THE SUPREME COURT

STATE OF NEVADA

DERRICK POOLE,

Appellant,

v

NEVADA AUTO DEALERSHIP INVESTMENTS LLC a Nevada Limited Liability Company d/b/a SAHARA CHRYSLER, JEEP, DODGE, and COREPOINTE INSURANCE COMPANY,

Respondents,

Supreme Court Case No: 74808

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

Appeal from the Eighth Judicial District Court, Clark County.
The Honorable Nancy Alff, District Court Judge

APPELLANT'S REPLY BRIEF

Law Offices of George O. West III
Consumer Attorneys Against Auto Fraud
George O. West III Esq, State Bar No. 7951
10161 Park Run Drive, Suite 150
Las Vegas, NV 89145
Telephone : (702) 318-6570
Email: gowesq@cox.net

CRAIG B. FRIEDBERG [SBN 4606]
Law Offices of Craig B. Friedberg, Esq.
Craig B. Friedberg, Esq, State Bar. No. 4606
4760 S. Pecos Road, Suite 103
Las Vegas, NV 89121
Telephone: (702) 435-7968
Email: attcbf@cox.net

Attorneys for Appellant Derrick Poole

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AB	POOLE's Answering Brief
Appx.	Appellant's Appendix
MSJ	SAHARA's Motion for Summary Judgment
NDTPA	Nevada Deceptive Trade Practices Act
OB	POOLE's opening brief
Sep. Stmt.	Plaintiff's Separate Statement of Undisputed Material Facts filed in Opposition to SAHARA's MSJ

ARGUMENT

I. The *only* document this Court needs to review in determining if there were triable issues involving POOLE's statutory claims for deceptive trade practices is POOLE's separate statement of undisputed material facts in opposition to SAHARA's MSJ

SAHARA's contentions in their Answering brief are stupefying. It would appear that SAHARA is not reading the same opening brief or appendix that was filed with this Court. This is because even a cursory examination of POOLE's separate statement in opposition to SAHARA's MSJ, categorically belies SAHARA'S contentions. *Sept. Stmt., Appx., Vol. 2: **311-338***.

First, SAHARA contends "... Poole *failed to submit* *actual evidence* that any of the details or information included within the [Allstate Collision Estimate] ("ACE") are material to the purchase of the [CPO] vehicle." *AB:10*. *See ACE at Appx., Vol. 2-3: **361-368***. This contention is farcical given the undisputed material facts contained in POOLE's separate statement, all of which were supported by admissible evidence. *Sept. Stmt., Appx., Vol 2: **311-338***. POOLE's declaration in support of his opposition to SAHARA's MSJ, ***in and of itself***, was more than sufficient to establish triable issues that the information reflected within the ACE would have been important (material) in making a decision ***not*** to purchase the CPO vehicle from

SAHARA. *Sep. Stmt. # 64-66, Appx., Vol. 2:* ***282-285****, and Decl. of POOLE ¶¶ 5-6, Appx., Vol. 2:* ***282-284.*** [1]

Indeed, two material facts in this case that are unequivocally undisputed on both sides are: (1) that the ACE was in SAHARA's possession at time of sale, and (2), that the ACE was never disclosed to POOLE. *Sep. Stmt. # 59-63 and 104, Appx., Vol. 2:* ***325-327*** *and* ***336****.* [2] The operative issue is whether the information reflected in the ACE was "material." If it was, the ACE was required to be disclosed to POOLE.

In addition to POOLE's declaration, and as copiously laid out in *Sep. Stmt.#34-58, Appx., Vol. 2:* ***320-325****,* SAHARA's sales person (Mr. Spruell),

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[1] SAHARA repeats, *ad nauseam*, that POOLE's declaration was "self-serving" and contends, at least impliedly, that it should have been disregarded as actual or admissible evidence. This argument has no merit. If an affidavit otherwise qualifies, meaning it is made by a person with personal knowledge and has factual statements or a factual basis for those statements, it must be considered on MSJ, because the "self-serving" nature of such an affidavit ***only bears on credibility,*** and not on admissibility. *S.E.C. v. Phan*, 500 F. 3d 895, 909 (9th Cir. 2007)

A MSJ has nothing to do with either the weight or the credibility of the evidence, only whether the evidence demonstrates that a factual dispute exists for a jury to resolve. See *Borgerson v. Scanlon,* 117 Nev. 216, 220, 19 P.3d 236, 238 (2001) [holding "a district court ***cannot*** make findings concerning the credibility of witnesses or weight of evidence in order to resolve a motion for summary judgment"]; see also *Banks v. Sunrise Hospital* 120 Nev. 822, 839, 102 P.3d 52, 64 (2004) [same].

[2] These undisputed/admitted facts were ***conclusively established*** via SAHARA's responses to POOLE's ***requests for admissions***, and therefore they were not and cannot be disputed.

and the finance and insurance manager, (Mr. Noah Grant),[3] both testified very clearly to the following:

Mr. Grant:

- Because it is important to disclose to the consumer a vehicle's accident history, ***it would be <u>equally important</u> to disclose to the consumer the nature and extent of that accident, <u>if the dealership knew the nature and extent of the previous accident</u>.*** *Sep. Stmt. # 42 and 46, Appx. 321-322; Depo of Grant: Appx., Vol. 2: 432 and 434.*

- That if the actual nature and extent of an accident was known to the dealer, ***<u>meaning the dealer knew what parts were replaced and repaired and the amount of previous accident damage, those facts would be important to disclose to a consumer who is buying a CPO Dodge</u>.*** *Sep. Stmt. # 43, Appx., Vol. 2: 321; Depo of Grant; Appx., Vol. 2, 433-434.*

- That he ***would have disclosed*** that the CPO vehicle POOLE was purchasing had **$4,088.70** in damage to it based upon the pre-purchase collision, if he had knowledge of such a fact. *Sep. Stmt. # 44, Appx. 321; Depo of Grant, Appx., Vol. 2: 433-434.*

Mr. Spruell:

- Because it is important to be truthful honest and accurate with the consumer, ***<u>it would be equally important to disclose to the consumer the nature and extent of that accident, if the dealership knew the nature and extent of the previous accident.</u>*** *Sep. Stmt. # 53, Vol. 2, Appx., 324; Depo of Spruell, Appx., Vol. 2:****445***

[3] Both were directly involved in the sale of POOLE's CPO vehicle and had training in CPO sales and extensive professional experience in actually selling ***hundreds of CPO vehicles*** to the community, (*Sep. Stmt. # 36-38, 52 and 54; Appx., Vol. 2: 320 and 324*).

- That he ***would have disclosed*** to POOLE that the vehicle had **$4,088.70** in damage caused to it by the pre-purchase collision, if he had knowledge of such a fact. *Sep. Stmt. # 54-56, Vol. 2, Appx., 324-325; Depo of Spruell, Appx., Vol. 2:* ***447-449***

- Had the ACE been in the used car deal file involving POOLE's CPO vehicle, ***Mr. Spruell would have shown the ACE to POOLE*** to ensure the nature and extent of the previous accident was disclosed to him and to ensure Spruell was truthful, honest and accurate with respect to what POOLE was buying. *Sep. Stmt. # 57-58, Appx., Vol. 2:* ***325.***

Furthermore, Joshua Grant (SAHARA's 30(b)(6) representative on Dodge CPO sales and SAHARA's director of used car sales at the time of POOLE's CPO vehicle purchase, and who had previously sold ***thousands*** of CPO Dodge vehicles to the community),[4] testified:

- That it is important for SAHARA ***to make full disclosure*** to a used car buyer involving things that ***might affect a vehicle's value, safety, desirability or marketability,*** because SAHARA "prefers to be upfront and honest as possible, legally ethically and morally." *Sep. Stmt. # 32 and 33, Vol. 2, Appx. 319; Depo of Grant, Appx., Vol. 2:* ***413 and 425.***

- That SAHARA has ***vastly superior knowledge*** about the condition of a CPO vehicle as opposed to that of the consumer at time of sale. *Sep. Stmt. # 29, Appx., Vol. 2:* ***318***

- That to help ensure a buyer within the community can make an ***informed choice and educated decision,*** it is important for SAHARA to be completely truthful, honest and accurate ***and make full disclosure to the car buyer*** who is thinking of purchasing a CPO vehicle. *Sep. Stmt. # 31, Appx., Vol. 2:* ***319***

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[4] *See Sep. Stmt. # 10, 18, 19; Appx., Vol. 2:* ***313, 315****.*

Yet, despite these admissions by SAHARA's own managers and sales staff of how important disclosure of the contents of the ACE would be to a potential buyer of that CPO vehicle, the trial court ruled that the information reflected in the ACE would ***not*** have been material (important) to a reasonable consumer within the community who was going to purchase a Dodge CPO vehicle from SAHARA.[5] What the trial court lost sight of was the fact that consumers generally do not review the information in a collision damage estimate entirely in isolation, but rather, they look at is "as a whole" and "in the aggregate," and that is what makes the ACE "material." *See section II infra.*

Notwithstanding, SAHARA attempts to "explain away" the testimony of Mr. Spruell and Mr. Grant relating to the necessity and the importance of SAHARA disclosing the information reflected in the ACE to ***any*** prospective CPO buyer, including POOLE. SAHARA contends that the aforementioned testimony was: (1) based on a "hypothetical scenario," (2) was based on

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[5] In its MSJ order, (*Appx. Vol. 5: 846:* ***20-24***), the trial court adopted SAHARA's argument that the ***only*** "material" fact involving the pre-purchase collision was the collision itself. ***Nothing more, irrespective of what SAHARA actually knew vis-à-vis the ACE.*** Taking away the issue from the jury with respect to whether the information reflected in the ACE was "material" was in error. In making this ruling, the trial court had to have either overlooked or disregarded the deposition testimony of SAHARA's own employees involving the necessity and importance of disclosing the ACE to POOLE and how important the ACE would have been to POOLE in making the decision of whether or not to purchase a CPO vehicle from SAHARA.

"conjecture and speculation," and (3), was "... neither actual evidence nor relevant to the actual facts of the case..." *AB:18*.

Mr. Spruell's and Mr. Grant's deposition testimony was not based upon conjecture or speculation. Rather, their testimony regarding what would have been important to a consumer purchasing a Dodge CPO was ***based upon their own personal knowledge via their training and extensive experience*** in actually selling hundreds of CPO vehicles to the community. *Sep. Stmt. #37-40,42-43, 46, 54-56, Appx., Vol. 2: 321-322, 324-325.*

Nor was their testimony based on a "hypothetical." Rather, their testimony was based on the actual information in the ACE that ***specifically related*** to the particular pre-purchase collision in which Mr. POOLE's CPO vehicle was involved. *Sep. Stmt. #44-45, 55-58, Appx., Vol. 2: 322 and 324-325.*

Finally, SAHARA contends that the sworn deposition testimony of Mr. Spruell and Mr. Grant (*supra*), is not "actual evidence" and was "not relevant to the facts of the case..." This contention is utterly mystifying given that deposition testimony is "actual evidence" for purposes of a MSJ (see NRCP 56(c)), and a principle gravamen in this case involves SAHARA's failure to disclose a "material" fact in a transaction involving the sale of goods.

Second, SAHARA contends that "***except for***" Plaintiff's retained expert declaration "... Poole has *failed to provide any actual evidence* that

the vehicle should not have been a CPO and was improperly certified at time of its inspection," and that "... *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 ..." *AB:30 and 35*. SAHARA's contention is befuddling. SAHARA states unremittingly (in hope that repetition will mask the lack of merit of its argument), that POOLE's vehicle "passed" SAHARA's CPO inspection, as evidenced by SAHARA's "passing" CPO inspection check list, and therefore that is end of the inquiry. *CPO inspection report; Appx., Vol. 2:* ***370-371,***

However, as meticulously set forth in POOLE's separate statement in opposition to Defendants' MSJ, (*fact # 92-104, Appx., Vol. 2; 333-336*), POOLE credibly challenged and got beyond the "the four corners" of SAHARA's purportedly "passing" CPO inspection check list via POOLES's retained expert. POOLE demonstrated the existence of genuine issues of material fact as to why the vehicle was ***not*** of CPO standard, quality or grade, and that SAHARA made a false representation as to the vehicle being Dodge CPO certified. *Sep. Stmt. # 100-103, Appx., 335; Decl. of Avillini* ***¶¶ 14-20,*** *Appx., Vol. 2:* ***292-296.***

To support SAHARA's nugatory contention, it regurgitates the same arguments that were previously raised and ***rejected*** by the trial court in *denying* SAHARA's motion to strike POOLE's expert declaration submitted in support of POOLE's opposition to SAHARA's MSJ. *See Appx., Vol. 4,*

866-868**, order **denying** SAHARA's motion, and Appx., Vol. 5, 1055: **16-21**, transcript of hearings.* This issue is ***not addressable in the instant appeal because SAHARA never filed a cross-appeal challenging the trial court's *denial* of SAHARA's motion and assigning it as error. *Sierra Creek Ranch, Inc. v. J.I. Case*, 97 Nev. 457, 460, 634 P. 2d 458, 460 (1981) [failure to file a cross-appeal will result in the appellate court lacking jurisdiction over an issue or contention advanced by respondent to challenge appealed-from order].

SAHARA is ***entirely foreclosed*** in the instant appeal from raising any issues that POOLE's expert declaration was not admissible, or that it lacked the requisite foundation and/or that it should not have been considered by the trial court as being "self-serving," because the Court ruled that it was in fact admissible because the Court *denied* SAHARA's motion to strike it. [6]

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[6] Indeed, that the trial court was *required* to consider POOLE's expert declaration in opposition to SAHARA's MSJ provides the basis for one of the errors assigned by POOLE in the instant appeal with respect to the Court dismissing POOLE's statutory claims for:

> Representing that goods for sale are of a particular standard, quality or grade ***if he knows or should know that they are of another standard, quality, grade***, style or model, and;
>
> Making a false representation as to the source, sponsorship, approval or ***certification*** of goods for sale.

See issue 2(C) and (D) under POOLE's issues for review in his opening brief.

Notwithstanding *Sierra Creek*, *id,* SAHARA circuitously attempts to resurrect an issue it is foreclosed from arguing on appeal, by ***falsely stating*** "the motion to strike was *deemed moot* <u>*after*</u> the grant of summary judgment." *AB:8, fn.5.* ***This is demonstrably false***. SAHARA's motion to strike was ***denied.*** It was not deemed or rendered "moot" in any way, and to suggest or state otherwise misrepresents the Court's Order. *See Appx., Vol. 4, 866-868, order* ***denying*** *SAHARA's motion, and Appx., Vol. 5, 1055;****16-21***, transcript of hearings.

Third, SAHARA contends that " ... [POOLE] did <u>*not*</u> inquire further as to the accident and only made his own assumptions..." *AB:21.* Notwithstanding that under the NDTPA, vis-à-vis NRS 598.0923(2), that it was statutorily incumbent on SAHARA to affirmatively disclose ***all known material facts*** to POOLE involving the CPO vehicle (which would have included the ACE), SAHARA's contention is bewildering given what POOLE set forth in his separate statement via his declaration. Prior to signing the purchase documents, POOLE and SAHARA's salesperson, Travis Spruell, took the vehicle on a test drive. During the test drive, Mr. Spruell told POOLE that the vehicle was in a previous "minor" accident. *Sep. Stmt. # 61, Vol. 2, Appx. 326; Decl. of POOLE ¶ 2, Vol 2, Appx. 282.*

In response, POOLE ***specifically inquired*** about the pre-purchase collision after he was told by Mr. Spruell that it was only a "minor" accident. Mr. Spruell again reiterated that it was only a "minor" accident, that the

vehicle had passed SAHARA's 125 point comprehensive inspection which is given to all CPO vehicles, and that if the vehicle had been in a significant accident, SAHARA would not be selling the vehicle to him. *Sep. Stmt. # 61, Vol. 2, Appx., 326; Decl. of POOLE ¶ 2, Appx., Vol. 2: 282.* [7]

Fourth, SAHARA contends that "POOLE … thoroughly fail[ed] to identify any misrepresentation that would fall into [*sic*] his allegations that [SAHARA made a false representation in a transaction"]. *AB:31.* SAHARA's contention is perplexing given POOLE's separate statement and his declaration submitted in opposition to SAHARA's MSJ vis-à-vis what Mr. Spruell's representation that the pre-purchase collision was just "minor" and/or was otherwise insignificant. *Id.*

The issue of whether the representation to POOLE was "false" with respect to the pre-purchase collision being only "minor" in nature and/or otherwise not significant, when compared to a four corners reading of the information reflected in the ACE, (*Appx. Vol. 2:* ***361-386***), (information that was in SAHARA's actual possession at time of sale), is a question of fact for

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[7] This is another assignment of error by POOLE. The Court found in its order granting SAHARA's MSJ that the POOLE made no inquiry about the accident. *MSJ Order, Appx., Vol. 4; 846:****24-26.*** It should also be noted that the conversation with Spruell went ***entirely unchallenged*** by SAHARA. SAHARA did ***not*** submit any countervailing evidence whatsoever, such as a declaration from Mr. Spruell, to dispute POOLE's version of events and what was represented to him.

the jury to determine. Indeed, after POOLE made the inquiry after being informed of the purported "minor" nature of the pre-purchase collision, SAHARA essentially allayed POOLE's concerns ***by misleading him*** about the nature and extent of the pre-purchase collision. *See Decl. of POOLE ¶¶ 4-6, Appx., Vol. 2:* ***283-284****; Sep. Stmt. # 64-66 and 107, Appx., Vol. 2:* ***327 and 336****; ACE; Vol. 2, Appx.* ***361-368***.

Furthermore, and perhaps most compelling was the fact that the ACE was a private party insurance document. POOLE had no way of obtaining the ACE on the date of sale, and it was incumbent upon SAHARA to disclose it, which segues into the next issue.

II De novo review with respect to the remedial nature and the liberal interpretation that should be afforded to the NDTPA is wholly germane and ripe to this appeal

A. Statutory interpretation of the NDTPA, as a whole, and specifically with respect to NRS 598.0923(2), was *raised* at the trial level

SAHARA contends "POOLE did ***not actually present <u>any argument</u>*** 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." *AB:1.* Again, SAHARA's contention is astounding given POOLE squarely addressed this exact issue in his opposition to SAHARA's MSJ. Not only was there a separate heading for this issue, but POOLE's opposition to SAHARA's MSJ, began, in pertinent part:

> ***The NDTPA via NRS 598.0923(2) drastically modified existing common law,*** *see fn. 7 infra.* ***Indeed, the NDTPA and NRS 598.0923(2) changed the entire landscape with respect to a fraud claim based on non-disclosure and/or omission in consumer sale transactions ...*** [8]

SAHARA's argument to this Court that POOLE never asserted the issue of statutory interpretation of the NDTPA and NRS 598.0923(2) at the trial level, and that it was raised for the first time in the instant appeal is demonstrably false. Contrary to SAHARA's contention, statutory interpretation is ripe for review and goes to the heart of the errors POOLE has assigned in this case vis-à-vis the grant of SAHARA's MSJ.

B. The Court's order granting SAHARA's MSJ reflects and misapplies a restrictive/narrow interpretation of the scope of the affirmative statutory disclosure obligations required under NRS 598.0923(2)

NRS 598.0923(2) states in pertinent part:

> A person engages in a "deceptive trade practice" when in the course of his or her business or occupation he or she knowingly:
>
> ***Fails to disclose a material fact in connection with the sale of ... goods ...***

The order granting MSJ stated in part:

> NRS 598.0923[(2)] only requires the disclosure of material facts. Here, the material fact is that the vehicle was in a prior accident. The duty to disclose under NRS 598.0923[(2)] ***does not extend to the entire effect of the accident, such as price breakdown of every part and service provided as listed in the ACE..."*** [9]

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[8] POOLE's Opp. to MSJ, *Appx., Vol. 2: 244-246.*

[9] *Appx. Vol. 4; 846:* ***20-24***

As a threshold matter, under NRS 598.0923(2), SAHARA is only required to disclose material facts it actually knows or reasonably should know about. This is implicit in the statute. Conversely, NRS 598.0923(2) cannot be interpreted to require disclosure of only "some" or "most" material facts, as SAHARA implies in its brief. Not only would such an interpretation be patently absurd, but it would defeat the entire underlying objective of the statute.

NRS 598.0923(2), along with the NDTPA, is a ***remedial statute*** that is to be applied expansively and ***liberally construed*** to effectuate the Legislature's objective. *See fn. 10 in OB and pp. 14-20 generally.* It was initially created, and then continuously expanded, to maintain a robust statutory scheme imbuing a broad and expansive range of purely statutory claims for "consumer fraud" to enable consumers to avail themselves of more extensive remedies in ***consumer-merchant sales transactions*** – claims and remedies that would otherwise not be actionable under a traditional common law fraud claim or otherwise too difficult to prove. *Id, and fn. 11 in OB.* [10]

[10] Other than falsely contending that POOLE never raised the issue of statutory interpretation at the trial level, SAHARA ***completely avoids*** any discussion of this operative issue in its answering brief.

SAHARA contends that POOLE is seeking to impose an "impracticably high burden of disclosure on … auto dealerships" *AB:11*. Rather, quite the opposite is true. POOLE is only seeking to require SAHARA to comply with its duty of disclosure under ***existing*** Nevada law. That existing law would either be based on common law fraud or *statutory consumer fraud* under NRS 41.600(2)(e) and the NDTPA.

It is noteworthy to point out that POOLE deliberately did not plead a claim of common law fraud based on omission. This was because of its rigorous duty requirements relating to affirmative disclosure that do ***not*** apply under a statutory claim for consumer fraud under NRS 598.0923(2). *See OB: footnote 12 and pp. 20-23.* Notwithstanding, as set forth in POOLE'S OB at page 33, if SAHARA was under an obligation to disclose the ACE to POOLE under the more stringent disclosure requirements of common law fraud by omission, then there were most certainly triable issues with respect to SAHARA's disclosure obligations involving the ACE under the much more liberal and expansive disclosure obligations under NRS 598.0923(2). *Case law is clear on this.* [11]

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[11] See *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 774 (Sprm. Ct. Mo. 2007) [***holding that a finding that Defendant's failure to disclose a material fact based on common law fraud claim also established that Defendant failed to disclose a material fact for purposes of statutory deceptive trade practices claim based on the same evidence***]; *Hanson-Suminski v. Rohrman Midwest Motors, Inc.*, 386 Ill. App. 3d 585, 596, 898 N.E. 2d 194, 205 (2008) [***holding generally, that if there is a showing of common-***

POOLE is ***not*** contending that the material non-disclosure in this case involved SAHARA's failure to disclose that the vehicle was in a pre-purchase accident. Indeed, a previous collision would be in all likelihood a material fact concerning the purchase of a CPO vehicle, which was disclosed to POOLE. Neither side disputes this.

Rather, what POOLE is contending is that under NRS 598.0923(2), merely disclosing that his CPO vehicle was in a previous "collision/accident" was ***not*** adequate disclosure given SAHARA had ***specific, particularized and actual knowledge*** regarding the *nature of, extent of, and the cost of repair for the damage* that was sustained to POOLE's CPO vehicle as a result of the pre-purchase collision – information that was ***not*** reasonably discoverable by POOLE because the ACE was in SAHARA's exclusive possession at the time of sale.

A material fact is a fact, or set of facts, or information, ***known to the seller,*** that a reasonable consumer would find important in making a

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law fraud involving a misrepresentation or omission, it also results in a showing of statutory consumer-fraud based on the same evidence]; *Canady v. Mann,* 107 N.C. App. 252, 260, 419 S.E. 2d 597, 602 (1992) [***holding proof of common law fraud necessarily constitutes a violation of the North Carolina Deceptive Trade Practices Act covering the same conduct***]; *Bond Leather Co. v. Q.T. Shoe Mfg. Co.,* 764 F.2d 928, 937 (1st Cir. 1985; Mass law) [***holding that if there was a material representation by Defendant which would have constituted common law fraud, then the district court's finding on the common law misrepresentation claim would also support the statutory deceptive trade practices claim on the same facts***].

decision in going forward with the transaction. *OB: fn. 13 case citations.* Obviously, what constitutes a "material" (important) fact or information depends on the nature and type of the transaction at issue. However, SAHARA contends that POOLE is conflating the terms "material" and "important." SAHARA argues that a "material" fact, as used in NRS 598.0923(2), and an "important" fact are "legally" ***not*** the same thing vis-à-vis a claim of misrepresentation by omission. *AB: 13.* SAHARA is simply wrong.[12]

Furthermore, as the Court held in *Powers II,* "***materiality is generally a question of fact***, ***and only where reasonable minds cannot differ may the issue be resolved as a matter of law."*** *Powers II, Id.* "**[I]t is *only in the rarest of cases*** [involving deception] ***that the materiality issue can be taken from the jury***." *Powers I*, *Id.*

Contrary to SAHARA's argument, POOLE is not seeking to require a dealer to "know [] each and every repaired bolt or penny spent to repair [a] vehicle ..." *AB:13.* POOLE is not contending that SAHARA is required to

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[12] ***Restatement of Torts (Second) § 538(2)(a) (1981) ("<u>the matter is material</u> if ... a reasonable person would <u>attach importance</u> to its existence <u>or non-existence</u> in determining his choice of action in the transaction in question").*** See also case citations in fn. 13 in opening brief. See also See *Powers v. United Services Auto. Ass'n,* 114 Nev. 690, 698, 962 P.2d 596, 601 (1998) ("*Powers I*"), modified on other grounds, 115 Nev. 38, 979 P.2d 1286 (1999) ("*Powers II*") cited in opening brief. [***holding that "a fact is material if "a reasonable person would attach importance to that fact."]***

actually know this type of "granular" information involving their used vehicle inventory. Far from it. Rather, the issue is simple. If a ***single fact***, or set of facts or information, was "material" in nature, there was an affirmative statutory obligation on SAHARA to disclose ***all*** known material facts to the POOLE involving the pre-purchase collision to the CPO vehicle.[13] *See case citations in fn. 13 in OB*

A reasonable consumer, (especially one who is about to sign a purchase contract involving a CPO vehicle), does ***not*** look at or review a vehicle collision repair estimate in a vacuum or in isolation. Rather, consumers review a collision repair estimate in a gestalt manner.[14] Put another way, consumers review and look at a vehicle collision repair estimate ***as an aggregate,*** and the information reflected in the ACE, ***taken as a whole***, would have been material to a buyer in a Dodge CPO vehicle sales transaction. Some individual items or information may be more important than others, but ***taken as a whole,*** the information in the ACE reflected the following information -- almost **$4,100.00** in previous damage was

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[13] And in this case, both POOLE and SAHARA's managers and sales staff have testified that the ACE and the information it contains would be important to disclose to a prospective buyer involving a CPO vehicle.

[14] Gestalt -- something that is made of many parts and yet is somehow more than the combination of its parts.

caused to POOLE's CPO vehicle, that included, but was not limited to the following:

- A repainted left front fender.
- A replaced/reconditioned front bumper.
- A replaced right front bumper bracket.
- A repaired left front frame end bracket.
- A replaced radiator support.
- A replaced left outer tie rod.
- A replaced left inner tie rod.
- A replaced aftermarket left stabilizer link.
- A repaired/replaced left wheel. [15]

Indeed, it could very well be that a consumer could key in on one or two the above items disclosed in the ACE, and that may very well be enough – such as almost $4,100.00 in prior damage. Irrespective, taken as a whole, the information in the ACE was material to a reasonable consumer purchasing a CPO vehicle, and it was error for the trial court to have decided the issue of materiality on summary judgment, as a matter of law.

C. The term "knowingly" as used in the NDTPA and in NRS 598.0923(2), does not involve any scienter element, or an intent to mislead or to deceive, or to otherwise even require "knowledge" that one is violating the law

SAHARA next contends that the term "knowingly," as used in the NDTPA, involves a "state of mind" element requiring some sort of "intent" to deceive or other scienter to be liable under the NDTPA. *AB:26.* SAHARA's contention is erroneous. SAHARA continues to propagate the narrative that *statutory deceptive trade practices* under Chapter 598 are essentially "the

[15] ACE; Appx., Vol. 2: **362-363.**

same" as a claim for common law fraud. SAHARA cites authorities dealing only with common law fraud, as if the NDTPA is a mere "codification" of common law fraud. It is not. This was thoroughly covered in POOLE's *OB: 8-9 and 14-20*.

Unlike a claim based on common law fraud, in a statutory deceptive trade practices claim under the NDTPA, there is no element of scienter under the "knowingly" standard. *See infra*. There is no intent to mislead, deceive or to defraud under a "knowingly" standard under the NDTPA. *See infra*. In fact, the term "knowingly" with respect to engaging in statutory deceptive trade practices does ***not*** even equate to an "intent" to violate the statute, nor does it require that the Defendant even "know" it was violating the statute. *See infra*. All that is required is the Defendant acted in a way that violated the statute. *See infra*.

In other words, the prohibited conduct or activities must be volitional and undertaken freely in that Defendant voluntarily intended to do the acts performed. *See infra*. This is a low threshold, but it is ***not*** strict liability. "Knowingly" still requires a "general intent" similar to that in criminal law to be found liable for a statutory claim under the NDTPA, ***and herein lies the most glaring distinction between a claim based upon common law fraud, and one based on statutory consumer fraud/deceptive trade practices.*** *See infra*.

Although the term "knowingly" is referred to throughout the NDTPA to trigger liability under many of its provisions, it is not defined within the NDTPA. However, there are other Nevada statutes that use and define the term "knowingly" which can be borrowed from, and would equally apply and be appropriate in the context of finding a violation of the NDTPA. Notably, all of them have the same definition:

> "Knowingly" imports a knowledge that the facts exist which constitute the act or omission, and does NOT require knowledge of the prohibition against the act or omission. ***Knowledge of any particular fact may be inferred from the knowledge of such other facts as should put an ordinarily prudent person upon inquiry.***[16]

Unless the applicable statute expressly incorporates an "intent" element, a violation based on a "knowingly" standard only requires a state of mind similar to the "general intent" criminal law to be found liable under the NDTPA. [17]

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[16] See NRS 624.024, NRS 281A.115, NRS 193.017 and NRS 208.055. Notably, it is this definition of "knowingly" that also equally applies to general intent crimes in Nevada (e.g., NRS 193.017) to show culpability with respect to the commission of a crime, ***and is the same "knowingly" standard governing violations by a general contractor under Chapter 624.*** *See NRS 624.024.*

[17] It should be noted that while most of the enumerated statutory violations in the NDTPA are governed by a "knowingly" standard, there are four (4) provisions that have ***both*** a "knowingly" *and* an express "intent" element within their provisions (*see* NRS 482.0915(9), (10), (11) and 598.0917), ***but none of these sections are at issue in this case***. This clearly indicates that the Legislature knew how to add an "intent" element if it wished to do so depending on the violation. Under the doctrine of *expressio unius est exclusio alterius*, the absence of the word "intent" in the

In addition to those case citations set forth in footnote 19 there are some particularly instructive cases that further illustrate this point. In *Einhorn v. Ford Motor Company*, 548 N.E. 2d. 933, 935 (1990), the Ohio Supreme Court held that to establish a "knowing" violation with respect to the *Ohio Sales Practice Act* ("OSPA"), a plaintiff only need to demonstrate that the defendant acted in a manner that violated the statute, and need ***not*** prove that the defendant actually "knew" that his conduct violated the statute. This is consistent with the same definition of "knowingly" that is found in the NDTPA as well as in the other aforementioned NRS sections, *supra*.

In *Charvat v. Ryan*, 400, 879 N.E. 2d 765, 771 (2007) the Ohio Supreme Court further delineated what the term "knowingly" means in the context of the OSPA and the Telephone Consumer Protection Act. It held:

> The term "knowingly" ... is not defined... [C]ourts have often defined the term in criminal cases. In Bryan v. United States (1998), 524 U.S. 184, 118 S.Ct. 1939, 141 L.Ed.2d 197, the United States Supreme Court explained that ***'knowingly' does not necessarily have any reference to a culpable state of mind or to knowledge of the law ...*** Thus, unless the text of the statute dictates a different result, ***the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense." ...*** United States v. Cohen (C.A.2, 2001), 260 F. 3d 68, 76 (***it matters only that defendant***

NDTPA provisions POOLE claims were violated, demonstrate that intent ***is not an element of the operative violations***. See *S. Nev. Homebuilders Ass'n v. Clark Cty.,* 121 Nev. 446, 451, (2005) [***holding courts must not infer additional statutory requirements into a statute because "it is not the business of this court" to correct what may be legislative omissions from statutory language***].

knowingly committed the deeds forbidden by statute, not that he intended to violate the statute)…

Another germane and instructive case is *State ex rel. Horne v. AutoZone, Inc.,* 227 Ariz. 471, 477–78, 258 P.3d 289, 295–96 (Ct. App. 2011), *vacated in part,* 229 Ariz. 358, 275 P.3d 1278 (2012). The *Horne* Court, in interpreting Arizona's Consumer Fraud Act ("CFA") held:

> We explained in [*State ex rel. Babbitt v. Goodyear Tire & Rubber Co.,* 128 Ariz. 483, 626 P.2d 1115 (Ct. App. 1981)] the CFA's act clause only required a showing of "an intent to do the act involved.... [We held]
>
> In light of the purpose of the [CFA], which is to protect the public from deceptive acts, ***we hold that the only showing of intent required by A.R.S. § 44–1522 is an intent to do the act involved. It is not necessary to show a specific intent to deceive.***
>
> **The *'intent to do the act involved' standard," [] is analogous to the criminal law concept of "general intent."*** General intent crimes only require proof the actor intended to do the act preformed.. *State v. Greenawalt,* 128 Ariz. 388, 394, 626 P.2d 118, 124 (1981) … ***[The] "intent to do the act involved" is not a very high standard. Indeed, Arizona courts recognized that in "crimes of general intent, the party is presumed to have the requisite criminal intent from the commission of the crime itself."*** *[citations omitted]* …
>
> We recognize that [] the CFA "is designed to root out and eliminate 'unlawful practices' in merchant-consumer transactions," … and the ***CFA's cause of action for consumer fraud is considerably different from a common-law fraud claim*** … *Cearley v. Wieser,* 151 Ariz. 293, 295, 727 P.2d 346, 348 (App.1986) (***CFA broader in scope than common-law fraud***); *Peery v. Hansen,* 120 Ariz. 266, 269, 585 P. 2d 574, 577 (App. 1978) (violation of the CFA is ***"more easily shown" than common-law fraud***) …

> … We reaffirm the formulation of intent we first described in *Goodyear*.

Associated Inv. Co. P'ship v. Williams Assocs. IV, 230 Conn. 148, 158–59, 645 A.2d 505, 510 (Conn. Sprm. Ct. 1994) is also instructive to this point. The *Associated* Court, in interpreting the Connecticut Unfair Trade Practices Act ("CUTPA"), explained:

> In addition to establishing a standard of conduct more flexible than traditional common law claims, the expansive language of CUTPA prohibits unfair or deceptive trade practices ***without requiring proof of intent to deceive, to defraud or to mislead.*** See, *Hinchliffe v. American Motors Corp., supra*, 184 Conn. at 617, 440 A.2d 810 (***CUTPA proscribes broader range of conduct than common law action for innocent misrepresentation***)… ***Because CUTPA removes these common law obstacles to recovery;*** * 159 *Hinchliffe,* ***the private cause of action created by CUTPA reaches conduct well beyond that proscribed by any common law analogue.***

Equally important to note is that there is a ***conspicuous absence*** in the overwhelmingly vast majority of the provisions found in the NDTPA (NRS Chapter 598) with respect to any "intent" on the part of the Defendant being an element of proof to show a violation. This conspicuous omission of any such "intent" language is not by accident, but rather by design. *See fn. 17, supra.* Furthermore, the majority of jurisdictions that have addressed this exact issue involving their state statutory consumer fraud or deceptive trade practices acts have held that intent is ***not*** an element of proof in a

statutory consumer fraud claim, ***unless*** the applicable statute expressly states that intent is an element. [18]

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[18] *See* **Alaska** *State v. O'Neill Investigations, Inc.,* 609 P.2d 520, 535 (Alaska Sprm. Ct. 1980) [*holding intent to deceive by Defendant is* ***not*** *an element under the Alaska Unfair Trade Practices Act*]; **Arizona** *(State ex rel. Horne v. AutoZone, Inc.,* 258 P.3d 289, 295–96 (Ct. App. 2011) *[holding intent to deceive by Defendant is* ***not*** *a required showing under Arizona's Consumer Fraud Act*]; **Connecticut** *Associated Inv. Co. P'ship v. Williams Assocs. IV,* 230 Conn. 148, 158–59, 645 A.2d 505, 510 (Conn. Sprm. Ct. 1994) [holding *proof of intent to deceive, to defraud or to mislead by Defendant* ***not required*** *under Conn. Decp. Trade Prac. Act*]; **District of Columbia** *Saucier v. Countrywide Home Loans*, 64 A.3d 428, 442 (D.C. App. 2013) [*holding that D.C. Consumer Protection Act must "be construed and applied liberally to promote its purpose … proof of an intent to deceive is* ***not required*** *involving either an affirmative misrepresentation or a failure to disclose a material fact*]; **Georgia** *Marrale v. Gwinnett Place Ford,* 271 Ga. App. 303, 309, 609 S.E.2d 659, 665 (2005) [*holding that under Georgia's Fair Business Practices Act that involves unfair or deceptive acts or practices in the conduct of consumer transactions the intent to deceive or to defraud by Defendant is* ***not required***]; **Idaho** *State ex rel. Kidwell v. Master Distributors, Inc.,* 615 P.2d 116, 122–23 (1980) [*holding proof of intent to deceive by Defendant under Idaho Consumer Protection Act is* ***not required*** *for finding that an act is unfair or deceptive*]; **Illinois** *Roche v. Fireside Chrysler-Plymouth, Mazda, Inc., 235* Ill. App.3d 70, 84, 600 N.E.2d 1218, 1227 (1992) [*holding an intent to deceive by Defendant is* ***not required*** *under Illinois Consumer Fraud Act*]; **Kansas** *Moore v. Bird Eng'g Co., P.A.,* 41 P.3d 755, 762-763 (Kan. Sprm. Ct. 2002) [*holding Kansas Consumer Protection Act is to be construed liberally to streamline the law of consumer transactions and to protect consumers from unscrupulous suppliers, and an intent to deceive by Defendant is* ***not required*** *under the "knowingly or with reason to know" violations*]*;* **Maine** *MacCormack v. Brower,* 948 A.2d 1259, 1261 (Me. Sprm. Ct .2008) [*holding intent to deceive by Defendant is* ***not required*** *under Maine's Unfair Trade Practices Act*]; **Massachusetts** *Aspinall v. Philip Morris Companies, Inc.,* 813 N.E.2d 476, 486 (2004) [*holding under Mass. Unfair Practices Act intent to deceive by Defendant is* ***not required***]; **Minnesota** *Church of the Nativity of Our Lord v. Wat Pro, Inc.,* 474 N.W.2d 605, 612 (Minn. Ct. App. 1991) [*holding that under Minnesota Consumer Fraud Act an intent to deceive by Defendant is* ***not required*** *as the Act covers unintentional and negligent misrepresentations*]; **Missouri** *Edmonds v. Hough,* 344 S.W.3d 219, 223

(Mo. Ct. App. 2011) [*holding intent to deceive by Defendant under Missouri Merchandising Practices Act is* ***not required*** *for the statutory claim*]; **New Hampshire** *Kowalski v. Cedars of Portsmouth Condo. Ass'n*, 769 A.2d 344, 349 (N.H. Sprm. Ct. 2001) [*holding under N.H. Consumer Protection Act an intent to deceive by Defendant is* ***not a required*** *element*]; **New Jersey** *Gennari v. Weichert Co. Realtors,* 148 N.J. 582, 605, 691 A.2d 350, 365 (Sprm. Ct. 1997) [*holding that under N.J. Consumer Fraud Act an intent to deceive by Defendant is* ***not required*** *when an affirmative misrepresentation is at issue*]; **New Mexico** *Richardson Ford Sales, Inc. v. Johnson*, 676 P.2d 1344, 1347 (N.M. App. 1984) [*holding an intent to deceive by Defendant under N.M. Unfair Practices act is* ***not required***]; **North Carolina** *Torrance v. AS & L Motors, Ltd.,* 459 S.E.2d 67, 70 (N.C. App. 1995) [*holding an intent to deceive by Defendant under S.C. Deceptive Trade Practices act is* ***not required***]; **Ohio** *Rose v. Zaring Homes, Inc.,* 122 Ohio App.3d 739, 745, 702 N.E.2d 952, 956 (1997) [*holding intent to deceive by Defendant is* ***not required*** *for a violation of the deceptive-practices portion of the Ohio Consumer Sales Practices Act*]; **South Carolina** *Young v. Century Lincoln-Mercury, Inc.,* 302 S.C. 320, 326, 396 S.E.2d 105, 108 (Ct. App. 1989), *mod. on other grnds,,* 309 S.C. 263, 422 S.E.2d 103 (1992) [*holding that under S.C. Unfair Practices Act an intent to deceive by Defendant is* ***not required***]; **Tennessee** *Smith v. Scott Lewis Chevrolet, Inc.,* 843 S.W.2d 9, 13 (Tenn. Ct. App. 1992) [holding that the Tennessee Consumer Protection Act is not constrained to intentional acts, rather it also contemplates negligent conduct]; **Texas** *Miller v. Keyser*, 90 S.W.3d 712, 716 (Sprm. Ct. Tex. 2002) [*holding that under Texas Deceptive Trade Practice Act Defendant may be held liable even if he did not know that his representations were false* ***or even if he did not intend to deceive*** *as misrepresentations which do not necessarily constitute common law fraud may still be actionable under the DTPA*]; **Vermont** *Inkel v. Pride Chevrolet-Pontiac, Inc.,* 183 Vt. 144, 151, 945 A.2d 855, 859 (Sprm. Ct. 2008) [*holding intent to deceive or mislead by Defendant* ***not required*** *under Vermont Consumer Fraud Act*]; **Washington** *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.,* 162 Wash.2d 59, 73, 170 P.3d 10, 18 (Sprm. Ct. 2007) [*holding an intent to deceive by Defendant is* ***not required*** *under Washington Consumer Protection Act*].

III. POOLE was damaged and/or suffered other monetary or other pecuniary loss as a result of SAHARA's deceptive trade practices

POOLE will rest on his opening brief.

IV. POOLE is entitled to the equitable and declaratory relief he alleged in his amended complaint pursuant to NRS 41.600(3)(b)

POOLE will rest on his opening brief.

V. POOLE was statutorily authorized and entitled to bring in the bond company (COREPOINT) as a direct party defendant under NRS 482.345(7).

POOLE will rest on his opening brief

VI. Conclusion

Based on the aforementioned, the Court's order granting summary judgment in favor of SAHARA and COREPOINT should be vacated and remanded for trial on all of POOLE's claims for relief as alleged in his amended complaint.

Dated this 14th day of October, 2018

By */s/ George O. West III*
George O. West III
Law Offices of George O. West III
Consumer Attorneys Against Auto Fraud

Law Offices of Craig B. Friedberg, Esq.
Craig B. Friedberg, Esq.

Attorneys for Appellant
DERRICK POOLE

CERTIFICATE OF COMPLIANCE

1. We hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP32(a)(5)and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2011 in 14-point Georgia font.

2. We further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is:

[X] proportionally spaced, has a typeface of 14 points or more and contains 6,997 words.

3. Finally, we hereby certify that we have read this brief, and to the best of our knowledge, information and belief, it is not frivolous or interposed for any improper purpose. We further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP28(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, we understand that we 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. 16 This number excludes Appellant's counsel's signature page which identifies counsel and their address on page 26.

Dated this 14th day of October, 2014.

By */s/ George O. West III*
George O. West III
Law Offices of George O. West III
Consumer Attorneys Against Auto Fraud
10161 Park Run Drive, Suite 150
Las Vegas, NV 89145
Attorney for Appellant
DERRICK POOLE

PROOF OF SERVICE

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

On October 14, 2018, I e-served the forgoing document(s) described as 1) **APPELLANT'S REPLY BRIEF** on interested party(ies) in this action via the Supreme Court's E-flex electronic filing and service system

JEFF BENDAVID, ESQ
Moran, Brandon, Bendavid, Moran
630 South Fourth Street
Las Vegas, NV 89101
j.bendavid@moranlawfirm.com

/s/ George O. West III
GEORGE O. WEST III