IN THE SUPREME COURT OF THE STATE OF NEVADA

DERRICK POOLE, an individual,

Appellant,

vs.

NEVADA AUTO DEALERSHIP INVESTMENTS, COREPOINT INSURANCE CO.,

Respondent.

Supreme Court Case No.: 74808

District Court Case No.: A-16-737120-C

RESPONDENTS, NEVADA AUTO DEALERSHIP INVESTMENTS LLC AND COREPOINTE INSURANCE COMPANY'S ANSWERING BRIEF

/s/ Jeffery A. Bendavid, Esq.
JEFFERY A. BENDAVID, ESQ.
Nevada Bar No. 6220
STEPHANIE J. SMITH, ESQ.
Nevada Bar No. 11280
MORAN BRANDON BENDAVID MORAN
630 South 4th Street
Las Vegas, Nevada 89101
(702)384-8424
Attorney for Respondents

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RESPONDENT, NEVADA AUTO DEALERSHIP INVESTMENTS LLC AND COREPOINTE INSURANCE COMPANY'S NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1 (a), and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Nevada Auto Dealership Investments:

1. No Parent corporation.

2. Publicly held company owning 10% of Respondent's stock- No such corporation.

3. Respondent Nevada Auto Dealership Investments' present counsel: Moran Brandon Bendavid Moran; previous counsel: Thorndal Armstrong Delk Balkenbush & Eisinger, PC.

4. Respondent Nevada Auto Dealership Investments' is authorized to do business under fictitious firm name: Sahara Chrysler Jeep Dodge Ram.

Corepointe Insurance:

1. AmTrust Financial Services, Inc.

2. AmTrust Financial Services, Inc.

3. Respondent Nevada Auto Dealership Investments' present counsel: Moran Brandon Bendavid Moran; previous counsel: Thorndal Armstrong Delk Balkenbush & Eisinger, PC.

4. No known pseudonym.

/s/ Jeffery A. Bendavid, Esq.
JEFFERY A. BENDAVID, ESQ.
Nevada Bar No. 6220
STEPHANIE J. SMITH, ESQ.
Nevada Bar No. 11280
MORAN BRANDON BENDAVID MORAN
630 South 4th Street
Las Vegas, Nevada 89101
(702)384-8424
Attorney for Respondent

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TABLE OF AUTHORITIES

I. Cases:

II. Nevada Constitution:

None.

III. Nevada Revised Statutes:

IV. Nevada Rules of Appellate Procedure:

None.

V. Nevada Rules of Civil Procedure:

None.

I. ISSUES PRESENTED

Respondents, Nevada Auto Dealership Investments LLC d/b/a Sahara Chrysler Jeep Dodge Ram ("Nevada Auto") and Corepointe Insurance Company ("Corepointe")(collectively "Respondents") object to Appellant, Derrick Poole's ("Poole" and/or "Appellant") first Issue Presented for Review.

Poole did not actually present an argument that NRS 598.0923(2) statutorily modified and/or abrogated some of the common law requirements of a claim predicated upon misrepresentation by omission and/or lack of disclosure." *Joint Appendix ("JA")*, 226-303. As is reflected within the Decision and Order, the District Court made no finding with respect to statutory construction and did not base its decision on Poole's failure to adequately meet all of the requisites of a common law fraud claim. *JA*, 845-848. Additionally, Nevada Auto and Corepointe made no argument that Poole had to meet a "clear and convincing" evidentiary standard, which Poole argues is the incorrect evidentiary standard. *See Respondent's Supplemental Appendix ("RA")*[1], 6, and *JA*, 048-225. Likewise, the District Court also made no finding that Poole failed to meet a "clear and convincing" standard of evidence. *JA*, 845-848. The statutory construction, and the

[1] Respondent is filing its own Appendix to supplement the Joint Appendix filed by Appellant, as Appellant's counsel mistakenly omitted one of the agreed upon documents, Respondent's Reply in support of its Motion for Summary Judgment, in the Joint Appendix. Additionally, Poole included the full briefing on an award of attorneys' fees and costs in the joint appendix which is irrelevant to this appeal and was not agreed upon by the Parties.

proper standard of evidence, was not in dispute in the underlying briefing. accordingly, this issue is not appropriate for review. See JA, 845-848.

II. STANDARD OF REVIEW

Nevada Auto agrees that a decision granting a motion for summary judgment is reviewed *de novo* however, it objects to the inclusion of the standard of review for statutory interpretation, as it applies to Appellant's First Issue for Review.

III. STATEMENT OF THE CASE

Poole initially filed his lawsuit on May 22, 2016, and filed his significantly altered First Amended Complaint on May 15, 2017. Nevada Auto and Corepointe filed their Motion for Summary Judgment on October 2, 2017. On October 20, 2017, Poole filed a total of 89 pages of briefing in Opposition to Summary Judgment. Poole's Opposition itself consisted of 54 pages, and Poole additionally submitted 35 pages of a purported "separate statement" of facts, and responses to Nevada Auto's Undisputed Material Facts. *See JA*, 226-638. Despite Nevada Auto and Corepointe moving to strike an additional declaration by Poole's expert, Poole's separate statement of "material facts", and Poole's response to Nevada Auto's Undisputed Material Facts consisting of 35 pages, the Court chose to consider all evidence set forth before it by Poole. The Court denied both of these motions and took all 89 pages of Opposition, not including exhibits, into

consideration. The District Court took the extensive arguments and briefing submitted by the Parties, initially under advisement. The District Court granted Nevada Auto's Motion for Summary Judgment and subsequently filed its Decision and Order on November 27, 2017, and a Notice of Entry of Decision and Order was entered on December 1, 2017. [2]

IV. STATEMENT OF FACTS

Despite Poole's lengthy briefs and substantial evidentiary submissions, the facts of this case are simple and clear. *JA*, 226-638. Poole purchased a used vehicle from Nevada Auto, which had been in a prior minor accident, and was fully repaired by Allstate Insurance and an autobody shop in Las Vegas, Nevada. *JA*, 091-098. Nevada Auto fully disclosed the fact that there was a prior accident, prior to Poole's purchase. *JA*, 100-101, 122. In fact, Poole from the time he purchased the used vehicle through the time of summary judgment, never had any issues throughout the thousands of miles he drove it. *JA*, 122, 164. It is undisputed that Poole continued to happily drive his vehicle even after filing suit, and through the pendency of litigation without a single repair, service, or warranty issue. *Id.*, *see*

[2] As part of his Opposition to Nevada Auto's Motion for Summary Judgment Poole submitted an additional 17 page declaration from his expert, which Nevada Auto moved to strike, and which the District Court denied, in order to consider all evidence presented by Poole.

also, 125, 127.[3] Here, it is undisputed that Poole admits he was informed, both verbally during the test drive and in writing, that there was an accident prior to his purchase, and it is undisputed that Poole has not actually suffered any damages. *See Id.* As such, the District Court was correct in granting summary judgment in favor of Nevada Auto. *JA*, 845-848.

On or about May 5, 2014, Nevada Auto acquired the used 2013 Dodge Ram truck, VIN1C6RR6GT8DS558275 (the "Vehicle") from a private third-party, Dale Hinton. *JA*, 79-82. At the time of acquisition, Dale Hinton provided Joshua Grant ("J. Grant"), Nevada Auto's experienced sales manager and person most knowledgeable in this underlying lawsuit, copies of documents evidencing minor repairs on the Vehicle, in the form of an Allstate estimate, reflecting some repaired and/or replaced parts at a total estimated repair cost of $4,088.77. *JA*, 88-89, 91-98. The Allstate estimate made clear that the Vehicle was fully repaired, and that it had sustained no structural damage. *Id.*

J. Grant had significant experience in dealing with used vehicles and testified that he personally reviewed the Allstate estimate to specifically determine whether the Vehicle had any indications of frame damage, or major issues. *Id*., 89. Upon his review of the documents, J. Grant did not observe any information evidencing any damage that would preclude the Vehicle from being submitted for

[3] Poole testified to being in a separate accident in May 2017, during which the Vehicle sustained damage and had to be repaired. *JA*, 127.

a Certified Pre-Owned ("CPO") inspection, saw only minor damage repairs, and made the determination to submit it for inspection to determine whether it could be a Certified Pre-Owned vehicle. *Id*., 86-87, 89.

Subsequently, on May 8, 2014, the Vehicle underwent an extensive detailed 125-point inspection, by a Chrysler certified mechanic, Ray Gongora ("Gongora"), to determine whether it could be a CPO vehicle. *JA*, 100-101. Notably, it was common practice for the certified mechanic conducting the CPO inspection to have had a CarFax prior to or contemporaneous to performing the CPO inspection, as such here, the mechanic would have been aware of a previous accident on the subject Vehicle. *Id*., at 105.

It is clear, and undisputed that the CarFax report was obtained as per the dealership's standard practice. *JA*, 420. The Vehicle passed the inspection, as is evidenced by the CPO checklist. *JA*, 100-101. Gongora, who had performed numerous CPO inspections, also testified that it was not required for the inspecting technician to report any previously repaired items, if those repairs were performed correctly, and to only notate if it was not a proper repair. *Id.*, 105.

It is undisputed that the Vehicle passed the CPO 125-point inspection, performed by experienced technician Gongora, and accordingly the Vehicle was designated as a CPO vehicle in Nevada Auto's inventory. *Id*., and *JA*,106.

On or about May 26, 2014, Poole went to Nevada Auto for the purpose of buying a truck. *JA*, 120. During his deposition, Poole admitted that during his test drive he was first verbally informed by salesman Travis Spruell ("Spruell") the Vehicle had previously been in an accident. *Id.*, 122. Despite being undisputedly told of the prior accident, Poole still decided to move forward with the purchase of the Vehicle. At the time of the Vehicle purchase, as was standard practice, Spruell went through a Certified Pre-Owned Vehicle Delivery Check Sheet, which was signed by Poole. *Id*., 135-139. Additionally, it is undisputed that Poole admits he was presented with a CarFax report dated May 10, 2014, (the "CarFax") pursuant to the CPO Delivery Check Sheet, reflecting the accident. *JA*,141-148.

It is undisputed that Poole signed the CarFax that he was presented at the time of his purchase. *Id.* The CarFax which Poole signed on the front page, clearly and undisputedly reflects on the first page, the second page, and on page 3, that the Vehicle had been in an accident, and states "Damage reported…". *Id*. Specifically on page 3 of the CarFax, it state "Vehicle towed." *JA*, 143. It is undisputed that at prior to and at the time of the sale of the Vehicle, Nevada Auto clearly and plainly disclosed the previous accident, and presented the CarFax reflecting the accident on the Vehicle to Poole. *Id*., *see also*, 122. Despite the prior accident being fully disclosed, informed of the prior accident on the Vehicle, Poole did not ask any questions regarding any actual specifics about the accident, he did not ask if there

were any documents regarding the accident, and he himself walked around the Vehicle, and admits during his deposition that did not see any issues with the Vehicle or the repairs. *Id.* It is undisputed that Poole never attempted to perform any investigation or inquiry, at the time of purchase, into the previous accident the Vehicle had been in, despite it being fully disclosed to him twice, prior to agreeing to purchase the Vehicle. *Id., at 122.*

Poole then entered into a contract with Nevada Auto to purchase the Vehicle with financing, and Poole was also given trade-in value for his former vehicle in the amount of Four Thousand Dollars ($4,000.00). *JA*, 109-115, 122. Nevada Auto also provided Poole additional warranties for the Vehicle, at the time of his purchase, based on the fact that it was a CPO vehicle. *Id.* at 124, 155. At the time of the sale, the Vehicle had 6,716 miles. *Id.* 137.

Poole testified that he left with the Vehicle on the day he purchased it and, it is undisputed that he drove the Vehicle over the course of the following three years with not one single problem. *JA*, 122. It is undisputed that Poole testified that he did not personally experience any safety issues with his Vehicle. *JA*, 126, 128. Poole also testified he did not have any repairs performed on the Vehicle during the time he drove the Vehicle (aside from repairing his own accident), and it is undisputed that he did not make any claims under his warranties. *Id*. at 129.

Poole testified he subsequently got into a collision accident in May 2017, during which the Vehicle sustained approximately $5,000.00 of damage, which was a higher estimate than the prior accident estimate. *JA*, 127.

In approximately April or May 2016, when Poole attempted to obtain a third refinance of his Vehicle after driving it for approximately two years. *Id*. He testified that an insurance company informed him that the Vehicle had "frame" damage. *Id*. at 123.[4] However, Poole testified he did not have his Vehicle inspected by any independent inspectors. *Id.* at 125.

Poole's Vehicle subsequently underwent an inspection on May 20, 2016 when the Vehicle had reached 17,468 miles. *JA*, 100-101, 164. It is undisputed that Poole's Vehicle was inspected for his lawsuit after he had driven it for two years and for an additional 10,752 miles, after the CPO inspection which took place on May 8, 2014. *Id.* The May 20, 2016 inspection was conducted by Poole's retained counsel's "expert" Rocco Avellini ("Avellini")[5], who testified to never having actually performed a CPO inspection, and who did not conduct a CPO inspection in May 2016, nor did he take any actual measurements of any kind. *Id.*, 821-829; *RA*, at 45, 36, 49.

[4] Poole never produced evidence of this information from the insurance company, or another admissible source.

[5] Nevada Auto moved to strike Avellini due his lack of methodology, failure to take measurements and only "observe" the Vehicle two years later, and the fact he did not perform a CPO investigation nor was he certified to do so. The motion to strike was deemed moot after the grant of summary judgment.

Despite alleging "safety" issues, it is undisputed that Poole continued to drive the Vehicle after Avellini inspected it, and after the filing of his complaint on May 22, 2016 for over another year, with no issues with the Vehicle. *Id*., 175-186. In fact, Poole testified during his deposition on August 14, 2017, to driving the Vehicle (aside from time it was being repaired from his accident) until the day before his deposition, when he was allegedly informed of a "safety" issue. *Id.*, 126. Poole testified during his deposition that the Vehicle had approximately Twenty-Three Thousand Miles (23,000). However, it is undisputed that Poole happily continued to drive his vehicle, without experiencing any issues with it, for approximately 5,500 miles after his expert inspected it on May 20, 2016. *Id*., 122, 164. *JA*, 133, 137.

The facts are clear. The Vehicle had been in a previous accident and Nevada Auto disclosed this fact multiple times regarding the Vehicle to Poole at the time of purchase. *JA*, 108-115, 122, 134-148. Poole, despite learning prior to his purchase that the Vehicle had been in an accident from which it had to be towed, Poole still chose to purchase the Vehicle. *Id*. at 117-133. Poole then happily drove the Vehicle for approximately three years and thousands of miles without any problems. *JA*, 125.

Oddly, Poole, just prior to filing his original complaint, tried to claim that he "discovered" that the Vehicle had been in an accident, and had also sustained over

Ten Thousand Dollars ($10,000.00) of damage and/or frame damage. *JA*, 188-203. However, during discovery, Poole was unable to produce any documentation that would substantiate this contention, from either an insurance company, or the other website he claimed to have checked, and only provides "opinion" from a hired Poole-oriented expert, as "evidence" for his allegations. *See generally, AB.*

V. SUMMARY OF ARGUMENT

The District Court correctly decided that Nevada Auto was entitled to summary judgment, by rightfully assessing the applicable statutory and common law issues, and deciding as a matter of law on the material facts, and concluding Poole failed to meet the requisites of his claim(s) pursuant to NRS 598 et seq. and NRS 41.600(e). Aside from pure self-serving speculation regarding his opinion, years after purchasing and using the Vehicle, Poole failed to submit actual evidence that any of the details of information included within the Allstate estimate are material to the purchase of the Vehicle. Poole's various arguments regarding either affirmative misrepresentations, or omissions, are a red herring for the Court and an attempt to generate a factual dispute when there is none. Most notably, Poole cannot escape the simple fact that he did not actually suffer any damages, monetary or otherwise. Poole tries to argue, that although he admits that he was disclosed both verbally and in writing of the prior accident, that he was somehow entitled to even more detailed information on specific parts that were repaired

and/or replaced, or the amount of money it took to fully repair the Vehicle, despite not even knowing what any of the information meant.

The facts are clear and simple, Nevada Auto did not make any affirmative material misrepresentations, and the purported "omission" of disclosing which specific parts of the Vehicle may have been replaced and/or repaired is neither "material" nor a requisite by law. *See NRS 598.0923.* In fact, Poole fails to provide legal authority that supports his contention that information regarding every nut or bolt that has been repaired or replaced on a vehicle is a material fact. Further, Poole failed to provide any actual evidence that would support his contention that the Vehicle was unsuitable as a CPO or otherwise actually had any issues, beyond pure speculation. In fact, it is undisputed that the Vehicle was inspected by an experienced Chrysler mechanic pursuant to a 125-point inspection, and passed that inspection.

Poole seeks to impose what in practicality would become an impractically high burden of disclosure on all salespersons and auto dealerships. Furthermore, regardless of whether Poole's claims are subject to the requisites of a common law claim or statutory fraud claim, the facts clearly support summary judgment in favor of Nevada Auto. The District Court found, and the evidence confirms that no fraudulent conduct occurred. Therefore, no matter what requisites and evidentiary standard are applied, Poole cannot meet the requisites of any claim predicated on

NRS 598.0923, because no knowingly fraudulent conduct (either affirmatively or by omission) occurred and he suffered no damages of any kind. Hence, as he concedes, his equitable claims fail as well. For these reasons the District Court did not err in any of its conclusions or findings and its grant of summary judgment in favor of Nevada Auto, and this matter should not be remanded.

VI. LEGAL ARGUMENT

A. Poole's Claims Fail Pursuant to the Requisites of Fraud under Any Standard Because No Fraudulent Conduct Occurred, and No Damages Were Suffered.

Poole devotes a significant portion of his Appellant's Brief trying to impress upon the Court a more lax standard, and different requisites for evaluating his claims, and the self-serving speculative "evidence" which he provides to support them. *See AB, 13-20.* Here, the District Court clearly found that no fraudulent conduct as defined by NRS 598.0923 occurred and that the statute does not require disclosure of each and every part, nut or bolt, that was repaired and/or replaced. Poole relies heavily upon the decision in *Betsinger v. D.R. Horton*, 126 Nev. 162, 232 P.3d. 433 (2010). However, the *Betsinger* court did not delve into an analysis of what constituted a deceptive trade practice in the sale of consumer goods, but instead instructed that a plaintiff, such as Poole, need only meet a "preponderance of the evidence" standard in proving claims for deceptive trade practices.

However, at no point did Nevada Auto argue that Poole had to prove deceptive consumer practices by a clear and convincing standard, and notably the District Court also did not make any such a ruling. *JA*, 845-848. In fact, Nevada Auto only argued that Poole must prove punitive damages claims by a "clear and convincing" evidentiary standard, which Poole does not and cannot dispute. *See generally, AB.* As such, Poole wastes this Court's time by explaining a standard which is not at issue. *See AB, 13-20.* Poole plainly, as a matter of law, fails to meet any of the requisites for any fraudulent claim, statutory or otherwise.

Poole's actual allegations do not constitute any of the alleged specific "Deceptive Trade Practices" which are clearly defined within NRS *598.0915* and *598.0923*, and thus were not false representations. Poole's First Amended Complaint continually references a "stigma" and "misrepresentations and/or omissions" regarding the subject Vehicle. *See generally, JA, 16-33.* Poole's brief tries to continuously state "all material facts" in bold font, in an attempt to bolster his argument that knowing each and every repaired bolt or penny spent to repair the Vehicle may potentially be "important" and therefore "material," however he conflates the two terms, as they are not legally the same. *See generally, AB.* Poole fails to provide authority which actually supports that contention. *Id.*

It is undisputed that Poole was fully aware that the Vehicle had been in a prior accident, and that damage had been reported. *JA*, 122. It is undisputed that

Poole was informed while test driving the Vehicle that it had been in a previous accident. *JA*, 121. Poole admits that he was also shown, and signed the CarFax, also reflecting the prior accident, and did not ask any questions regarding the prior accident at that time. *JA*, 122.

As such, it is undisputed that Poole was already fully apprised that the Vehicle had been in a prior accident, and also fully accepted any associated "stigma" that there may be with respect to an accident, and the general fact that it had been in an accident for which he had no additional information. *See JA*, 122, 141-148. The Vehicle was still a CPO pursuant to Nevada Auto's inspection by a qualified mechanic, and most importantly it is undisputed that Poole continually drove the Vehicle without <u>any actual problems</u> with the Vehicle. *Id, see also*, 126, 128, 129.

B. It was Appropriate for the District Court to Determine Materiality of Certain Facts by Law.

Poole cites to two related Nevada cases that address the provenance of the Court to assess what facts are material, *Powers v. United Services Auto. Ass'n.,* to substantiate his contention that materiality is an objective standard to be submitted to a jury. *AB, 23-25*. In *Powers I*, as Poole designates it, the Court actually states, "…the issue is whether there is a *material* 'variance between the representation and the existing facts'" (internal citation omitted)(*emphasis in original*), 114 Nev. 690, 698 (1998). Here, there is no such determination to be made, there is not

material "variance" between the fact that the Vehicle had been in an accident, sustained damage, and had undergone repairs (which is plainly undisputed), and the fact that Poole could have been presented with each and every part, nut, or bolt, that had been repaired, and thus the Court is the appropriate "fact finder". In *Powers II*, as Poole identifies it, the Court is careful to state that, "…every case must be considered on its own facts." 115 Nev. 38, 45, 979 P.2d 1286, 1289 (1999). It is disingenuous for Poole to claim he is not a "car guy" and conversely, years later, purportedly attach "importance" to the repair of specific parts. *RA*, 39. Indeed, Poole's brief repeatedly conflates the concept of legal materiality and general sentiments of "importance" regarding specific repairs. *See generally, AB.*

The affirmative representation that there was in fact, an accident, combined with the fact that there was previous damage to the Vehicle, including information that the Vehicle had been towed, is a legally sufficient disclosure. *See generally, NRS 598.0915, 598.0923, et seq.* The undisputed fact that Poole admitted to being told verbally and also in writing that the Vehicle had been in a prior accident, which he confirmed by signing the CarFax, plainly does not evidence that there was a knowingly fraudulent statement or omission made, or any fraudulent conduct, just as the District Court found. *See NRS 598 et seq., see also JA*, 843-845. Poole's brief specifically argues that the "entire subject matter and the policy of the law…should always be construed so as to avoid absurd results." *See AB*,

citing *State Welfare Div. v. Washoe Cty. Welfare Dept.*, 88 Nev. 635, 637 (1972). Here, in order to avoid "absurd results" summary judgment should be affirmed, as setting this precedence would create an undue burden of disclosure on car dealerships in general. Additionally, it is absurd for a car dealership to be forced to disclose each and every nut and/or bolt, which may have been repaired and/or replaced, on a vehicle that was fully repaired prior to its acquisition. In fact, disclosure of a prior accident is what is actually required, and that disclosure is admittedly undisputed in this case.

C. The Only Material Fact Which Required Disclosure was that the Vehicle was in a Previous Accident, from which it was Fully Repaired, and that it Passed a Certified Pre-Owned Inspection.

Poole fully admitted during his deposition that he was informed that the Vehicle was in a prior accident, both verbally and in writing by the salesperson, prior to deciding to actually purchase it. Poole testified after disclosure he chose to purchase the Vehicle anyhow, which shows he had no problems with any possible "stigma", or even potential issues which could commonly be associated with a used vehicle. *See JA* 122, 125. Indeed, the standard is that where, "reasonable minds cannot differ" then summary judgment may be granted as a matter of law. Here, it is disingenuous for Poole to argue that had he known of each and every part that was repaired or replaced that he would not have purchased the Vehicle. Poole specifically testified, "I'm not really a mechanic or a car guy. So I don't

really know when it comes to what I'm looking at as far as details and stuff." *RA, 39.* As such, whether or not Poole was given information that a specific part being repaired or replaced is irrelevant, and not material.

In *Powers v. United Servs. Auto Ass'n*, which does have markedly different facts and involves different obligations placed particularly upon an insurance company, the Nevada Supreme Court still stated that, "[T]o be deemed a material misrepresentation, it must be shown that an insurer's 'investigation would have proceeded differently had' the insured told the truth." (internal citation omitted), 114 Nev. 690, 699, 962 P.2d 596 (1998). Indeed, Poole must show that: "[T]he false representation must have played a material and substantial part in leading the plaintiff to adopt his particular course…" *Nevada Power Co. v. Monsanto Co.*, 891 F. Supp. 1406 (D. Nev. 1995).

Similarly, by Poole's own argument, Poole should demonstrate the materiality of the additional information that his investigation or course of action would have been different had he been informed specific parts had been repaired or replaced. *Id.* However, aside from Poole's self-serving testimony, there is no actual evidence that he would have proceeded any differently, including otherwise not purchasing the Vehicle. *See JA, 120-133, see generally RA.* In fact, Poole's own testimony evidences that despite the disclosure, verbally and in writing, of a prior accident, he happily drove the Vehicle without any issues, safety, or otherwise, for

3 years and thousands of miles. *JA*, 122, 133. Poole only began having an alleged "safety issue" with his Vehicle the day prior to his deposition, despite his "expert" inspecting it over a year earlier and purportedly identifying a "safety issue". *Id.*, 123. Even after filing this litigation, at the time of his deposition, Poole admitted he had no intention of selling the Vehicle or otherwise replacing it. *Id.* at 131. In other words, Poole has suffered no damages.

Poole was fully informed that the Vehicle had been in an accident, and signed a CarFax that reflected damage had been reported and that the Vehicle had been towed. *See JA*, 141-149. Poole specifically testified that he was satisfied with the knowledge that the Vehicle had undergone and passed the CPO inspection by a certified mechanic, which Poole admitted he is not. *JA*, 128. Poole also attempts to argue that being informed the Vehicle had sustained $4,088.70 in previous damage would have been "material" or "important" to disclose. *AB, 28-30.* Poole cites the fact that there was testimony confirming that based on a "hypothetical" scenario, that the car salesman and the F&I manager of Nevada Auto, may have disclosed additional facts as evidence that the repairs themselves were "important." *AB*, 30. However, conjecture and speculation on a hypothetical is neither actual evidence, nor relevant to the actual facts of this case, and the purchase of the Vehicle. Even Poole's own "expert" testified as follows:

Q: Based on your extensive experience in performing car repairs and as a repair shop owner, if someone told you their vehicle had $4,088.77 of repairs, would that signify anything to you.

A: Not at all.

JA, 211. As such, it is clear that such a disclosure involving a precise dollar amount of repairs is actually immaterial, as it does not actually signify anything "material", even to an "expert." After Poole was informed that the Vehicle had been in a wreck, he felt completely assuaged at The Vehicle was still a CPO pursuant to Nevada Auto's inspection, and Poole continually drove the Vehicle without any actual problems for three (3) years with the Vehicle. *See Id. at* 122, 126, 128. Poole's self-serving speculative testimony argues that he should prevail on his claims, based on the conjecture that someone may want to know some information, that they may deem as "important". *See AB.* However, Poole fails to support this argument with actual legal authority supporting that premise. *Id.*

Nevada Auto made the requisite disclosure that the Vehicle was in an accident, Poole no matter how many times he claims, details of the previous accident were "material," cannot seek to impose extra duties on Nevada Auto, and indeed car dealers in general, with zero legal basis. Poole has provided no actual authority that there was any extra duty for Nevada Auto to disclose every single dollar spent, or every nut and/or bolt that was possibly repaired, particularly since

all of those events occurred prior to Nevada Auto's acquisition of the Vehicle. *See AB.* It is undisputed that the Vehicle had been in a previous accident and undisputed that this fact was disclosed to Poole verbally during the test drive, and in writing, via the CarFax, which he signed. *JA*, 121, 141-148.

Any reasonable consumer would surmise that if a vehicle was in an accident from which it had to be towed, some of the parts would have been repaired and/or replaced. For Poole to claim 3 years after he happily drove the Vehicle, that he would have not purchased any vehicle from Nevada is entirely self-serving, particularly because he personally experienced no issues with it (aside from being in his own second accident), and he continued to drive the Vehicle for 3 years, and thousands of miles and even after filing his Complaint, and Amended Complaint in this matter, and after his "expert's" inspection. *JA*, 131.

Poole previously attempted to frame the fact that some parts on the Vehicle had been repaired and/or replaced as a "material" fact which should have been disclosed to him because vehicles that have been in an accident have a "stigma." *JA,* 16-33, *and generally, JA*, 226-303. However, Poole accepted any such stigma, and even more tellingly, even after he found out additional details regarding the accident which he had already accepted, he did not try to sell his truck nor did he take it in for any "repairs" (until he got in a subsequent accident). *JA*, 130-131. Indeed, Poole's conduct, evidences that he would not have refrained from

purchasing the Vehicle. *See Id.* at 117-133, *RA*, 35-40. Poole freely admits that he knew that the Vehicle was in an accident, from which it had to undergo at least some repairs, and still purchased it. *Id.* If any "stigma" or lingering doubt in Poole remained, he accepted that the day he purchased the Vehicle and in the successive 3 years he owned and drove it.

No matter how many times Poole reiterates that he should have been told of every single nut or bolt that was repaired and/or replaced, or every penny of the amount of the estimate of repairs, it is undisputed that Poole was fully disclosed a prior accident and accepted that fact. *Id.* It is undisputed that Poole had been told of the prior accident, signed the CarFax reflecting in multiple places that the Vehicle had been in a previous accident, and had seen the CarFax stating damage had been reported, and that the Vehicle had been towed. *JA*, 121, 141-148. Poole's continuous conflation of "material" and "important" is not supported by actual authority. *See generally, AB.* He had already accepted any "stigma" and/or any possible issues, which may be associated with purchasing a pre-owned vehicle, even in spite of an inspection, including price, value, and other factors. In fact, Poole admitted that he did not inquire further as to the accident and only made his own assumptions. *JA*, 121, 122.

Poole was informed of all of the material facts as they related to the sale of the Vehicle, it is undisputed that Poole was informed that the Vehicle had been in

an accident and that it had undergone and passed an inspection to be certified as a CPO Vehicle. *JA*, 100-101, 141-148. To this day, Poole received and used exactly what he purchased, a used CPO vehicle that had been in an accident prior to him purchasing it. *JA*, 135-138. Poole undisputedly knew about the prior accident and drove the Vehicle without any issues for multiple years and thousands of miles. *JA*, 122, 133. Accordingly, summary judgment is appropriate, as a matter of law, because no material facts are actually in dispute.

D. Nevada Auto Fulfilled All of Its Disclosure Duties Under Common Law Fraud and/or NRS 598 et seq.

NRS 598.0923 (2) does not, nor does common law fraud, provide that any and all known facts about a transaction must be affirmatively disclosed to a consumer. It provides only a "material fact in connection with the sale" should be disclosed. *See NRS 598.0923(2), NRS 41.600.* Poole fails to actually produce evidence that demonstrates any of the elements, of either a common law or NRS 598 et seq. claim. In particular, Poole fails to provide evidence that Nevada made any knowingly false representation (or omission), or that Nevada Auto knew or believed any representations it made were false, or made any such representations without a sufficient basis, and/or that Poole actually suffered any damages from either his reliance on those purportedly "false" misrepresentations, or any damages at all. *Blanchard v. Blanchard,* 108 Nev. 908 (1992); *Picus v. Wal-Mart,* 256 F.R.D. 651, 658 (D. Nev. 2009).

Despite Poole's self-serving testimony and "expert" testimony, there is no actual evidence that disclosure of any or all of the repaired or replaced parts or the cost to repair and/or replace those parts was "material" at the time of the sale. *See generally, JA 339-638.* There is no dispute that Poole was specifically informed of the material fact that the Vehicle had been in a previous accident. *See generally, AB.* Poole claims that any information about a repaired or replaced part would have been "material." *See generally, AB.* However, during deposition, Poole testified he had no idea what the various parts even were or what it meant that they were repaired and/or replaced. For instance, Poole testified:

> Q. Do you know what – I believe you keep referring to a frame bracket; is that right?
>
> A. Yeah. I believe that's what I read on the estimate.
>
> Q. Do you know what that is?
>
> A. I have no idea what that is.
>
> Q. Do you know what it does?
>
> A. I have no idea what it does. *RA,* 40.

Accordingly, the actual evidence indicates that Poole would have proceeded along the exact same course as he actually did, and still purchased the Vehicle after receiving "the information" that the Vehicle had been put through the CPO process. *Id.* The information contained within the Allstate report could not have

been material to Poole because he did not know what it meant, or what specific parts were actually used for or what their function was. The evidence demonstrates Poole would have utilized the same information, the CPO inspection, that was provided to him when he was originally informed that the Vehicle had been in an accident. *Id.*

Poole also argues that somehow because he did not have knowledge about car repairs, that fact promulgates an extra duty for Nevada Auto to provide each specific repair or the cost of repairs to Poole. *See AB*, 32. However, as the District Court pointed out this argument is flawed, as the knowledge that was imparted upon Poole, (that the Vehicle had been in an accident and had sustained damage), is the same knowledge that puts him on notice. *JA*, 843-845. This disclosure provided Poole with the information he needed to either perform additional research on his own, or accept that the Vehicle had been in an accident despite not knowing precisely what parts were repaired and/or replaced, but was still in excellent condition, by not only his own estimation, but also pursuant to Nevada Auto's CPO certification. *See JA*, 100-101, 121, 141-148. Additionally, Poole also neglects to consider the fact that the repairs were performed not by Nevada Auto, but by an independent third-party automotive repair shop, and authorized by an insurance company. *See* JA, 91-98. Most importantly, Poole has not produced any actual evidence that there is anything wrong with the Vehicle. As such, Poole's

claims that repairs were improperly performed, or that the Vehicle was in an uncertifiable condition, and Nevada Auto knew and/or should have known has even less credibility.

It is only the omission of a "material fact" which may constitute a false representation. *See Nelson v. Heer*, 123 Nev. 217, 163 P.3d 420 (2007). Poole has not actually provided evidence or legal authority which declares the precise details of a previously repaired automotive accident are "material" to the purchase of a vehicle, when it has been disclosed that it was in an accident, and that the vehicle sustained damage, or that there was an additional affirmative duty. *See generally, AB and JA*. Poole cites to cases regarding "common law" fraud and disclosure, however, in one of them the court recognizes that there was a special relationship beyond that of buyer and seller, and the other case included facts wherein, the person making representations had no knowledge or actual basis on which to base some of her representations, neither of those situations is applicable to the facts at hand. *See AB, fn. 14.* For example, Poole cites to a case dealing with significant unrepaired damage, and a representation that the car purchased was in "perfect condition" with no mention of any accident, and the plaintiffs in that case made their discovery within a day of purchasing the vehicle. *See Totz v. Cont'l v. Du Page Acura*, 236 Ill. App. 3d 891, 899 (1992). *Id*. Here, none of the parties,

noticed any actual defects, safety issues, or other issues which caused it concern, prior to, during or after the sale of the Vehicle. *See generally, JA,* 48-225.

Poole has additionally failed to present any actual evidence that there was any intent to knowingly defraud, misrepresent, or to otherwise omit "material" information from Poole whatsoever. *See generally, AB.* Indeed, Poole admits that he was confident in purchasing the Vehicle after learning that it was a certified CPO, despite the accident, a fact which is not in dispute. *JA*, 122, 125. Poole's claim for deceptive trade practices, cannot be sustained because, again, he cannot meet even the initial requisite of actual knowing fraudulent conduct of such a claim, which is also reflected in the District Court's findings. *See NRS 598 et seq., see also JA*, 845-848.

The precise nature and extent of the accident previously sustained by the Vehicle is not material, because the Vehicle had been fully repaired prior to Nevada Auto's acquisition of it, and then was put through a comprehensive 125-point inspection. *See generally, 048-225, 91-98, 100-101.* It is purely speculative that Poole would not have purchased the Vehicle (or any vehicle) if he had obtained any other additional information about specific parts that had been replaced/repaired on the Vehicle, or the amount of money which was spent on repairs or replacements. Poole purchased the car knowing it had sustained damage from a previous accident. *See JA*, 122.

Nevada Auto fulfilled their only affirmative duty, which was to disclose that the Vehicle had been in an accident and had sustained previous damage. It is undisputed that Nevada Auto performed a 125-point inspection, and based on that inspection, certified the Vehicle, provided additional warranties based on that certification, and made all legally required disclosures. *See JA*, 48-225, and *see generally, RA.* Here, the evidence is undisputed that Nevada Auto did not knowingly conceal any "material" information, nor did it fail to disclose any "material" information, because in this set of circumstances, the details of precise parts which may have been repaired and/or replaced in the prior accident were not material to the Vehicle's condition. It is undisputed that Nevada Auto inspected and certified the Vehicle and that is what was offered and sold to Poole, as such, its condition was not misrepresented. *JA*, 100-101. Therefore, Nevada Auto did not violate NRS 598.0923(2), or any common law disclosure duties because it fulfilled all of its duties. Summary judgment as to Poole's claim should be affirmed, as a matter of law.

E. Poole Extrapolates and Misconstrues the District Court's Decision and Order.

Poole challenges the District Court's observation regarding the fact that he did not inquire regarding additional parts or service utilized to repair the Vehicle. *AB*, 34. However, to take that single sentence, misconstrues the finding of the District Court.

Most notably, the District Court held that, "[T]he duty to disclose under NRS 598.0923 does not extend to the entire effect of the accident, such as a price breakdown of every part and service provided as listed in the ACE (Allstate estimate). It is undisputed that Nevada Auto disclosed the prior accident to Plaintiff." *JA*, 845-848. This is precisely the type of interpretation the District Court is permitted to make, and the District Court does not delve into any other requisites that would require additional statutory interpretation by this Court. It is the substantive law that controls which factual disputes are actually material. *See Wood v. Safeway*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

Here, despite the fact that Poole attempted to create issues of "material" fact, the actual "material" facts pursuant to the applicable law are not in dispute. Indeed, Poole's argument further fails to take into account that he has no evidence, that Nevada Auto, knowingly withheld "material" facts, even if some additional facts were known about the Vehicle. *See generally, AB and JA.* Poole, despite repeating the same statements, has not produced actual evidence that he was affirmatively and knowingly mislead, either by affirmative statement or a knowing omission by anyone at Nevada Auto. The opposite has been shown by the actual evidence, and the District Court considered the significant amount of information presented by Poole and granted summary judgment accordingly.

Poole is attempting to frame his situation as affirmative and knowingly fraudulent conduct, when there is no evidence to support such a conclusion. *AB*, 35-37. Poole, in conjunction with attempting to reframe entirely self-serving "facts" and paid "expert" opinions, as knowingly fraudulent conduct by Nevada Auto, and attempts to create a finding and conclusion by the District Court that was not actually set forth. *JA*, 845-848. Poole then explores an argument regarding *caveat emptor*, which was not present in his District Court argument, despite arguing that justifiable reliance is not necessary. *AB*, 33-27. Poole cites to *Collins v. Burns*, 103 Nev. 394, in order to support his *caveat emptor* argument. *AB*, 36-37. The *Collins* court acknowledges that, "[L]ack of justifiable reliance bars recovery in an action at law for damages for the tort of deceit. *Pacific Maxon, Inc. v. Wilson*, 96 Nev. 867, 870, 619 P.2d 816, 818 (1980)," and Poole attempts to claim the information he received would not have triggered any "red light" to any "normal person of his intelligence and experience." *Collins v. Burns*, 103 Nev. 394, 397 (1987). However, Poole neglects to acknowledge he had purchased other vehicles, originally came to look at new trucks, and was then disclosed multiple times both verbally and in writing, that the Vehicle had been in an accident from which it was towed prior to his purchase. *JA*, 122, 141-148. Although Nevada Auto denies any actually fraudulent conduct, the fact that the Vehicle had been in any accident would have served as a "red light" to a reasonable person, and Poole has

not produced any evidence aside from self-serving testimony that he would have taken any other particular course. *See AB*, 122.

Furthermore, Poole has continuously failed to provide any actual evidence that the Vehicle should not have been a CPO and was improperly certified at the time of its inspection. *See generally, AB.* Indeed, the only "evidence" which Poole attempts to rely upon to prove his allegation that the Vehicle should not have been a CPO vehicle, is his own paid "expert" who inspected the Vehicle years after its purchase, and thousands of miles of driving. *JA*, 162-170. Poole's argument regarding the District Court's decision mischaracterizes the findings, and attempts to add in an argument regarding *caveat emptor*, and accordingly, summary judgment should be affirmed.

F. There are No Disputed Issues of Material Fact with Respect to Nevada Auto's Representations During the Sale of the Vehicle.

Poole argues that there are genuine issues of material fact with respect to representations under NRS 598.0915(15) and NRS 598.0923(3)(or by association § 16 C.F.R. § 455.1(A)(1)). *AB*, 37-39. Poole's argument is flawed. NRS 598.0915 is designed as a catchall for any other misrepresentations which were not necessarily encompassed by the other delineated misrepresentations of NRS 598. Here, the allegations within Poole's First Amended Complaint relate directly to the certification/quality of the Vehicle or the nature and extent of the accident, and Poole's expectations. *JA*, 16-33. As such, any allegations made by Poole are

encompassed in the other specifically defined "deceptive trade practice" definitions in the other sections of NRS 598.0915 as alleged in his FAC. *Id.* Nevada Auto made no false representations regarding the overall quality, condition, and certification of the Vehicle. *JA*, 79-204. Nevada Auto disclosed that the Vehicle had previously been in an accident where damage was reported. *Id*. at 141-148.

Indeed, Poole did not actually provide any evidence that the Vehicle was improperly certified. *See generally, JA*, 226-339. Poole accepted that the Vehicle had been in an accident and made no actual inquiry or reasonable investigation into any details, despite receiving this information. *JA*, 122. Poole also failed to present evidence of any misrepresentation of the actual condition of the Vehicle. *JA*, 226-638.

Notably, in Poole's First Amended Complaint, he fails to even allege that one of his purported "false" misrepresentations was that the Vehicle was in a "minor" accident. *JA*, 16-33. Poole then happily drove his Vehicle for 3 years without any problems, warranty claims, or repairs, aside from an accident he got in. *Id*., 126, 128, 133. Poole was also unable to produce actual evidence that the Vehicle should not have been a CPO vehicle at the time it was certified, or that the mechanic who performed the certification inspection did so inadequately. Poole, even in his opposition to summary judgment, thoroughly fails to identify any misrepresentations that would fall into his allegations that Nevada Auto actually

violated NRS 598.0915(15), which is the catchall for any other misrepresentations which were not necessarily encompassed by the other specified misrepresentations of NRS 598. Clearly by neglecting this portion of the statute within his Opposition, Poole actually conceded any allegations made by Poole regarding purported misrepresentations by Nevada Auto are encompassed wholly in the other specifically defined "deceptive trade practice" definitions in the other sections of NRS 598.0915 as alleged in the First Amended Complaint. *Id.*, *see also*, 226-638. Therefore, Poole does not have a claim that Nevada Auto engaged in "deceptive trade practice" pursuant to 598.0915(15), and summary judgment should be affirmed.

G. There are No Genuine Issues of Material Fact that Nevada Auto Knew or Should Have Known that the Vehicle was Not of the Quality They Represented or Otherwise Falsely Certified the Vehicle.

Poole tries to contend that Nevada Auto somehow engaged in statutory consumer fraud/deceptive trade practices pursuant to NRS §41.600 and NRS 598.0915(2), (7) by allegedly making a false representation as to the source, sponsorship, approval or certification of goods for sale. *See JA, 16-33.* However, Poole's does not identify the allegedly false representation made to Poole regarding any source, sponsorship, approval, or certification of any goods for sale by Nevada Auto that constituted a deceptive trade practice under NRS 598.0915(2). *See Id.* Poole argues that there is a "false" statement with respect to

Nevada Auto's advertising. *See AB generally, and at 27-28*. however, Poole asserts that Nevada Auto advertises "only the finest late model vehicles get certified" and because the Vehicle had previously sustained damage, which had been repaired, it could not possibly be one of the "finest late model vehicles." *See Id., JA, 249-250.* Firstly, an advertising phrase, such as "finest late model vehicles" is non-actionable puffery. *See generally, Henderson v. Gruma Corp.*, 2011 U.S. Dist. LEXIS 41077, *see also*, *Summit Tech., Inc. v. High-Line Medical Instruments, C*o., 933 F. Supp. 918, 931 (C.D. Cal 1996) (finding a statement that is "incapable of objective verification" cannot be expected to induce reasonable consumer reliance). Here, there is no objective verification of the term "finest." The advertisement does not say that each and every certified vehicle will be free from any previous damage. And, indeed, a used car is obviously not a new car and not subject to the same expectations that any consumer may have for a new car. As to the extent that, such a phrase imparts fact by stating "late model vehicles", there is no dispute that Poole purchased a late model (at the time) vehicle, with fewer than 7,000 miles, that was a certified CPO.

Poole also now attempts to argue that the "false" statements were that the accident the Vehicle had been in was "minor" accident. In Nevada, fraudulent misrepresentation requires actual proof that a plaintiff was supplied false information. *See Guilfoyle v. Olde Monmouth Stock Transfer*, 335 P.3d 190 (Nev.

2014.) However, here, Poole fails to produce any actual admissible evidence that the Vehicle was not in a "minor" accident, a fact confirmed not just by the CPO inspection but also by the CarFax report. *JA*, 100-101, 141-148.

As admitted in Poole's First Amended Complaint, the Vehicle underwent the 125-point CPO inspection required for Nevada Auto to certify the Vehicle as CPO, by a trained experienced mechanic who had performed numerous such inspections. *JA* 100-101, 105-106, *see also*, 26. The mechanic who inspected the Vehicle testified that by signing the 125-point inspection checklist, it was his opinion that the Vehicle qualified as a factory-backed certified pre-owned vehicle (*i.e.,* "CPO"). *JA*, 106. The mechanic who inspected the Vehicle had approximately twenty (20) years of experience, and was certified to work in the service department and received training specifically from Nevada Auto. *Id. at 105.* Furthermore, the expert retained by Nevada Auto, Thomas Lepper opined that the Vehicle was correctly certified as a Certified Pre-Owned Vehicle, and did not observe any repair or safety issues. *Id. at 172-186.* Nevada Auto also provided extra warranties on the Vehicle that were provided specifically as a result of its successful certification as a CPO. *Id*., 125.

Furthermore, Poole was informed of the Vehicle's CPO certification. *JA, 130.* More importantly, it is undisputed that Poole also was informed both verbally and in writing that the Vehicle had been in a previous accident. *JA*, 122,141-148.

Poole then, with the full knowledge that the Vehicle had been certified CPO while being in a previous accident, made no further inquiries and purchased the Vehicle. *Id*. It is undisputed, that Poole himself testified that he drove the car for 3 years and thousands of miles without any problems, without experience any safety issues and without having any repairs performed on the Vehicle, and thus has no damages. *Id.*, 125-126, 128-129. The Vehicle that Poole purchased is the vehicle that he received, and fully used the benefit of, even during the pendency of litigation.

Accordingly, no issue of material fact remains that Nevada Auto knowingly made any false representation to Poole regarding the Vehicle's source, sponsorship, approval, or certification at the time Poole purchased the Vehicle. As such, Nevada Auto is entitled to a judgment as a matter of law as to Poole's claim that Nevada Auto violated NRS § 598.0915(2).

Poole argues that Nevada Auto somehow engaged in statutory consumer fraud/deceptive trade practices pursuant to NRS §41.600(2)(e) and NRS 598.0915(7), (15) by allegedly knowingly representing falsely that the Vehicle for sale to Poole was of a particular standard, quality or grade, style or model. *JA*, 16-33.

However, no evidence exists in this matter that establishes that the standard, quality, or grade of the Vehicle was anything other than that of a CPO at the time

Poole purchased the Vehicle from Nevada Auto, or that there was any improper certification or inspection. *Cf. supra*. Poole does not allege and no evidence exists that Nevada Auto did not perform the required 125-point inspection of the Vehicle before certifying the Vehicle as a CPO. Poole does not allege and no evidence exists that demonstrates the Vehicle failed its 125-point inspection and Nevada Auto certified the Vehicle as CPO regardless of this failure. *See Id.*

To the contrary, the only admissible evidence that exists demonstrates that the Vehicle was inspected and accordingly certified as a CPO vehicle at the time Poole purchased it. *See infra*. Nevada Auto's experienced manager, Josh Grant, testified that he thoroughly reviewed all information he received to determine whether the Vehicle was suitable to be considered as a CPO before it was sold to Poole. *JA*, 89. Nevada Auto's representatives testified that the Vehicle underwent the required 125-point CPO inspection as was required by Nevada Auto, in order to certify the Vehicle as CPO. *JA*, 100-101, 105*; see also,* 10-11. Based upon his inspection, mechanic Ray Gongora, signed a CPO inspection checklist, and certified the Vehicle, that he personally inspected prior to its sale, as a CPO. *Id*., *see also 105.*

It is clear that Nevada Auto could not and did not knowingly make a false representation about the certification of the Vehicle, or otherwise falsely certified it, prior to it being sold to Poole. Nevada Auto had a sufficient basis, based on its

own inspection, for making the representation that the Vehicle was suitable for CPO. *See supra. Blanchard.* Poole did not produce any evidence that mechanic Gongora was improperly trained, did not conduct the inspection per his testimony, or otherwise, could not and/or should not have certified the Vehicle. *See generally, AB.* Accordingly, Nevada Auto had a reasonable basis for representing that the Vehicle was suitable and met applicable CPO standards.

Poole's "expert" attempts to opine that the Vehicle should not have been a CPO vehicle, however, he never inspected the Vehicle in 2014, at the time Nevada Auto acquired it, did not inspect it in 2015, and did not inspect it until Poole had driven it for two years and thousands of miles, in May 2016. *See JA*, 162-170. Furthermore, Poole's "expert" has not performed any CPO inspections himself, and did not do a CPO checklist inspection, or take actual measurements, when he inspected the Vehicle, years and thousands of miles later, in 2016. Id., see also *209*. The ONLY methodology that Avellini relies upon in rendering any of his opinions conclusions, and in making the various comments in his report, is his "observations" and "experience." *Id.* He proffers no actual solid data or evidence to support his conclusions. In particular his purely speculative "safety" issue, and more importantly he is not certified to opine on CPO certification, and/or what Nevada Auto "knew or should have known" at the time of the CPO inspection two years prior. *Id.* Poole's "expert" is not qualified to determine whether the Vehicle

in 2014 (or at any time) was unsuitable for CPO certification when trained mechanic, Ray Gongora performed his inspection and certified the Vehicle, as he admittedly had never performed a CPO inspection. *Id., See RA*, 21.

The actual undisputed evidence is that Poole testified the only maintenance he ever did on the Vehicle was oil changes, until 2016 when he got an alignment on the Vehicle, and at that time no other issues were pointed out to him. *JA*, 122. Poole did not have any issues with his Vehicle, nor did he make any warranty claims, which evidences a lack of any actual problems with the Vehicle. *Id*., 126, 128. Therefore, again, Nevada Auto clearly did not knowingly make any representations about the standard or quality of the Vehicle that were false at the time of the Vehicle's sale.

The only "evidence" which Poole has proffered to support any of his allegations that the Vehicle was not properly certified as a CPO, and that there was damage from the 2014 accident which was not repaired properly, is paid opinion from his hired expert who inspected the Vehicle two years after he purchased and drove it, and at the request of retained counsel. *JA*, 162-170, *210*. Allegedly, at this expert inspection, Avellini noted many "observations" about the Vehicle, including improper repairs and residual damage. *See Id.* However, Avellini did not utilize any measurement specifications, dealer specifications or tolerances, and/or other

standards, and utilized a variety of unverifiable, uncited, and unsubstantiated sources. *Id.*

Avellini attempted to testify during his deposition that there was a safety issue with a "reconditioned" wheel. *Id.*, 212-213. Poole devotes a substantial portion of his Appellate Brief, delineating the purported safety issues regarding this wheel, and how one alleged guideline which Avellini found on the internet (and could not otherwise authenticate) somehow proves that the reconditioned wheel was "unsafe" or otherwise unsuitable for certification. *See AB, 40-45.* However, Avellini did not actually note any safety issues in his actual "expert" opinions, and provided no actual authority prohibiting certification of the Vehicle as a CPO. *Id.* 162-170. Indeed, Avellini does not provide actual evidence of his "opinion" that any allegedly reconditioned wheel disqualified the Vehicle from certification, particularly after it had already been repaired by another party. *Id., see also AB 40-45.* Most importantly, Poole drove the Vehicle for another year and thousands more miles after Avellini's inspection, without any issues or repairs (save for the collision he was involved in). *JA*, 122, 125, 127; *see also* 162-170.

Additionally, it was not Nevada Auto who repaired the Vehicle, and there was no other actual evidence that Avellini provided that actually even showed that there was any safety or certification issues with the wheel and/or whether there was even a reconditioned or re-chromed wheel on the Vehicle. *See AB*, 40-45, *See also,*

JA, 162-170. In other words, it was only speculation and not relevant to any actual issue. In fact, the "safety" issue itself is entirely speculative as Poole did not experience any safety issues, and drove the Vehicle for another year after Avellini's inspection. *JA*, 126, 128.

Clearly, there could be no actual "safety" concerns, if Poole was then permitted to continue to drive the Vehicle (thousands of miles) after his "expert's" inspection, and with no repairs. *Id.*, 122. Again, it is undisputed that Poole continually had use of the Vehicle until he himself got it into an accident. *JA*, 125, 127.

Poole has also provided no admissible evidence that Nevada Auto made any misrepresentations about the mechanical condition of the Vehicle at the time of sale. It is undisputed that Nevada Auto conducted a 125-point CPO inspection on the subject Vehicle prior to Poole purchasing it. *JA*, 100-101. Additionally, it is an undisputed fact that Nevada Auto sold Poole a CPO vehicle, that came with a manufacturer's warranty, and specifically a "Mechanical Repair Service Contract for Manufacturer's Certified Vehicles." *Id. at* 125, *see also* 215-216. It is also undisputed that Poole did not make a single claim under this warranty (or any other one). *Id.*, 128-129. Poole drove his Vehicle for three years, and as of August 2017, he had not made any repairs, mechanical or otherwise, until he made repairs for his own collision. *Id.* As such, there is no actual evidence that the Vehicle's

mechanical condition was anything different from what Nevada Auto represented at the time of sale; a CPO vehicle that is in a mechanical condition that meets applicable CPO standards. In fact, the evidence supports that the mechanical condition was precisely what Nevada Auto represented.

It is undisputed that Nevada Auto had the Vehicle inspected, and had a sufficient good faith basis for making the representation that the Vehicle was suitable for CPO, and properly certified as such. *See supra., Blanchard.* As such, it is clear that Nevada Auto could not, and did not knowingly make a false representation about the certification of the Vehicle, at the time of the sale. There is no evidence that Nevada Auto or its mechanic otherwise falsely certified its condition, or falsely represented that the Vehicle met the Chrysler standards that were checked on the CPO checklist. Accordingly, there are no material facts in dispute regarding alleged false representations about the nature and extent of the pre-purchase accident, and/or the certification of the Vehicle.

H. Poole's Claims for Equitable Relief Fail, Because His Claims Pursuant to NRS 598 et seq. Fail, and also Because He Fails to Meet the Requisites of His Equitable Claims.

The evidence supports an affirmation of summary judgment with respect to Poole's claim pursuant to NRS 598 et seq., as the District Court correctly determined. Poole's equitable claims for relief generally do not meet the requisites of such claims, regardless of his purported deceptive trade practices claims.

Poole's evidence does not support his argument that somehow his bargained for contract was or could be void ab initio. *See AB*, 45-46. Indeed, Poole is not entitled to any equitable relief because he did not establish any knowingly fraudulent inducement, knowing misrepresentation, or sustain any actual equitable damages. *See generally, AB.*

1. Poole's Claim for Rescission Fails to Meet the Necessary Requisites for That Claim and Summary Judgment Should be Affirmed as a Matter of Law.

Poole is not entitled to Rescission because Nevada Auto did not engage in any "deceptive trade practices" therefore, he is not permitted a return of all of his payments. Additionally, "[R]escission is an equitable remedy which totally abrogates a contract and which seeks to place the parties in the position they occupied prior to executing the contract." *Scaffidi v. United Nissan*, 425 F. Supp. 2d 1172, 1183 (2005) *citing Bergstrom v. Estate of DeVoe*, 109 Nev. 575, 854 P.2d 860, 861 (Nev. 1993). Where a contract between two parties has been partially performed, and one party does not fully perform, the other has a choice of remedies. *Id.*

Here, Poole and Nevada Auto cannot be put in the same position they occupied prior to executing the contract, because Poole got the Vehicle into an accident, drove it for thousands of miles, and continued to depreciate its value throughout the pendency of litigation. Furthermore, as in *Scaffidi*, "[T]here is no

evidence [D]efendants made a false representation…with the intention to induce" Poole to purchase a "defective car." *See Scaffidi, supra. Scaffidi* has a specific set of facts regarding false inducement. *Id.* In this case, there is no actual evidence that Nevada Auto knew or even should have known that there were defects in the Vehicle, or that there were any problems which should have been disclosed to Poole, aside from the simple fact that the Vehicle had been in an accident. *See JA*, 226-638. There is no evidence that Nevada Auto knowingly omitted material information in an attempt to induce Poole to purchase the Vehicle, and in fact there is no evidence that any representations made by Nevada Auto were false at the time they were made. *Id.* Additional support for this fact is that the Vehicle had no actual adverse issues, did not require repairs, and Poole made no warranty claims during the three years, and thousands of miles he drove it. *See 122, 126, 128.*

"The law is clear that damages and restitution are alternative remedies and an election to pursue one is a bar to invoking the other in a suit for breach of contract. *Mullinix v. Morse*, 81 Nev. 451, 454, 406 P.2d 298, 300 (1965). Poole is barred from seeking both damages and restitution. "The law is clear that damages and restitution are alternative remedies and an election to pursue one is a bar to invoking the other in a suit for breach of contract. *Id.* Poole must, "rescind or affirm the contract, but he cannot do both. If he would rescind it, he must immediately return whatever of value he has received under it, and then he may

defend against an action for specific performance . . . and he may recover back whatever he has paid…" *Scaffidi v. United Nissan*, 425 F. Supp. 2d 1172, 1183 (2005)(internal citation omitted)(emphasis added).

Here, despite any "notice" of rescission per the Complaint, Poole continued to utilize the Vehicle for three years and put thousands of miles on the Vehicle and got into a subsequent accident. *JA*, 125, 127. Poole's claim further fails because Nevada Auto cannot be put in the same position they occupied prior to executing the contract, because Poole got into a second collision accident, which caused over $5,000.00 in damage to the Vehicle. *JA*, 125, 127, *see also generally, Scaffidi.*

In *Scaffidi*, the Court found that summary judgment was appropriate for that defendant dealership because the plaintiff did not provide evidence that the defendant failed to perform, and the vehicle at issue in that case was totaled. *Id.* Furthermore, there are no triable issues of material fact regarding Poole's entry into the contract, as there was no fraud in the inducement, and Poole did not adequately plead or introduce evidence of either. Poole entered into the purchase contract knowing that the Vehicle had been in an accident, and subsequently repaired, inspected and certified. *JA*, 122-125. There is no evidence that the introduction of <u>additional</u> information regarding specific parts or monetary amounts spent on repair in an insurance estimate would have put Poole on any other course. *Id.*

Affirmation of summary judgment is appropriate, because Poole has not produced any admissible evidence that Defendant actually engaged in any "deceptive trade practice" and the Vehicle has had an additional accident, repair work, and three additional years of use. As such, Poole failed to meet the requisites for a claim for rescission (sounding in either tort or contract).

2. Poole Failed to Satisfy the Requisites of Equitable Estoppel, thus his Claim Fails as a Matter of Law.

As Poole acknowledged, "equitable estoppel operates to prevent a party from asserting legal rights that, in equity and good conscience, they should not be allowed to assert because of their conduct." *Nevada State Bank v. Jamison Partnership*, 106 Nev. 792, 799, 801 P.2d 1377, 1382 (1990). The elements of estoppel are as follows:

> (1) the party to be estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting estoppel must be ignorant of the true state of facts; (4) he must have relied to his detriment on the conduct of the party to be estopped.

NGA #2 Ltd. Liab. Co. v. Rains, 113 Nev. 1151, 1160 (1997)(internal citation omitted). There are no material facts in dispute regarding Nevada Auto's actual conduct, with respect to estoppel. Nevada Auto's representative, Joshua Grant admitted he had no recollection of whether he disclosed details regarding which specific parts may have been repaired or replaced on the Vehicle to the

mechanic who performed the inspection or to Poole. However, all parties agree that Nevada Auto did affirmatively disclose to both the inspecting mechanic and Poole that the Vehicle had been in a wreck, from which it was towed, and that it had sustained damage. *See JA, 109.*

Regardless of Poole's self-serving allegations about whether the details of specific parts were "material" to his decision to purchase the Vehicle, he still failed to provide evidence that Nevada Auto conducted itself in a way that precludes it from asserting all of its legal rights and defenses. *See generally, 16-33.* Poole was informed that the Vehicle was in a previous accident and made no investigation into the nature and extent of the accident at the time of purchase. *See generally, AB.* Josh Grant testified to reviewing the Allstate documents and not seeing anything that would preclude the Vehicle from being submitted for a CPO inspection. *See JA, 88-89.* Accordingly, there is no evidence that Nevada Auto intended to fraudulently, either by affirmative representation or silence, induce Poole to act in a way that would be detrimental to him. Again, there is no evidence of intentional and knowing misconduct.

Poole still has produced no evidence, aside from his own self-serving testimony that he relied on Nevada Auto's representations to his "detriment." See *JA* 226-638. However, Poole continuously drove his car for nearly 3 years without any incident or repair attributable to any of Nevada Auto's conduct affirmative or

otherwise. Accordingly, affirmation of summary judgment is appropriate with respect to this claim.

3. Poole's Claim for Restitution/Unjust Enrichment Because He Fails to Meet the Requisites for his Claim.

Poole's only claim of any actual damages for his unjust enrichment/restitution is the return of his payments on the Vehicle. However, Poole continuously neglects to take into account that he used the Vehicle for 3 years, and thousands of miles, since he purchased it. As such, there is no equitable relief he is entitled to recover. Poole clearly already received the benefit of the bargain.

Poole's First Amended Complaint alleges both a statutory and common law claim for Restitution and Unjust Enrichment and he fails to meet the basic requisites for a claim for unjust enrichment and thus it fails as a matter of law. Regardless of Poole's argument that he is seeking the amount Nevada Auto has been "unjustly" enriched, such relief still must be equitable. "[U]njust enrichment occurs whenever a person has and retains a benefit which in equity and good conscience belongs to another." *In re Amaro Derivative Litig.*, 252 P.3d 681 (Nev. 2011)(internal citation omitted). Here, Poole paid monthly payments on the Vehicle, which he used and/or had the ability to use, from the time of his purchase through the time of filing his Complaint, and past that date. *See generally, JA*, 16-33, 122-123. Poole neither ceased using the Vehicle (aside from the collision he

was in), nor sold it or attempted to sell it. *Id., 131*. Poole's claim for unjust enrichment fails, on its face, because he has a full and adequate remedy at law, which would include his damages, which are the same as what he is claiming would be the "unjustly" retained amount by Nevada Auto. Poole had a purchase agreement for the Vehicle with Nevada Auto, and Poole obtained and utilized the Vehicle for two (2) years prior to filing his Complaint and continued to use the Vehicle after he filed his Complaint for over a year. *See Id.*, 122, 125, 127.

Poole was not injured by the Vehicle, nor did a third-party sustain injury as a result from Poole's use of the Vehicle, and he did not sustain any other "damages" aside from what he paid for the Vehicle that he has been using actively for 3 years. As such, Nevada Auto has not been unjustly enriched, as it has only been paid for Poole's usage and ownership for the car and is not inequitably retaining any "benefit" that belongs to Poole.

The undisputed evidence shows that Defendant did take into account the Vehicle's history prior to pricing the Vehicle for sale, and pursuant to the CPO certification. *See JA*, 226-638. Poole's "expert" opined the untenable opinion that no matter what price was assigned to the Vehicle on the day Poole purchased it, it was "inherently worth $8,000 less that day." *RA*, 48. As such, Poole, in essence arbitrarily assigned a value, "no matter what he paid for the Vehicle", for his damages. *Id.* Poole himself did not actually "suffer" these damages nor were they

imposed on him. In fact, Poole did not actually suffer any actual compensable damages. It is contrary to equitable relief to attempt to compensate Poole on that basis, and for more than he actually could prove as damages.

Nevada still maintains the long-standing general rule that a plaintiff may not recover equitable remedies where a plaintiff has a full and adequate remedy at law. *See State v. Second Judicial Dist. Court in & for Washoe County*, 49 Nev. 145, 159, 241 P. 317, 322 (1925). Since Poole has an express agreement with Defendant regarding the purchase of the Vehicle, his claims in equity fail, as a matter of law on that basis as well. *See JA*, 122. Therefore, affirmation of summary judgment is appropriate for Nevada Auto.

4. Poole's Claim for Declaratory Judgment is Duplicative, thus this Claim Should Not be Remanded.

Poole alleges that he entered into the RISC contract with Defendant and Wells Fargo, and further alleges that he is entitled to Rescission and/or Restitution because the RISC is void ab initio or voidable. *JA*, 16-33. Nevada Auto maintains that the RISC is valid and binding contract, and that Poole accepted and utilized the full value for which he agreed, including up until, at least the granting of summary judgment. The elements of an equitable claim for declaratory relief are:

1. A justifiable controversy exists between two or more parties;
2. Regarding their respective rights pursuant to a contract;
3. Such that the plaintiff asserts a claim of a legally protected right;
4. The issue is ripe for judicial determination; and

5. Plaintiff asks the court to determine the parties' relative rights under the contract.

See Nev. R. Civ. P. 57; *NRS* Chapter 30; *Kress v. Corey*, 65 Nev. 1, 189 P.2d 352 (1948). Here, the "justifiable controversy" stems from Poole's First Cause of Action for Fraud/Deceptive Trade Practices, the contract itself, and the Parties' respective positions is not what is actually at issue. Poole's claim for Declaratory Judgment therefore completely encompasses claims and defenses of both, Poole and Nevada Auto, which were resolved through summary judgment, and should not be remanded. *See JA*, 16-33.

Here, Poole already alleged a claim for Rescission and therefore the declaratory judgment claim is redundant and rendered moot by adjudication of the main action. *Id.* The main purpose for the Declaratory Relief cause of action is solely related to the other claims, upon which any voiding of the RISC is dependent. As such, a determination on the RISC is inappropriate and summary judgment should be affirmed in favor of Nevada Auto.

I. Poole's Claim for Recovery Under the Auto Dealership Bond, does Not Satisfy the Requisites of that Claim, and therefore Fails as a Matter of Law.

Poole asserts a claim under NRS 482.345(7), which provides in pertinent part:

> If a consumer has a claim for relief against a dealer, distributor, rebuilder, manufacturer, representative or salesperson, the consumer may:
>
> (a) Bring and maintain an action in any court of competent jurisdiction. If the court enters:

(1) A judgment on the merits against the dealer, distributor, rebuilder, manufacturer, representative or salesperson, the judgment is binding on the surety.

Poole concedes that his claim against Corepointe fails if his claims against Nevada Auto fail. Poole also states that any claim against Corepointe is directly based on vicarious liability.

Poole did not bring a claim for contribution and indemnity against Corepointe. Poole has definitively not obtained a judgment on the merits or a judgment in any other capacity with respect to Corepointe, and his claims against Corepointe hinge on findings specifically with respect to the dealership. Therefore, summary judgment on behalf of Corepointe should be affirmed.

J. Poole has Produced No Evidence of Damages, either Monetary or Otherwise, and Summary Judgment Should be Affirmed in its Entirety. [6]

Throughout the entirety of Poole's litigation, pleadings, and briefings, he argues about purported fraudulent conduct, and how he was legally entitled to each and every detail of an accident that occurred, and was fully repaired, prior to Nevada Auto acquiring the Vehicle. *See generally, JA.* However, Poole has failed to actually provide any evidence of damages. It is undisputed that Poole drove the Vehicle, happily, for thousands of miles over the course of approximately, three (3)

[6] Poole does not make any argument regarding Punitive Damages in his Appellant's Brief. Accordingly, Nevada Auto relies upon its asserted arguments regarding punitive damages, as incorporated in its Motion for Summary Judgment and Reply within the Joint Appendix and Respondent's Appendix.

years, which is directly relevant as Nevada Auto clearly did not cause Poole to incur any damages related to loss of use. *Id.*, 122, 128, 129. Poole also sought financing and claims that he is entitled to the equity trade-in of his previously used vehicle. *See AB*. However, it is undisputed that Poole went in to purchase a vehicle, ended up purchasing the Vehicle, and accordingly paid a down payment (in the form of a trade-in) and then financed the remaining amount owed on the Vehicle (and refinanced it multiple times), and continuously made payments while he was fully using the Vehicle. *JA*, 122, 125-126, 128-129, 133.

It is undisputed that Poole never made repairs to the Vehicle aside from regular maintenance, and never made any warranty claims for any problems he experienced with the Vehicle. *Id.* Indeed, Poole testified merely to wanting "to get his money back and have them (Nevada Auto) take the vehicle back." *JA*, 132. Poole even testified that he wanted all of his money back, despite the fact he had been driving the Vehicle for the past three years, and for thousands of miles, without a single issue or repair. *Id.*, see also, 122, 126, 128. Poole specifically testified that his money could have been going "[T]owards paying off a vehicle that wasn't damaged before (he) bought it." *Id.* This is an untenable assertion, as it is undisputed that Poole already knew he was buying a vehicle that had been "damaged" prior to his purchase of the Vehicle. *Id.*, 122. Poole also claims he is somehow owed his trade-in value for his previous vehicle, however, that was extra

value applied directly to the purchase of the Vehicle, which he purchased and used for three years, and as such, he already received the value of that benefit. *See generally, AB.* Poole is grasping to impose a duty upon Defendant regarding additional disclosures, which does not exist and for which he does not provide any actual authority.

Poole's claims should not be remanded, not only because he has provided no evidence of actual fraudulent conduct pursuant to NRS 41.600 and NRS 598 et seq. but also because he has not been damaged by Nevada Auto. Accordingly, summary judgment should be affirmed in its entirety.

VII. CONCLUSION

There are no genuine issues of material fact in dispute. The District Court rightfully determined that Nevada Auto (and Corepointe) were entitled to summary judgment as a matter of law, because the governing law did not mandate disclosure of each and every repaired part of the subject Vehicle. Furthermore, Poole failed to actually provide evidence of damages pecuniary or otherwise, and accordingly, all of his statutory, common law, and/or equitable claims fail, as a matter of law. Based on the underlying record and the foregoing, the District Court did not err in any of its findings and/or conclusions and Nevada Auto respectfully requests that

this Court affirm summary judgment and deny remand to District Court.

Dated this 13th day of August, 2018.

/s/ Jeffery A. Bendavid, Esq.
JEFFERY A. BENDAVID, ESQ.
Nevada Bar No. 6220
STEPHANIE J. SMITH, ESQ.
Nevada Bar No. 11280
MORAN BRANDON BENDAVID MORAN
630 South 4th Street
Las Vegas, Nevada 89101
(702)384-8424
Attorney for Respondents

VIII. CERTIFICATE OF COMPLIANCE PURSUANT TO N.R.A.P. 28.2

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 requirements of NRAP 32(a)(6) because this brief, including footnotes, has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Times New Roman 14-point;

2. I further certify that this brief complies with the page limit and/or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(A)(ii) and (C), is proportionately spaced, has a typeface of 14 points or more, and only contains 13,145 words, including footnotes, quotations, and signature block.

3. I further certify that I have read this Respondent's Answering Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose.

4. Finally, I certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the 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 Procedure.

DATED this 13th day of August, 2018.

/s/ Jeffery A. Bendavid, Esq.
JEFFERY A. BENDAVID, ESQ.
Nevada Bar No. 6220
MORAN BRANDON BENDAVID MORAN
630 South 4th Street
Las Vegas, Nevada 89101
(702) 384-8424
Attorney for Respondent