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7-23-2022

**Leigh-Pink v. Rio Properties, LLC., 138 Nev. Adv. Op. 48 (Jun. 30, 2022)**

Candace Mays

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FEDERAL COURTS: THE MEASUREMENT OF DAMAGES IN A FRAUD CLAIM  
CANNOT BE ARBITRARILY ESTABLISHED.

**Summary**

In a fraudulent conceal claim, this Court declined to restate a certified question but answered that a movant may not recover damages under a theory of fraudulent concealment without first establishing the entitlement to damages.

**Background**

After patrons of a hotel sued for damages related to the facility's concealment of an infectious outbreak, the federal district court certified the question to Nevada for its own determination on damages, since present case law was unclear on the matter. The appellants were unsuccessful in their claim for damages in circuit court and the case was removed to federal court and dismissed. The appellants appealed to the Nevada Supreme Court for reconsideration on the issue of damages.

**Discussion**

***We decline to rephrase the certified question***

The Supreme Court, while acknowledging its discretion to restate the certified question, declined to because the Court reasoned, that would impermissively 'go beyond' the question of law posed.<sup>2</sup>

***A plaintiff has not been damaged for purposes of common-law fraudulent concealment or consumer fraud under NRS 41.600 when they received the true value of the goods or services they purchased***

***Common-law fraudulent concealment***

The Court recited the *Dow Chem*<sup>3</sup> elements for fraudulent concealment at common law. A finding of fraudulent would require a finding that (1) the defendant concealed or suppressed a material fact; (2) the defendant was under a duty to disclose the fact to the plaintiff; (3) the defendant, intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; that is, the defendant, concealed or suppressed the fact for the purpose of inducing the plaintiff to act differently than she would have if she had known the fact; (4) the plaintiff was unaware of the fact and would have acted differently if she had known of the concealed or suppressed fact; (5) and, as a result of the concealment or suppression of the fact, the plaintiff sustained

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<sup>1</sup> By Candace Mays

<sup>2</sup> The Court cited *Progressive Gulf Ins. v. Faehnrich*, 130 Nev. 167, 170, 327 P.3d 1061, 1063 (2014).

<sup>3</sup> *Dow Chem. Co. v. Mahlum*, 114 Nev. 1468, 1485, 970 P.2d 98, 110 (1998).

damages<sup>4</sup>. The Court noted that this was a conjunctive test which required satisfaction of each of the enumerated elements.

The appellant argued that it was erroneous to conclude that there were no damages suffered because of the contamination, but the respondent contends that the appellants are seeking punitive damages, which are beyond the scope of what is allowable in such an action.

The Court acknowledged the two appropriate rubrics for determining whether an alleged victim of fraudulent misrepresentation can establish entitlement to recover damages. The first rubric considers whether or not transgressed person got the “benefit of the bargain” which is the thing that induced him to enter into the agreement. The second is to determine what, if any, “out-of-pocket” loss the transgressed party has sustained.<sup>5</sup> The appellant insists that they did not get what they bargained for in regard to their stay at the property, as the amenities rendered unavailable were material to booking the stay.

After an analysis of case law surrounding the measurement for damages, the Court held that a showing of loss under either theory would be sufficient. Each claim of loss must recognize a loss which is cognizable<sup>6</sup> and the deception itself was not compensable. Since the appellants in the present action had received the full value of the amenities covered by their resort fee, they could show entitlement to damages under neither theory of loss, therefore the Court held that they would fail on a required element of common law fraudulent concealment.

### ***Consumer fraud under NRS 41.60<sup>7</sup>***

The Court did not altogether insist that they got the value of what they paid for. The Court’s interpretation of the Nevada consumer fraud statute did not limit “damages” to merely compensation for an injury. The statute would, however, require a person seeking damages to plead sufficiently to establish the justification for the damages being sought. Here, where the appellants had not alleged their entitlement to damages under the theory that what they got was less than what they paid for, the Court noted that the difference between statutory and common law fraud left their conclusions unchanged.

### **Conclusion**

The Supreme Court declined to restate the certified question out of the risk of rendering an advisory opinion in violation of the doctrine of sovereign immunity.

The appellant, having received the true ‘benefit of the bargain’ has not suffered damages for purposes of fraudulent concealment or consumer fraud claim.

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<sup>4</sup> *Id.*

<sup>5</sup> *Randono v. Turk*, 86 Nev. 123, 130, 466 P.2d 218, 222-23 (1970).

<sup>6</sup> *Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 698 N.Y.S.2d 615, 720 N.E.2d 892 (1999).

<sup>7</sup> NEV. REV. STAT. 41.60.