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### R.J. Reynolds Tobacco Co. v. Eighth Jud. Dist. Ct., 138 Nev. Adv. Op. 55 (July 28, 2022)

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CIVIL LAW: STANDING TO BRING DECEPTIVE TRADE PRACTICE CLAIM UNDER  
NRS 41.600

**Summary**

In an opinion drafted by Justice Cadish, the Court clarifies whether a plaintiff has the standing to assert a deceptive trade practice claim under NRS 41.600(1)<sup>2</sup> when the plaintiff never purchased or used products manufactured by the defendant. The Court found that a plaintiff has standing as long as they can show they are directly harmed by the deceptive trade practices of the defendant. Additionally, it found that the plaintiffs pleaded sufficient facts, including that they were directly harmed by the petitioner's false and misleading advertising. Thus, the Court denied the defendant's petition for writ relief.

**Facts and Procedural History**

In March 2018, Sandra Camacho ("Sandra") was diagnosed with laryngeal cancer caused by her cigarette use. Sandra and her husband, Anthony Camacho, raised several claims against three cigarette manufacturers. Those claims include fraud and products-liability-based claims against the two manufacturers that produced the cigarettes that Sandra used. Sandra concedes that she did not purchase or use any products manufactured by R.J. Reynolds Tobacco Co. ("Reynolds"). The Camachos included Reynolds in two claims: (1) a claim for violating the Nevada Deceptive Trade Practices Act (NDTPA) by making false representations in their advertisements, and (2) a civil conspiracy claim by acting in concert to harm Sandra by concealing, omitting, or otherwise misrepresenting the health hazards of cigarettes in various public statements and marketing materials.

Reynolds filed a motion to dismiss the two claims against it, arguing that the claims were effectively product-liability claims, which require product use. The Camachos opposed the motion to dismiss, arguing that neither claim requires product use under Nevada law. They argue that Reynolds's argument relied on cases involving claims for negligence, strict product liability, or fraud, as opposed to an NDTPA- or civil-conspiracy-based theory of liability. As for the NDTPA claim, the Camachos asserted that they adequately pleaded causation, as they alleged that but for cigarette manufacturers engaging in "concerted actions" to misinterpret the health risks of smoking, Sandra would not have continued to smoke cigarettes. The district court granted Reynolds's motion to dismiss, concluding that Sandra was not a consumer fraud victim under NRS 41.600(1)<sup>3</sup> because she did not use a Reynolds product.

The Camachos filed a motion for reconsideration, arguing that the district court clearly erred by reading a product-use requirement into the NDTPA. They also assert that "sale" under the NDTPA includes an attempt to sell, which would include Reynolds's implied failure to sell their products. The district court granted reconsideration over Reynolds's opposition, concluding that the earlier dismissal was due to the erroneous addition of a product-use requirement or legal-relationship requirement into NDTPA, which is meant to be an easier claim to establish than common law fraud. The court also reinstated the derivative civil conspiracy claim. Reynolds now

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<sup>1</sup> By Christopher Sommers.

<sup>2</sup> NEV. REV. STAT. § 41.600(1).

<sup>3</sup> *Id.*

seeks mandamus relief directing the district court to vacate its order granting reconsideration and to reinstate the dismissal order.

### **Discussion**

Although writ relief is not normally appropriate when parties can simply appeal from a final judgment,<sup>4</sup> the Supreme Court issued an advisory mandamus because the issue of whether a nonuser of a product may qualify as a victim with standing to bring an NDTPA suit against a product manufacturer presented a novel legal question of statewide importance requiring clarification. Moreover, this issue presented a substantial public-policy concern regarding liability for deceptive trade practices, and “intervention is further warranted because district courts are reaching different conclusions on this very issue.”<sup>5</sup>

#### ***The district court did not manifestly abuse its discretion in granting the Camachos’ motion for reconsideration***

The court can only grant writ relief if the district court manifestly abused its discretion.<sup>6</sup> The district court “may reconsider a previously decided issue if . . . the decision is clearly erroneous.”<sup>7</sup> Reynolds contends that the Camachos failed to show that the dismissal order was clearly erroneous and that the dismissal order correctly applied the law. It asserts that Camachos are not victims under NRS 41.600(1),<sup>8</sup> because Sandra did not use a Reynolds product and, thus, cannot show any direct harm from its allegedly deceptive trade practices. Moreover, Reynolds argues that the Camachos failed to show how a person can be a victim of deceptive trade practices when the defendant fails in its attempt to sell its product to the person. Reynolds contends that even if an individual can be victimized by deceptive trade practices in ways other than buying or using the product, the individual must show that he or she was directly harmed, which the Camachos cannot do here. Reynolds’s arguments are rejected.

The court considers only a statute’s plain language when that language is unambiguous. Under NRS 41.600(1), “any person who is a victim of consumer fraud” may bring an action against the alleged perpetrator.<sup>9</sup> Consumer fraud includes “[a] deceptive trade practice” as defined by the NDTPA.<sup>10</sup> Deceptive trade practice occurs when a business operator “[k]nowingly makes a false representation as to the characteristics, ingredients, uses, benefits, alterations, or quantities of goods or services *for sale or lease*.”<sup>11</sup> “Sale” includes “any . . . attempt to sell any property for any consideration.”<sup>12</sup> The word “victim” has been disputed in other contexts, but the courts consistently conclude that “a ‘victim of consumer fraud’ need not be a ‘consumer’ of the defendant’s goods or services.”<sup>13</sup> One federal district court concluded that business competitors may be victims if they are directly harmed by the alleged consumer fraud.<sup>14</sup>

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<sup>4</sup> See *Archon Corp v. Eighth Judicial Dist. Court*, 133 Nev. 816, 820, 407 P.3d 702, 706 (2017).

<sup>5</sup> See *Lyft, Inc. v. Eighth Jud. Dist. Court*, 137 Nev., Adv. Op. 86, 501 P.3d 994, 998 (2021).

<sup>6</sup> *Round Hill Gen. Improv. Distr. V. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981).

<sup>7</sup> *Masonry & Tile Contractors Ass’n of S. Nev. v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997).

<sup>8</sup> NEV. REV. STAT. § 41.600(1).

<sup>9</sup> *Id.* (emphasis added).

<sup>10</sup> § 41.600(2)(e).

<sup>11</sup> § 598.0915(5) (emphasis added).

<sup>12</sup> § 598.094.

<sup>13</sup> See *Del Webb Cmtys., Inc. v. Partington*, 652 F.3d 1145, 1152 (9th Cir. 2011).

<sup>14</sup> *S. Serv. Corp. v. Excel Bldg. Servs., Inc.*, 617 F. Supp. 2d 1097, 1099, 1100 (D. Nev. 2001); see also *Prescott v. Slide Fire Sols., LP*, 410 F. Supp. 3d 1123, 1145 (D. Nev. 2019).

The Ninth Circuit Court of Appeals extended standing to a group broader than business competitors in *Del Webb Communities, Inc.*, where a retirement community's reputation and consumer relationship were directly harmed by the misrepresentations of an unlicensed construction company.<sup>15</sup> This interpretation of the statute is accepted because the NDTPA is a remedial statute which requires a liberal construction to accomplish its beneficial intent.<sup>16</sup>

Turning to the case at hand, the Court held that Reynolds violated the NDTPA by making "false and misleading statements" that denied cigarettes are addictive, claimed "it was not known whether cigarettes were harmful or caused disease," advertised various types of cigarettes as either safe, "low tar," or "low nicotine," and made several other knowingly false statements regarding the potential health risks of cigarettes. Despite not using Reynolds products, Sandra relied on those representations to smoke generally, which resulted in her cancer. Thus, the district court did not manifestly abuse its discretion when it granted reconsideration of its order dismissing Reynolds, as the dismissal order was clearly erroneous in imposing a product-use requirement on NDTPA claims in contradiction to the plain language of NRS 41.600(1), NRS 598.0915(5), and NRS 598.094.

This interpretation of consumer fraud victim is consistent with earlier Nevada decisions. In *Bestinger*, the court held that deceptive trade practices claims require a lower burden of proof than common law fraud.<sup>17</sup> The court in *Poole* held that "knowingly" under the NDTPA means "that the defendant is aware that the facts exist that constitute the act or omission," rather than "the defendant intend[ed] to deceive" the victim. Furthermore, this interpretation is also consistent with how other states apply analogous consumer fraud protection and deceptive trade practices acts. Washington does not require that a plaintiff be a consumer of goods or services, and Massachusetts rejects any requirement of privity between a consumer and the plaintiff.<sup>18</sup>

Reynolds's contrary arguments are not persuasive to the Court. First, the Court's conclusion does not "undermine" the Legislature's statutory scheme, as its interpretation merely gives the statutory scheme's plain language its natural meaning. Second, the plain language of the pertinent statutes imposes liability when the plaintiff can show direct harm, and the Camachos pleaded sufficient facts of direct harm, showing that Sandra would not have smoked cigarettes and developed cancer but for the deceptive trade practices of all defendants, including Reynolds. Third, Reynolds's claim that the Camachos are asserting a strict products-liability claim is unpersuasive because the Camachos properly asserted a strict products-liability claim against the other two defendants. Also, the claim against Reynolds is based on Reynolds's alleged knowing misrepresentation of the dangers of smoking, which is distinct from a products-liability claim, despite relying on similar facts. Fourth, the fact that the Camachos raised the attempted sale argument for the first time in their motion for reconsideration does not mean that they waived the argument. Parties may assert new legal arguments in motions for reconsideration when (1) "the reconsideration motion and order are part of the record on appeal" and (2) the district court "entertained the [reconsideration] motion on its merits."<sup>19</sup>

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<sup>15</sup> *Del Webb Cmtys., Inc.*, 652 F.3d at 1147, 1149.

<sup>16</sup> *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).

<sup>17</sup> *Bestinger v. D.R. Horton, Inc.*, 126 Nev. 162, 165-66, 232 P.3d 433, 435-36 (2010).

<sup>18</sup> *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 858 P.2d 1054, 1061 (Wash. 1993); *Maillet v. ATF-Davidson Co.*, 552 N.E.2d 95, 98-99 (Mass. 1990).

<sup>19</sup> *Cohen v. Padda*, 138 Nev., Adv. Op. 18, 507 P.3d 187, 190 (2022).

Thus, the district court did not manifestly abuse its discretion when it granted reconsideration of its order dismissing the claims against Reynolds.

### **Conclusion**

Under NRS 41.600(1), a “victim” is any person who can show he or she was directly harmed by consumer fraud. There is no product-use requirement so a “victim” can be a consumer, a business competitor, or any other person who suffered harm from the defendant’s consumer fraud. Sandra pleaded that she would not have smoked tobacco and, consequently, would not have suffered cancer, but for the deceptive trade practices engaged in by Reynolds and the two other tobacco companies. This is sufficient for the Camachos to proceed with their claim against Reynolds under NRS 41.600(1) for an NDTPA violation. The Court denies Reynolds’s petition for writ relief. Justice Pickering concurs in results only, opining that this case did not qualify for extraordinary writ because parties have the right to appeal from any adverse final judgment.