.

On appeal, the issue was whether the district court erred in finding that no issues of material fact existed as to whether Nevada Auto *knowingly* (1) failed to disclose a material fact under NRS 598.0923(2); (2) misrepresented the vehicle's certification under NRS 598.0915(2) or its certified standard, quality, or grade under NRS 598.0915(7); (3) made a false representation under NRS 598.0915(15); or (4) misrepresented the vehicle's mechanical condition under the Federal Trade Commission Act ("FTCA"), 16 C.F.R. § 455.1(a)(1) (2018), in violation of NRS 598.0923(3).

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[1] By Petya Pucci.

[2] NEV. REV. STAT., Ch. 598.

[3] NEV. REV. STAT. § 41.600.

Discussion

The issue in this case necessitated that the Court first defined the terms "knowing" and "material" under the NDTPA.

The meaning of "knowingly" under the NDTPA

NRS Chapter 624 defines "knowingly" as implying "knowledge that the facts exist [that] constitute the act or omission." Knowing that the act or omission is prohibited is not required.[4] Multiple other statutes similarly define "knowingly" as requiring no more than general intent.[5]

The Court determined that Chapter 624 captures best the legislative intent within NDTPA and concluded that the term "knowingly" does not require any specific intent to deceive with the act or omission, but merely that "the defendant is aware that the facts exist that constitute an act or omission." To illustrate this, the Court explained that a dealership would *knowingly* make a false representation if it was aware that one of its cars was involved in a collision, but it told a consumer that the car had never been damaged in a collision.

To further support its conclusion, the Court referred to the principle *expressio unius est exclusio alterius*, meaning "the expression of one thing is the exclusion of another." Because NDTPA included both general and specific intent provisions, the Court determined that the Legislature deliberately omitted specific intent requirements from some provisions, while expressly including them in others.[6] Therefore, the Court concluded that those NDTPA provisions which do not include any specific intent elements, require only knowledge that the facts exist that constitute the act or omission.

The Court's review of the way other jurisdictions interpreted the term "knowingly," including Kansas, New Mexico, and Ohio, also supported its conclusion.[7] The fact that some jurisdictions, such as Alaska, defined the term differently by adding a specific intent requirement, did not affect the Court's position.[8]

The Court found that its interpretation also better served the NDTPA's remedial purpose. Remedial statutes, such as the NDTPA, are generally afforded liberal construction in order to achieve its beneficial intent to redress existing grievances and introduce regulations

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[4] NEV. REV. STAT. § 624.024 (addressing licensing and discipline of contractors).

[5] *See, e.g.*, NEV. REV. STAT. § 193.017 (addressing crimes and punishments); NEV. REV. STAT. § 208.055 (addressing correctional institutions and aid to victims of crime).

[6] *Compare* NEV. REV. STAT. § 598.015(1) ("Knowingly passes off goods or services for sale or lease as those of another person."), *with* NEV. REV. STAT. § 598.015(9) ("Advertises goods or services with intent not to sell or lease them as advertised.").

[7] *See, e.g.*, KAN. STAT. ANN. § 50-626(b)(1) (2005) (defining deceptive trade practices to include "[r]epresentations made knowingly or with reason to know"). *See also Richardson Ford Sales, Inc. v. Johnson,* 676 P.2d 1344, 1347–48 (N.M. Ct. App. 1984) ("A knowing nondisclosure requires [only] an awareness of the nondisclosure."). *But see Cox v. Sears Roebuck & Co.,* 647 A.2d 454, 461-62 (N.J. 1994) (quoting N.J. STAT. ANN. § 56:8-2 (West 2012) ("knowing [] . . . omission . . . of any material fact . . . requires intent to commit a violative omission").

[8] ALASKA STAT. § 45.50.471(b)(12) (2018) (defining deceptive trade practices to include "knowingly concealing, suppressing, or omitting a material fact").

conducive to the public good [9] To interpret "knowingly" as requiring more than general intent—the Court reasoned—would render the NDTPA redundant and discourage claims by raising the burden of proof much higher than what is currently required.[10]

The meaning of "material fact" under the NDTPA

NRS Chapter 598 provides that failure to "disclose a material fact" by a seller constitutes a deceptive trade practice.[11] The Second Restatement of Torts defines "material fact" as follows: "The matter is material if (a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it."[12]

Reasoning that a subjectively material fact under subsection (b) of the Second Restatement may be just as important to a buyer as an objectively material fact, and that applying a subjective standard of materiality would be consistent with the NDTPA's remedial purpose[13], the Court concluded that applying *both* the objective and subjective definitions best served the legislative intent within the NDTPA.

The Court's interpretation is consistent with the approach in a majority of other jurisdictions, which also referred to the Second Restatement of Torts, such as New Jersey and Tennessee.[14] Indeed, the Court found that only a small minority of states used a purely subjective standard, and neither of them expressly rejected an objective standard.[15]

Whether a genuine issue of material fact exists under Poole's NRS 598.0923(2) claim

NRS 598.0923(2) provides that "A person engages in a 'deceptive trade practice' when, in the course of his or her business or occupation, he or she knowingly . . . [f]ails to disclose a material fact in connection with the sale or lease of goods or services.". Poole argued—and the Court agreed—that a genuine issue of material fact existed as to whether Nevada Auto failed to disclose a material fact under NRS 598.0923(2). The Court rejected Nevada Auto's argument that its disclosure of the fact of the collision was sufficient under the

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[9] *See Welfare Div. of State Dep't of Health, Welfare & Rehab. v. Washoe Cty. Welfare Dep't,* 88 Nev. 635, 637, 503 P.2d 457, 458 (1972); *Sellinger v. Freeway Mobile Home Sales, Inc.,* 521 P.2d 1119, 1122 (Ariz. 1974).

[10] *See Betsinger v. D.R. Horton, Inc.,* 126 Nev. 162, 166, 232 P.3d 433, 436 (2010) ("deceptive trade practices, as defined under NRS Chapter 598, must only be proven by a preponderance of the evidence.").

[11] NEV. REV. STAT. § 624.0923(2).

[12] RESTATEMENT (SECOND) OF TORTS § 538(2) (AM. LAW INST. 1995).

[13] *See Washoe Cty. Welfare Dep't,* 88 Nev. at 637, 503 P.2d at 458 (holding that remedial legislation should be afforded liberal construction to accomplish its beneficial intent).

[14] *Mango u. Pierce-Coombs*, 851 A.2d 62, 69 (N.J. Super. Ct. App. Div. 2004) (applying subsections (a) and (b) in a claim under New Jersey's Consumer Fraud Act); *Odom v. Oliver*, 310 S.W.3d 344, 349 (Tenn. Ct. App. 2009) (applying subsections (a) and (b) in a fraudulent concealment claim).

[15] *See, e.g., Briggs v. Ant. Nat'l Prop. & Cas. Co.*, 209 P.3d 1181, 1186 (Colo. App. 2009) (Under the Colorado Consumer Protection Act, [u]ndisclosed facts are material if the consumer's decision might have been different had the truth been disclosed.")

statute, and that listing the specific damages would have been irrelevant since Poole was not "a car guy." The Court reasoned that while Nevada Auto need not disclose "each and every repaired bolt or penny spent," it was required to include any material facts to which a reasonable person may attach importance, such as the frame damage.

The Court seemingly criticized the district court's finding that the material fact in the case was the collision itself, which thus led to its conclusion that Nevada Auto had a duty to disclose only that there was a collision, and not the nature and extent of that collision. According to the Court, instead of using the proper legal standard governing the issue of materiality under NRS 598.0923(2), the district court wrongfully used Nevada Auto's self-imposed CPO certification standard to decide what needed to be disclosed.

Further, the Court noted that Poole offered his own deposition testimony, as well as the testimonies of three Nevada Auto employees, which offered evidence that Poole had asked the salesperson about the collision, and that the salesperson described it as "minor." Additionally, two of the salespeople also testified that from the perspective of a potential buyer, the nature and extent of the damage in a collision, would be just as important as the collision itself.

The Court concluded that the district court erred in granting summary judgment on this claim, since the evidence was such that a rational fact-finder could find that Nevada Auto failed to disclose an objectively material fact, such as the frame damage. Additionally, a rational fact-finder could also find that Nevada Auto failed to disclose a subjectively material fact, such as the nature and extent of the collision.

Whether a genuine issue of material fact exists under Poole's NRS 598.0915(2) and (7) claims

NRS 598.0915(2) provides that "A person engages in a 'deceptive trade practice' if, in the course of his or her business or occupation, he or she . . . [k]nowingly makes a false representation as to the . . . certification of goods or services for sale or lease."[16] NRS 598.0915(7) further adds that it is also a deceptive trade practice to represent "that goods . . . are of a particular standard, quality or grade, or that such goods are of a particular style or model, if he or she knows or should know that they are of another standard, quality, grade, style or model."[17] The Court held that a genuine issue of material fact existed as to whether Nevada Auto knowingly made a false representation under NRS 598.0915(2), or misrepresented the vehicle's certified standard, quality, or grade under NRS 598.0915(7). To support his argument, Poole offered evidence that the extend of the damage was such that CPO certification was not warranted. The evidence included an expert declaration, as well as a statement from the manufacturer's website suggesting that the vehicle's damage precluded certification; an Allstate Collision Estimate report; and a testimony from the Nevada Auto mechanic who conducted the certification inspection, which was consistent with the expert's opinion.

Nevada Auto argued that Poole failed to provide evidence to prove any misrepresentation as to the certification of the vehicle, since the vehicle was in fact certified. The Court noted that the issue was not whether or not Nevada Auto certified the truck, but

[16] NEV. REV. STAT. § 598.0915(2).
[17] NEV. REV. STAT. § 598.0915(7).

rather whether it should have certified it under the CPO standard, knowing the nature and extent of damage it had suffered in the prior collision.

The Court concluded that the district court erred in granting summary judgment on this claim, since the evidence provided by Poole was such that a rational fact-finder could find that CPO certification was not warranted under the circumstances, and that Nevada Auto thus knowingly made a false representation under NRS 598.0915(2), or misrepresented the vehicle's certified standard, quality, or grade under NRS 598.0915(7).

Whether a genuine issue of material fact exists under Poole's NRS 598.0915(15) claim

NRS 598.0915(15) provides that "A person engages in a 'deceptive trade practice' if, in the course of his or her business or occupation, he or she . . . [k]nowingly makes any other false representation in a transaction."[18] Poole argued—and the Court agreed—that a genuine issue of material fact existed as to whether Nevada Auto made a false representation when he inquired about the collision, and was assured by the salesperson that the collision was "minor." To support his argument, Poole offered evidence which purported to prove that the collision was not "minor," however the district court did not address this issue when it granted summary judgment.

Nevada Auto's counter-argument was that Poole did not offer any evidence to support this claim, and also that he conceded the issue when he failed to include this portion of the statute in his opposition to Nevada Auto's motion for summary judgment. The Court, however, noted that Poole offered as evidence the Allstate Collision Estimate report, which listed each repaired and replaced part, its respective cost, as well as the total cost of repair, which was $4,088.77; an expert opinion that the vehicle's value was "substantially diminished" as a result of the collision; and the Nevada Auto mechanic's testimony which indicated that the frame damage listed in the collision report could only have been the result of the collision.

The Court concluded that the district court erred in granting summary judgment on this claim, since the evidence provided by Poole was such that a rational fact-finder could find that Nevada Auto knowingly made a false representation when it described the collision as minor.

Whether a genuine issue of material fact exists under Poole's 16 C.F.R. § 455.1(a)(1) claim

16 C.F.R. § 455.1(a)(1) of the Federal Trade Commission Act ("FTCA") provides that "It is a deceptive act or practice for any used vehicle dealer, when that dealer sells or offers for sale a used vehicle in or affecting commerce . . . [t]o misrepresent the mechanical condition of a used vehicle[.]"[19] While the FTCA does not provide a private cause of action, the NDTPA provides a private cause of action for FTCA violations.[20] Poole argued—and the Court agreed—that a genuine issue of material fact existed as to whether Nevada Auto

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[18] NEV. REV. STAT. § 598.0915(15).

[19] Federal Trade Commission Act, 16 CFR § 455.1(a)(1).

[20] *See* NRS 598.0923(3) ("A person engages in a 'deceptive trade practice' when in the course of his or her business or occupation he or she knowingly . . . [v]iolates a state or federal statute or regulation relating to the sale or lease of goods or services"); *See Dreisbach v.Murphy,* 658 F.2d 720, 730 (9th Cir. 1981) (explaining that the FTCA confers remedial power solely on the Federal Trade Commission).

misrepresented the vehicle's mechanical condition in violation of the FTCA. To support his argument, Poole cited to the evidence offered in his claims under NRS 598.0915(2), (7), and (15).

Nevada Auto answered that he failed to provide such evidence. The district court did not expressly address this claim in its granting of summary judgment on all of Poole's claims. This Court, noted, however, that Poole did offer evidence to prove that Nevada Auto misrepresented the vehicle's mechanical condition, including the Allstate Collision Estimate, listing a reconditioned wheel among the replaced parts, as well as an expert's declaration and a FCA statement explaining the dangers of reconditioned wheels.

The Court concluded that the district court erred in granting summary judgment on this claim, since the evidence provided by Poole was such that a rational fact-finder could find that Nevada Auto misrepresented the vehicle's mechanical condition by certifying it using CPO standards, despite knowing that such certification may have been precluded by certain mechanical conditions within parts of the vehicle.

Conclusion

Since the Court found that genuine issues of material facts existed with respect to each of Poole's claims, the district court's order granting summary judgment was reversed and remanded for further proceedings consistent with the Court's opinion.