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' PETITION FOR REVIEW

COMES NOW NEVADA AUTO DEALERSHIP INVESTMENTS and COREPOINTE INSURANCE CO., through their counsel of record, JEFFERY A. BENDAVID, ESQ, of BENDAVID LAW and hereby files this Petition for Review pursuant to Nevada Rules of Appellate Procedure 40B. This Petition is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this October 7, 2019

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I. QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in creating new definitions for "material fact" and "knowingly" within in the Nevada Deceptive Trade Practices Act, codified at NRS 598 et seq.?

2. Did the Court of Appeals err in deciding there were genuine issues of material fact in dispute, pursuant to their application of new definitions?

3. Did the Court of Appeals err neglecting to address or observe the fact that Appellant Derrick Poole did not actually suffer any compensable damages or injury?

II. RATIONALE FOR REVIEW

Pursuant to Nevada Rule of Appellate Procedure 40B(a)(1), 40B(a)(2) and 40B(a)(3), the Supreme Court may consider whether the question presented is one of first impression of general statewide significance, whether a decision conflicts with prior decisions, or additionally, the Supreme Court may consider that the case involves fundamental issues of statewide public importance.

Here, the Nevada Court of Appeals ("Appeals Court"), issued a decision[1] that specifically provided new and specific definitions of the term "knowingly", and "material fact" to present a stronger presumption against a business, essentially rendering the omission and/or representation to be a "knowingly" fraudulent act

[1] Decision attached hereto.

even if it may sound only in negligence, for the Nevada Deceptive Trade Practices Act ("NDTPA"). Specifically, the Appeals Court noted that the Nevada Supreme Court, nor the District Court in making its order, has addressed the terms "knowingly" or "material" with respect to the NDTPA. *See Decision*, p. 5. Accordingly, the issuance of a definition was one of first impression, and one that materially impacts the interpretation and application of the NDTPA for all consumers and businesses engaged in trade practices throughout the State of Nevada.

Additionally, the Appeals Court's application of its new definitions to the facts at hand, involved misstated or assumed "facts" where there were none, and did not take into consideration undisputed facts. Specifically, such as the lack of damages suffered by the Appellant, and the failure of Appellant to make any true inquiry despite being put on notice of potential additional facts, factors which are considered in more common law fraud claims, and which should be reviewed by the Supreme Court in this instance, and both of which materially changed the disposition of the matter at the trial court level, in conflict with Nev. R. Civ. P. 56. Further interpretation and clarification of NRS 598 et seq., causes of action brought pursuant to the NDTPA, and the requisites of such claims, are of fundamental statewide importance, as it impacts all potential consumer fraud actions, and will place a new overly strict standard on all sales entities and

purveyors of goods. In particular, the Appeals Court's interpretation of the definitions within the NDTPA and their particular application, are of fundamental importance to consumers and sales representatives, not just vehicle dealerships throughout Nevada.

III. LEGAL ARGUMENT

A. RELEVANT FACTS AND PROCEDURAL HISTORY

Appellant purchased a used vehicle from Respondent, which had been in a prior minor accident, and was fully repaired by Allstate Insurance, through a licensed autobody shop in Las Vegas, Nevada, and as estimated in the Allstate Collision Estimate ("ACE"). *Joint Appendix ("JA")*, vol.1 091-098. Respondent fully disclosed the fact that there was a prior accident, prior to Appellant's purchase, which Appellant admitted in his sworn testimony. *JA*, *Id. at* 100-101, 122. In fact, Appellant from the time he purchased the used vehicle in May 2014, through the time of the November 2017 summary judgment, never had any issues with his car and proceeded to put thousands of miles of uninterrupted wear and tear on it. *JA*, 122, vol. 2, 164. It was undisputed that Appellant continued to happily drive his vehicle for more than three (3) years, through the pendency of litigation without a single repair, service, or warranty issue. *Id.*, *See also*, 125, 127. It was also undisputed that Appellant admits he was informed, both verbally during the test-drive and in writing, that the subject vehicle had been in an accident prior to

his purchase, and it is undisputed that Appellant has not actually suffered any damages. *See Id.*

Appellant's argument, which failed in summary judgment, that he essentially overpaid for a vehicle that should not have been certified because it had been in a prior collision, failed at the District Court level, because that is not the true case based on the actual admissible evidence and facts. The District Court in rendering summary judgment, found that Appellant did not actually create genuine issue of material fact, and that as a matter of law, the only truly salient material fact is that the vehicle had been in a prior collision. The Respondent did disclose this fact, which Appellant concedes. In fact, Appellant was informed twice verbally of this prior collision, once during his test drive and once before he signed the agreement to purchase his car. Then, Appellant also was informed of this prior collision as part of the Carfax report he received prior to his purchase, which also informed him that no frame damage was found on the car as a result of the prior accident.

In surveying the record, the Appeals Court neglected to consider Appellant's shifting arguments, the self-serving nature of his purported expert, and the actual testimony of Appellant. Testimony, in which, Appellant admitted that he knowingly purchased his car after being informed that it had been in a previous collision. Testimony, in which, Appellant, also admitted that he attempted to refinance the loan on his car through his insurance carrier and that his insurance

carrier refused because "someone" at State Farm thought they had seen on the "Internet" that Appellant's car allegedly had frame damage, which Appellant could not verify or provided even the slightest gossamer of evidence demonstrating such "frame damage." In fact, Appellant testified that he had no evidence of any such "Internet report," could not remember who at State Farm he spoke to, and could not produce any report identifying any frame damage to the car.

In reality, Appellant suffered no cognizable harm, he only set forth hypothetical "theories" of potential harm, which do not constitute actual harm, namely that his car had suffered frame damage prior to his purchase. A theory and set of allegations that is completely wrong and not supported in any way by Appellant with actual evidence. Actual evidence that indisputably established that Appellant was informed at least twice that his car was in a prior accident, once verbally and once as part of the Carfax report. Appellant also received a full warranty because the vehicle was certified, which unequivocally proved that no frame damage occurred previously to his car.

Nonetheless, the Court of Appeals reversed and remanded on the basis that it found there were "material" facts in dispute, namely that there was frame damage to Appellant's car, and that Respondent acted "knowingly," pursuant to the Appeals Court's interpretation of their new definitions, and reversed and remanded the matter. The Court of Appeals erred in such regard because the undisputed facts

demonstrated that no such frame damage occurred or even existed despite Appellant's opportunity to provide any evidence to the contrary. In other words, Appellant received exactly what he agreed to purchase – a certified pre-owned car involved in a prior accident whose prior history was fully disclosed to him verbally and in writing prior to his purchase. In fact, Appellant received the full value of his bargain, a certified pre-owned car with a full warranty with absolutely no issues occurring, never one, from his use, which has been more than three (3) years from his May 2014 purchase and for thousands of miles.

B. LEGAL ANALYSIS

1. The Appeals Court Erred in Creating an Overbroad Standard for Sales Entities within Nevada.

The Appeals Court finds that they should apply both an objective and subjective definition to reflect the Nevada legislature's intent in enacting the NDTPA. *See generally, Decision.* The creation of definitions based on the Appeals Court's interpretation of legislative history was an issue of first impression, as the Court noted, and that alone should warrant the Supreme Court's review.

The purpose of the NDTPA is to provide protections to consumers against actual deceptive practices. Here, there was no evidence submitted that could possibly demonstrate any deceptive practice, and no damages to Appellant as a result of any alleged deception. Accordingly, the Appeals Court erred in failing to

take this into consideration these undisputed facts that no damages existed while applying these new definitions.

Further, the Appeals Court's application absolves consumers of any duty whatsoever, to inquire further into any potential issues, despite having knowledge that such issues may exist. Whereas claims sounding in fraud typically have an element of justifiable reliance, here, it appears to be abdicated. See, *Barmettler v. Reno Air, Inc.*, 114 Nev. 441 (1998), see also generally, *Decision.* The Appeals Court cites to *Betsinger v. D.R. Horton, Inc.* 232 P.3d 433 (2010), in finding that a "preponderance of the evidence" standard is applicable here, however, of note, the fact pattern in *Betsinger* involved a blatant misrepresentation, after a specific "consumer" inquiry. Now, pursuant to the Appeals Court's rationale, a sales entity is not only tasked with determining what a "reasonable person" may attach importance to, but each idiosyncratic person's preferences, there is no limit.

No such fact pattern occurred here, Plaintiff made inquiry, was informed of the collision and that it still underwent an inspection and certification process, and Plaintiff was satisfied. Plaintiff made no specific further inquiry, and received no specific representation or knowingly false or inaccurate omission, aside from the vehicle was in a prior collision which it was, and which was also reflected in documentation. Plaintiff never expressed an intent that if specific items were

repaired that it would have any significant for him. Such a broad standard, and its subsequent application should be reviewed accordingly.

2. The Appeals Court Erred in its Application of Its Newly Created Definitions to the Underlying Facts at Hand.

Here, the Appeals Court utilizes its definition to not only impose an impossibly high standard on sales entities, and absolve a consumer from any responsibility to exercise informed judgment under the NDTPA, but also, and perhaps most important, completely removes any requirement whatsoever of intent.

The Appeals Court held that merely "knowing" any facts that relate to a transaction exist and not affirmatively disclosing them constitutes an "act or omission." *Decision*, p. 7. The Appeals Court then provides a specific example that a "defendant auto dealer 'knowingly' makes a false representation, of a car's condition to a plaintiff consumer if the car has been damaged in a collision and the dealer is aware that it represented to the consumer that the car has never been damaged in a collision." *Id.* The Appeals Court then states, that " '[Knowingly' does not require that the dealer intended to deceive the consumer or knew of such a misrepresentation's prohibition—the defendant must simply be aware of the fact that it represented that the car had never been damaged in a collision."] *Id.* The Appeals Court has interpreted this to mean there must be zero harmful intent on behalf of the sales representative or entity, when in fact, knowingly presenting a

false characterization necessitates some intent, i.e. representing there was no collision, versus disclosing there was a collision.

Here, based on the present record, no such "deception" ever occurred and no misrepresentation regarding his car is in dispute. In this matter, it is undisputed that Appellant was informed of the prior collision involving his car both verbally and in writing through the Carfax report that Appellant acknowledged and signed. Appellant admitted that he was informed that his car was in a prior collision and only incurred $4,088.77 of damage that was repaired. More importantly, it is not in dispute that Appellant's car was devoid of any frame damage, even though Appellant had ample opportunity to present actual evidence to the contrary. He did not. As a result, Appellant's allegation of such frame damage was nothing more than unfounded conjecture.

It was the Appeals Court itself that somehow mistakenly declared that there was actual "frame damage" in the ACE report. This is inaccurate as the ACE report never identified any such "frame damage" because there was no actual frame damage to Appellant's car. In fact, Respondent informed Appellant multiple times that the subject vehicle had been in a collision prior to its acquisition, and the $4,088.77 of damages incurred had been subsequently repaired and the car was inspected and certified, to the point that Respondent warrantied the vehicle specifically due to its certification by its own certified mechanic. Specifically, in

reviewing the ACE report, prior to submitting the vehicle for inspection, Respondent looked for any indication of frame damage, which would have precluded it from being submitted for certification in the first place.

In fact, Appellant testified to the fact that he was informed about the prior collision, which had no frame damage, verbally at least twice and was provided the Carfax report identifying the prior collision, which Appellant acknowledged and signed at the time of his purchase. Appellant also testified that he assumed or viewed the collision as minor after being informed through an independent Carfax report that the vehicle had been towed from its previous collision, and Appellant still purchased and refinanced the vehicle after his purchase.

Most tellingly, Appellant admits, from his May 2014 purchase through the November 2017 summary judgment, that he suffered no actual damages or harm. Why? Because he never had a single problem or issue with the car and did not have one repair bill beyond the routine oil changes. In fact, Appellant continuously utilized the vehicle from the day he purchased his car in May 2014 and for over three (3) years after, and only had a period of non-use after he got into a second collision, where the car was again repaired. Most notably, Appellant admitted that the repair of his car after the second accident failed to show that the car had suffered any frame damage.

Further, the Appeals Court erred in recognizing any alleged "wheel" issue because there was no harm to Appellant, and there was no actual fact illustrating that the wheel in question was not up to a certification standard. The Appeals Court "cautioned" against "self-imposed certification standards" regarding the CPO checklist, however, the CPO checklist was not a Respondent specific or generated checklist, it was a manufacturer provided checklist for Certified Pre-Owned Vehicle Dealers, this finding by the Appeals Court demonstrates a discrepancy in its findings.

The Appeals Court found any legal type reliance on such a standard to be insufficient, while similarly relying on other manufacturer regulations or "FCA" guidelines provided by Appellant, in determining there was an issue of disputed material fact. *See Decision*, pgs. 19, 24. Regardless of whether the inspecting mechanic had the report, the experienced individual who took the subject vehicle in on behalf of Respondent, testified that they looked at the ACE report and did not observe any repair that precluded the vehicle from being submitted for a certification inspection. Again, this provides a discrepancy within the Appeals Court's application of the statute and the new definitions to this particular set of facts.

In addition, the Appeals Court misconstrued the actual testimony of the Respondent's employees, who as persons within the car industry may have

hypothetically desired to know more, because as car industry professionals repaired pieces may hold a significance. However here, Appellant had no such background and expressed no preference or interest in particular repairs or history. Appellant admitted that had he been given more information, especially through the Carfax report, he was not a "car guy," and thus would be unlikely to attach any significance to any particular item or repair, and clearly accepted that the vehicle had been in a collision (whether he were to consider it minor or major) and had been repaired, and still purchased it.

Despite this testimony, the Appeals Court relied almost solely upon the ACE "report," which specifically, again, did not show any "frame" damage. The Appeals Court neglected to consider that even a separate repair shop and insurance company deemed the vehicle safe, roadworthy, and devoid of any alleged frame damage, and most importantly, completely repaired prior to Appellant's purchase. This was an error on the part of the Appellate Court.

As provided above, the Appellate Court clearly erred in determining that there were material issues of fact remaining regarding "knowingly" making misrepresentations in the sales transaction or to the mechanical condition of the vehicle. To the contrary, no genuine issues of material fact remained that could demonstrate any actual misrepresentation of the facts to Appellant. As such, Respondent fully disclosed to Appellant on several occasions that the car was in a

prior accident had been repaired fully prior to Respondent's and Appellant's ownership of the car. Accordingly, there was no material omission of the information regarding Appellant's car or that it was in a prior accident and was repaired completely prior to even Respondent's ownership of the car. Accordingly, the Appeals Court erred in finding there were any issues of material fact, which precluded summary judgment on Appellant's NRS 598.0915(2) and (7) claims, as well as erred in its creation and application of its new definitions and standard.

3. The Appeals Court did not consider that Appellant did not suffer any damages.

Appellant since May 2014, throughout the underlying litigation which went on for more than three (3) years, and likely presently, drove, utilized and had no harm or damages whatsoever from the vehicle, a fact that is clearly and plainly undisputed as the Appellant was driving the subject vehicle of the litigation continuously through its pendency, and upon belief, still owns and utilizes that vehicle. In fact, Appellant testified that he never had any problems with his car for the more than three (3) years he owned and drove it. It was only later, when Appellant decided to claim there was a "safety" issue, because he could not actually prove that Respondent failed to disclose any material fact, such as the alleged "frame damage."

In fact, to date, Appellant has failed to produce any report, document, or inspection that evidences that the subject vehicle had frame damage from the collision that occurred prior to Respondent's acquisition. Appellant failed to produce any report from any insurance company that reflected the subject vehicle had frame damage.

Appellant failed to present any such evidence because none exists. Appellant admitted so in his testimony. The Carfax and the ACE report similarly do not state that the vehicle had frame damage. However, the Appellate Court concluded incorrectly that the car had "frame damage."

Appellant only managed to produce his paid expert's report suggesting the vehicle "may have" frame damage and safety issues, after Appellant drove the vehicle for thousands of miles, and for more than two (2) prior to any "expert" inspection.

Most tellingly, Appellant, never had any repairs done to the vehicle, never made any warranty claims, and continued to drive the vehicle even after his expert's inspection that allegedly found "issues". The only "repairs" Appellant ever had on the vehicle were those incurred in his own second accident, and those repairs were more expensive and <u>also found no frame damage</u>. Despite a second accident involving the car, Appellant still kept the vehicle and utilized it putting

thousands of miles of wear and tear on the car without incident. Appellant still likely has possession and has been using this car to this very day without issue.

Here, despite any new legal definitions, the undisputed material facts have remained clear throughout the pendency of litigation and the underlying appeal, Appellant has suffered no compensable damages. Appellant admits that he knowingly and willingly purchased a vehicle that he was well aware and was fully informed that it had been in a previous collision. Appellant also knowingly admits that he purchased a vehicle that was repaired by Allstate Insurance and another auto body shop that was independent from Respondent (Appellant does not make claims against the independent auto body shop for allegedly placing an unsafe vehicle on the road). Appellant further admits that he purchased a vehicle that had its previous accident report reviewed by an experienced automotive professional, and that underwent and passed an inspection by a certified auto mechanic. Then Appellant admits that he drove the vehicle for multiple years and thousands of miles, with zero repairs or warranty claims, and only upon failing to obtain his third refinance, did an issue arise with the vehicle only because he allegedly was told by "someone" at his insurance company, they believed they "saw" an "internet report" that the car had frame damage.

The Appellate Court erred in relying on the fact that the car had incurred frame damage, when the evidence indisputably established that frame damage

never existed and Appellant never produced any evidence to the contrary and Appellate Court mistakenly believed that "frame damage" was part of the underlying facts.

As this Supreme Court can see, summary judgment was appropriate in this case and these facts at hand, and the Appeals Court erred in its application of its new standards to this particular case and along with erring in ruling that an actual factual dispute existed.

IV. CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Petition for Review be granted and the Supreme Court should review the Appeals Court decision.

Dated this 7th day of October, 2019.

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CERTIFICATE OF COMPLIANCE

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 40B(d) 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 4,002 words less than the 4,667, including footnotes, quotations, and signature block.

3. I further certify that I have read this Petition for Review and all briefings 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 7th day of October, 2019.

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135 Nev., Advance Opinion 39

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DERRICK POOLE,
Appellant,
vs.
NEVADA AUTO DEALERSHIP INVESTMENTS, LLC, A NEVADA LIMITED LIABILITY COMPANY, D/B/A SAHARA CHRYSLER; AND COREPOINTE INSURANCE COMPANY,
Respondents.

No. 74808-COA

FILED
SEP 05 2019
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

Appeal from a district court final order and summary judgment in a deceptive trade practices action. Eighth Judicial District Court, Clark County; Nancy L. Allf, Judge.

Reversed and remanded.

Law Offices of George O. West III and George O. West III, Las Vegas; Law Offices of Craig B. Friedberg and Craig B. Friedberg, Las Vegas,
for Appellant.

Moran Brandon Bendavid Moran and Jeffery A. Bendavid and Stephanie J. Smith, Las Vegas,
for Respondents.

BEFORE GIBBONS, C.J., TAO and BULLA, JJ.

19-37098

OPINION

By the Court, GIBBONS, C.J.:

This appeal arises from a deceptive trade practices action. Appellant Derrick Poole sued respondents Nevada Auto Dealership Investments, LLC, and its surety company, Corepointe Insurance Company, under the Nevada Deceptive Trade Practices Act (NDTPA) and NRS 41.600 (consumer fraud). Poole alleged that Nevada Auto knowingly failed to disclose material facts about a truck that it sold to him and misrepresented the truck's condition. The district court granted summary judgment for respondents on each of Poole's claims.

In this opinion, we consider the meaning of "knowingly" and "material fact" under the NDTPA. These terms appear frequently throughout the NDTPA but remain undefined under the Act. We conclude that "knowingly" means that the defendant is aware that the facts exist that constitute the act or omission, and that a fact is "material" if either (a) a reasonable person would attach importance to its existence or nonexistence in determining a choice of action in the transaction in question: or (b) the defendant knows or has reason to know that the consumer regards or is likely to regard the matter as important in determining a choice of action, although a reasonable person may not so regard it. Using these definitions, we conclude that Poole presented sufficient evidence to raise genuine issues of material fact[1] under each of his claims, and thus that the district court

[1]Our dual usage of the term "material fact" is unavoidable in this case. The first usage is that of the summary judgment standard under *Wood v. Safeway, Inc.*, 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005) (providing that summary judgment is proper when "no genuine issue of material fact remains"); the second is that of NRS 598.0923(2) (enumerating "[f]ail[ure] to disclose a material fact" as a deceptive trade practice).

erred in granting summary judgment. We therefore reverse the district court's order granting summary judgment and remand this matter to the district court for further proceedings consistent with this opinion.

BACKGROUND

Poole purchased a certified pre-owned (CPO) Dodge truck from Nevada Auto. Nevada Auto advertises that "CPO vehicles must pass a stringent certification process that guarantees only the finest late model vehicles get certified." The truck's previous owner had been in an accident and repaired the truck before selling it to Nevada Auto. The previous owner's insurer, Allstate, prepared an Allstate Collision Estimate (ACE) listing each replaced or repaired part. The ACE listed damage to the truck's frame, and a "reconditioned" replacement for a damaged wheel. Despite its knowledge of the damage that the ACE described, Nevada Auto certified the truck as a CPO vehicle.

Poole test-drove the truck with a Nevada Auto salesperson who told him that the truck had been in a "minor" collision. When Poole asked about the extent of the damage from the collision, the salesperson repeated that it was only minor and explained that Nevada Auto would not sell the truck were the collision significant. Nevada Auto also disclosed the collision by providing a Carfax report to Poole. The Carfax report did not reveal the frame damage, the reconditioned wheel, or the cost of repairs, and Nevada Auto did not disclose to Poole the ACE's contents or even its existence. Two years later, Poole learned the extent of the damage when he tried to refinance the loan on the truck. The lender explained to Poole that it had declined his loan application because it discovered that the collision had damaged the truck's frame and significantly reduced its value.

Poole sued Nevada Auto and Corepointe,[2] alleging violations of several deceptive trade practice statutes under the NDTPA, codified in NRS Chapter 598, and seeking equitable relief for consumer fraud under NRS 41.600. Respondents moved for summary judgment, arguing that no genuine issues of material fact existed under Poole's deceptive trade practices claims. After a hearing on the motion, the district court granted summary judgment, concluding that each of Poole's deceptive trade practices claims failed. and thus that his equitable claims likewise failed.

ANALYSIS

Poole appeals, arguing that the district court erred by determining that no genuine issue of material fact existed as to whether Nevada Auto knowingly (1) failed to disclose a material fact under NRS 598.0923(2); (2) misrepresented the truck's certification under NRS 598.0915(2) or its certified standard, quality, or grade under NRS 598.0915(7); (3) made a false representation under NRS 598.0915(15); or (4) misrepresented the truck's mechanical condition under the Federal Trade Commission Act (FTCA), 16 C.F.R. § 455.1(a)(1) (2018), in violation of NRS 598.0923(3). Respondents answer that no genuine issue of material fact remains because Nevada Auto disclosed all material facts, properly certified the truck, and in any case, did not "inten[d] to knowingly defraud" Poole.

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[2]Poole sued Corepointe, Nevada Auto's surety company, under NRS 482.345(7)(a)(1), which provides that "[i]f the court enters . . . [a] judgment on the merits against the dealer . . . , the judgment is binding on the surety." He notes that respondents disputed his claim against Corepointe in their motion for summary judgment and asks this court to "dispose of this" issue. Because the district court did not address Corepointe's liability, however, we decline to do so in the first instance. *See, e.g., Douglas Disposal, Inc. v. Wee Haul, LLC*, 123 Nev. 552, 557 n.6, 170 P.3d 508, 512 n.6 (2007) (declining to address an argument that the district court did not address).

As Poole notes, however, the NDTPA does not define "knowingly" or "material," and the district court did not define them in granting summary judgment. The Nevada Supreme Court, too, has not addressed either NDTPA term, and respondents offer little guidance. Because the application of these terms is essential in this case and in many other deceptive trade practices actions, we take this opportunity to address each term's meaning under the NDTPA.

"We review questions of statutory meaning de novo." *Knickmeyer v. State*, 133 Nev. 675, 679, 408 P.3d 161, 166 (Ct. App. 2017). The primary goal of interpreting statutes is to effectuate the Legislature's intent. *Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010). We interpret clear and unambiguous statutes based on their plain meaning. *Id.* When a statute "is susceptible to more than one natural or honest interpretation, it is ambiguous, and the plain meaning rule has no application." *State, Dep't of Bus. & Indus. v. Granite Constr. Co.*, 118 Nev. 83, 87, 40 P.3d 423, 426 (2002). "[W]hen a statute is ambiguous, we consult other sources, such as legislative history, reason, and policy to identify and give effect to the Legislature's intent." *In re CityCenter Constr. & Lien Master Litig.*, 129 Nev. 669, 673-74, 310 P.3d 574, 578 (2013). "When a legislature adopts language that has a particular meaning or history, rules of statutory construction also indicate that a court may presume that the legislature intended the language to have meaning consistent with previous interpretations of the language." *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 580-81, 97 P.3d 1132, 1135-36 (2004).

The meaning of "knowingly" under the NDTPA

Respondents argue that Poole presented no evidence that Nevada Auto "inten[ded] to knowingly defraud" him. Poole replies that he

did present such evidence, but that under the NDTPA, "knowingly" means only general intent—not intent to deceive, but mere knowledge of the facts that constitute the act or omission.

Poole directs this court to several civil and criminal Nevada statutes that define "knowingly" in similar contexts, two of which predate the NDTPA's passage in 1973. For example, NRS Chapter 624, which addresses licensing and discipline of contractors, provides in NRS 624.024, codified in 2003, that

> "Knowingly" imports a knowledge that the facts exist [that] 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.

Each of the statutes defines "knowingly" in nearly identical language and requires no more than general intent. *See also* NRS 193.017 (addressing crimes and punishments, and first codified in 1912); NRS 208.055 (addressing correctional institutions and aid to victims of crime, and first codified in 1912); NRS 281A.115 (addressing ethics in government, and first codified in 2009); *Bolden v. State*, 121 Nev. 908, 923, 124 P.3d 191, 201 (2005) ("General intent is 'the intent to do that which the law prohibits.'" (quoting *Black's Law Dictionary* 810 (6th ed. 1990))), *receded from on other grounds by Cortinas v. State*, 124 Nev. 1013, 1026-27, 195 P.3d 315, 324 (2008).

The above definition of "knowingly" best effectuates the Legislature's intent under the NDTPA. The Legislature has used "knowingly" as a term of art and defined it consistently elsewhere in the Nevada Revised Statutes, and thus presumably intended to use it consistently under the NDTPA. *See NAIW v. Nev. Self-Insurers Ass'n*, 126

Nev. 74, 84, 225 P.3d 1265, 1271 (2010) ("We presume that the Legislature enact[s a new] statute with full knowledge of existing statutes relating to the same subject."); *cf. Beazer*, 120 Nev. at 587, 97 P.3d at 1139-40 ("Generally, when a legislature uses a term of art in a statute, it does so with full knowledge of how that term has been interpreted in the past, and it is presumed that the legislature intended it to be interpreted in the same fashion."); *see also State v. Hagan*, 387 So. 2d 943, 945 (Fla. 1980) ("In the absence of a statutory definition, resort may be had to case law or related statutory provisions [that] define the term . . . ."); *Nelson v. Transamerica Ins. Servs.*, 495 N.W.2d 370, 373 n.18 (Mich. 1992) ("The Legislature is presumed to be aware of existing statutes."). Each of those statutes in which the Legislature has defined "knowingly" is part of a statutory scheme with a purpose similar to that of a consumer protection act—protecting and assisting the public. *See, e.g.*, NRS 624.005 ("[T]he provisions of this chapter . . . are intended to . . . protect the health, safety and welfare of the public."); NRS 217.010 ("[T]he policy of this State [is] to provide assistance to . . . victims of violent crimes . . . ."); *see also Thomas v. Sun Furniture & Appliance Co.*, 399 N.E.2d 567, 570 (Ohio Ct. App. 1978) (The purpose of Ohio's deceptive trade practices act "was to give the consumer protection from a supplier's deceptions which he lacked under the common law requirement of proof of an intent to deceive in order to establish fraud.").

We therefore conclude that a "knowing[ ]" act or omission under the NDTPA does not require that the defendant intend to deceive with the act or omission, or even know of the prohibition against the act or omission, but simply that the defendant is aware that the facts exist that constitute the act or omission. For example, a defendant auto dealer "knowingly" makes a false representation of a car's condition to a plaintiff consumer if

the car has been damaged in a collision and the dealer is aware that it represented to the consumer that the car has never been damaged in a collision. "[K]nowingly" does not require that the dealer intended to deceive the consumer or knew of such a misrepresentation's prohibition—the defendant must simply be aware of the fact that it represented that the car had never been damaged in a collision. *See* NRS 598.0915(15) ("*Knowingly mak[ing]* any other false representations in a transaction" is a deceptive trade practice. (Emphasis added)).

We also find support for our conclusion in the statutory interpretive canon *expressio unius est exclusio alterius*, "the expression of one thing is the exclusion of another," *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967). As Poole notes, NRS 598.0915 includes both "knowingly" and specific intent elements, *compare* NRS 598.0915(1) ("Knowingly passes off goods or services for sale or lease as those of another person."), *with* NRS 598.0915(9) ("Advertises goods or services with intent not to sell or lease them as advertised."). This implies that the Legislature deliberately omitted any further intent requirement from those subsections that require only knowing acts. In light of the Legislature's inclusion of specific intent elements in some statutes and subsections and omission from others, the NDTPA provisions that include "knowing[]" acts but lack a specific intent element require only knowledge that the facts exist that constitute the act or omission. *See Galloway*, 83 Nev. at 26, 422 P.2d at 246 (noting that *expressio unius est exclusio alterius* "has been repeatedly confirmed in this State"); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012) ("[A] material variation in terms suggests a variation in meaning."); *see generally Sheriff, Pershing Cty. v. Andrews*, 128 Nev. 544, 548, 286 P.3d 262, 264 (2012)

(reasoning that where the Legislature "clearly knows how to prohibit" an act under one statute and does not prohibit it under a second statute, the Legislature did not intend to prohibit it under the second statute).

Our review of other jurisdictions that have addressed the meaning of "knowingly" in similar statutes also supports our conclusion. Kansas, New Mexico, and Ohio require "knowing[ ]" acts or omissions under their respective deceptive trade practices acts. *E.g.*, Kan. Stat. Ann. § 50-626(b)(1) (2005) (defining deceptive trade practices to include "[r]epresentations made knowingly or with reason to know"); N.M. Stat. Ann. § 57-12-2(D)(14) (LexisNexis 2010) (defining deceptive trades practices to include "knowingly . . . failing to state a material fact"); Ohio Rev. Code Ann. § 1345.09(F)(2) (LexisNexis 2018) (providing that a prevailing complainant may recover attorney fees when "[t]he supplier has knowingly committed" a deceptive trade practice). Courts in each state have likewise concluded that those statutes do not require intent to deceive or knowledge of the act's or omission's prohibition. *Moore v. Bird Eng'g Co.*, 41 P.3d 755, 764 (Kan. 2002) ("knowingly or with reason to know" does not require intent to deceive); *Richardson Ford Sales, Inc. v. Johnson*, 676 P.2d 1344, 1347-48 (N.M. Ct. App. 1984) ("A knowing nondisclosure requires [only] an awareness of the nondisclosure."); *Einhorn v. Ford Motor Co.*, 548 N.E.2d 933, 936 (Ohio 1990) ("knowingly" requires only that the supplier "intentionally do the [violative] act").

Similarly, Utah's Consumer Sale Practices Act distinguishes knowing from intent to deceive and awareness of an act's or omission's prohibition by requiring *either* "knowing[ ] or intentional[ ]" acts. Utah Code Ann. § 13-11-4(2) (LexisNexis 2009). The Utah Legislature has amended the Act twice—the first time to include an intent element by adding "intent

to deceive," and the second time to replace "with intent to deceive" with "knowingly or intentionally." *Martinez v. Best Buy Co., Inc.*, 283 P.3d 521, 523 n.2 (Utah Ct. App. 2012). Although Utah courts have not yet addressed the meaning of "knowingly" under the Act, the Utah Legislature's amendments further support our conclusion that "knowing[ ]" acts do not require intent to deceive.

Colorado and New Jersey courts, however, have concluded otherwise. Under Colorado's Consumer Protection Act, deceptive trade practices include "[e]ither knowingly or recklessly mak[ing] a false representation," Colo. Rev. Stat. Ann. § 6-1-105(1)(b) (West 2019), and the Colorado Supreme Court held that a "knowingly" false representation under the Act requires an intent to defraud. *Crowe v. Tull*, 126 P.3d 196, 204 (Colo. 2006). Similarly, the New Jersey Supreme Court held that a "knowing[ ] . . . omission . . . of any material fact" under New Jersey's Consumer Fraud Act requires intent to commit a violative omission. *Cox v. Sears Roebuck & Co.*, 647 A.2d 454, 461-62 (N.J. 1994) (quoting N.J. Stat. Ann. § 56:8-2 (West 2012)).

Alaska, Tennessee, and Texas have also defined "knowingly" otherwise. Each state's deceptive trade practices act requires "knowing[ ]" acts or omissions, *e.g.*, Alaska Stat. § 45.50.471(b)(12) (2018) (defining deceptive trade practices to include "knowingly concealing, suppressing, or omitting a material fact"); Tenn. Code Ann. § 47-18-109(a)(3) (2013) (providing that a court may award treble damages for a "knowing violation"); Tex. Bus. & Com. Code Ann. § 17.46(b)(13) (West 2011) (defining deceptive trade practices to include "knowingly making false or misleading statements"), and defines "knowingly" to require awareness not of the act, but of the falsity or deception, Alaska Stat. § 45.50.561(11) (2018)

("'[K]nowingly' means actual awareness of the falsity or deception . . . ."); Tenn. Code Ann. § 47-18-103(10) (2013) ("'Knowingly' or 'knowing' means actual awareness of the falsity or deception . . . ."); Tex. Bus. & Com. Code Ann. § 17.45(9) (West 2011) ("'Knowingly' means actual awareness . . . of the falsity, deception, or unfairness . . . .").

We conclude, however, that our interpretation better serves the NDTPA's remedial purpose. Because the NDTPA is a remedial statutory scheme, *Sellinger v. Freeway Mobile Home Sales, Inc.*, 521 P.2d 1119, 1122 (Ariz. 1974) (recognizing that remedial statutes are those that "are designed to redress existing grievances and introduce regulations conducive to the public good"), we "afford[ ] [it] liberal construction to accomplish its beneficial intent," *see Welfare Div. of State Dep't of Health, Welfare & Rehab. v. Washoe Cty. Welfare Dep't*, 88 Nev. 635, 637, 503 P.2d 457, 458 (1972) (construing a remedial public welfare statute liberally to accomplish its intent). Interpreting "knowingly" to require more than general intent would render NDTPA and common law fraud claims redundant, *see Bulbman, Inc. v. Nev. Bell*, 108 Nev. 105, 110-11, 825 P.2d 588, 592 (1992) (listing "knowledge or belief that the representation is false" and intent to deceive as elements of a common law fraud claim), disserve the NDTPA's remedial purpose, and discourage claims by forcing parties to clear a significantly higher bar. *Cf. Betsinger v. D.R. Horton, Inc.*, 126 Nev. 162, 166, 232 P.3d 433, 436 (2010) ("Statutory offenses that sound in fraud are separate and distinct from common law fraud. Therefore, we conclude that deceptive trade practices, as defined under NRS Chapter 598, must only be proven by a preponderance of the evidence."); *see also United States v. Krohn*, 573 F.2d 1382, 1386-87 (10th Cir. 1978) (recognizing the difficulty of proving fraudulent intent); *Thomas*, 399 N.E.2d at 570 (The purpose of

Ohio's deceptive trade practices act "was to give the consumer protection from a supplier's deceptions which he lacked under the common law requirement of proof of an intent to deceive in order to establish fraud. To require proof of intent would effectively emasculate the act and contradict its fundamental purpose."); *Einhorn*, 548 N.E.2d at 935-36 (concluding that interpreting "knowingly" to require knowledge of the act's or omission's prohibition would "take[ ] the teeth out of" Ohio's deceptive trade practices act, "is inapposite to" its remedial purpose, and would discourage consumers from suing under the act).

The meaning of "material fact" under the NDTPA

NRS 598.0923(2) provides that a seller who "[f]ails to disclose a material fact" engages in a deceptive trade practice. Poole, citing an extensive array of caselaw across multiple jurisdictions, argues that a material fact is one that is reasonably relevant to the transaction and one to which a reasonable person would attach importance. Poole thus proposes an objective standard of materiality. Respondents answer that only the fact of the collision was material—not the extent of the damage—because Poole is, by his own admission, not "a car guy." Respondents thus implicitly propose a subjective standard. We conclude, however, that applying both the objective and subjective definitions best effectuates the Legislature's intent and is most consistent with the NDTPA.

Nevada law generally directs us to the definition of "material fact" in the Second Restatement of Torts:

> The matter is material if
>
> (a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or

> (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.[3]

§ 538(2) (Am. Law Inst. 1977). The Nevada civil pattern jury instructions, for instance, adopt subsection (a)'s objective "attach importance" language. Nevada Jury Instructions: Civil § 11.19 (State Bar of Nevada 2018) (addressing "material misrepresentation . . . in [an] application for insurance or the claims process"). Instruction 11.19 provides that "[a] fact is material if it concerns a subject reasonably relevant . . . and if a reasonable person would attach importance to that fact." Further, the Nevada Supreme Court applied subsection (a)'s objective standard in *Winn v. Sunrise Hospital & Medical Center*, a professional negligence case in which the court considered whether a hospital withheld material information and thus tolled the applicable statute of limitations. 128 Nev. 246, 255, 277 P.3d 458, 464 (2012).

A subjectively material fact under subsection (b) of the Second Restatement may be no less important to a buyer in some special circumstances than an objectively material fact, however, and applying a subjective standard of materiality is consistent with the NDTPA's

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[3]Subsection (b) does not address failure to disclose, but its affirmative opposite—representation. Nevertheless, we hold that failure to disclose a fact is equivalent to affirmative representation of that fact's nonexistence. *See Ollerman v. O'Rourke Co.*, 288 N.W.2d 95, 100 (Wis. 1980) ("If there is a duty to disclose a fact, failure to disclose that fact is treated in the law as equivalent to a representation of the non existence of the fact."). We thus interpret subsection (b) to apply to failure to disclose material facts as well as affirmative misrepresentations thereof.

legislative purpose to protect consumers.[4] *See Washoe Cty. Welfare Dep't*, 88 Nev. at 637, 503 P.2d at 458 (holding that remedial legislation "should be afforded liberal construction to accomplish its beneficial intent"); *see also* Restatement (Second) of Torts § 538(2) cmt. f (Am. Law Inst. 1977) ("There are many persons whose judgment, even in important transactions, is likely to be determined by considerations that the normal man would regard as altogether trivial or even ridiculous. One who practices upon another's known idiosyncracies cannot complain if he is held liable when he is successful . . . .").

Our approach is consistent with a majority of other jurisdictions that likewise look to the Second Restatement of Torts to define "material fact" in contexts similar to the NDTPA.

New Jersey and Tennessee use the objective subsection (a) and the subjective subsection (b) alike, *Mango v. Pierce-Coombs*, 851 A.2d 62, 69 (N.J. Super. Ct. App. Div. 2004) (applying subsections (a) and (b) in a claim under New Jersey's Consumer Fraud Act); *Odom v. Oliver*, 310 S.W.3d 344, 349 (Tenn. Ct. App. 2009) (applying subsections (a) and (b) in a fraudulent concealment claim), while Arizona has used subsection (a), *Caruthers v. Underhill*, 287 P.3d 807, 815 (Ariz. Ct. App. 2012) (applying subsection (a) in a fraudulent inducement claim). Several others simply use subsection

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[4]For instance, if a buyer sought to purchase a used truck and preferred, for some purely idiosyncratic reason, that the truck had originally not been sold in California; the dealer knew or had reason to know of the buyer's preference and the truck's sales history; and the truck had in fact been sold in California, then the dealer must disclose that fact to the buyer under NRS 598.0923(2). Although a reasonable person may consider such a fact unimportant, the dealer knew or had reason to know that the idiosyncratic buyer considered the fact important to the decision to purchase the truck.

(a)'s "importance" standard without citing the Restatement, and without expressly rejecting subsection (b). *E.g., Weinstat v. Dentsply Int'l, Inc.*, 103 Cal. Rptr. 3d 614, 622 n.8 (Ct. App. 2010) (Under California's Unfair Competition Law, "[t]he question of materiality . . . is whether a reasonable person would attach importance to the representation or nondisclosure in deciding how to proceed in the particular transaction . . . ."); *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 337 (Tex. 2011) (In a fraudulent misrepresentation claim, "[m]aterial means a reasonable person would attach importance to and would be induced to act on the information in determining his choice of actions in the transaction in question." (quoting *Smith v. KNC Optical, Inc.*, 296 S.W.3d 807, 812 (Tex. Ct. App. 2009)); *Inkel v. Pride Chevrolet-Pontiac, Inc.*, 945 A.2d 855, 859 (Vt. 2008) (Under Vermont's Consumer Fraud Act, a material fact is one that "a reasonable person would regard as important in making a decision.").

Ohio, however, uses a unique objective standard, *Davis v. Sun Ref. & Mktg. Co.*, 671 N.E.2d 1049, 1058 (Ohio Ct. App. 1996) (In a fraudulent concealment claim, a fact is material if it "would be likely, under the circumstances, to affect the conduct of a reasonable person with reference to the transaction in question."), while Illinois uses a combination of unique objective and subjective standards, *Connick v. Suzuki Motor Co., Ltd.*, 675 N.E. 2d 584, 595 (Ill. 1996) (Under Illinois' Consumer Fraud Act, "[a] material fact exists where a buyer would have acted differently knowing the information, or if it concerned the type of information upon which a buyer would be expected to rely in making a decision whether to purchase.").

Only a small minority of states uses a purely subjective standard, and none expressly reject an objective standard. *Briggs v. Am. Nat'l Prop. & Cas. Co.*, 209 P.3d 1181, 1186 (Colo. App. 2009) (Under the

Colorado Consumer Protection Act, "[u]ndisclosed facts are 'material' if the consumer's decision might have been different had the truth been disclosed."); *Casavant v. Norwegian Cruise Line, Ltd.*, 919 N.E.2d 165, 170 (Mass. App. Ct. 2009) ("To determine if the nondisclosure was of a material fact [in an unfair or deceptive act or practice claim], we ask whether the plaintiff likely would have acted differently but for the nondisclosure."); *Colaizzi v. Beck*, 895 A.2d 36, 39-40 (Pa. Super. Ct. 2006) (Under the Pennsylvania Consumer Protection Act, "a misrepresentation is material if it is of such character that if it had not been misrepresented, the transaction would not have been consummated."); *see also Carcano v. JBSS, LLC*, 684 S.E.2d 41, 53 (N.C. Ct. App. 2009) (In a fraud claim, "[a] fact is material if had it been known to the party, [it] would have influenced that party's decision in making the contract at all.").

We therefore conclude that applying both the objective and subjective definitions in the Second Restatement of Torts best effectuates the Legislature's intent and is most consistent with the NDTPA.

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

We review a district court's order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.*; *see also* NRCP 56. "[T]he evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." *Wood*, 121 Nev. at 729, 121 P.3d at 1029. "A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Id.* at 731, 121 P.3d at 1031.

"A person engages in a 'deceptive trade practice' when, in the course of his or her business or occupation, he or she knowingly . . . [f]ails to disclose a material fact in connection with the sale or lease of goods or services." NRS 598.0923(2). Poole argues that a genuine issue of material fact exists as to whether Nevada Auto failed to disclose a material fact under NRS 598.0923(2). He argues that he offered evidence sufficient to raise a genuine factual dispute under this claim, including deposition testimony from three Nevada Auto employees.

Respondents answer that disclosure of the fact of the collision was sufficient under NRS 598.0923(2), and that more specific information about the damage from the collision would have been irrelevant and immaterial because Poole, by his own admission, is not "a car guy." They argue that construing NRS 598.0923(2) to require a dealer to disclose as facts material to the sale "each and every nut and/or bolt, which may have been repaired and/or replaced" would be "absurd." Respondents also argue that Poole presented no evidence that they "inten[ded] to knowingly defraud, misrepresent, or to otherwise omit 'material' information."

Respondents' "each and every nut and/or bolt" argument misstates Poole's argument and frames the issue as a false dilemma in which the district court must either (1) limit the scope of material facts to the single fact of the collision, as the district court did in its order, or (2) broaden the scope of material facts to an extent that requires an unconscionably burdensome and painstaking account of the damage from the collision. This ignores, of course, a vast intermediate territory in which the scope of material facts may exclude relatively useless ones, such as "each and every repaired bolt or penny spent," but include those to which a reasonable person may attach importance, such as the nature and extent of

the collision damage. Nonetheless, the district court found that "the material . . . fact is that the vehicle was in a prior accident"[5] and 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."

The district court also found that "[t]here is no indication in the record that [Poole] inquired about the parts and services used to repair the vehicle as provided in the ACE, and such information was then withheld."[6] The court concluded by finding that "[Poole] relied on the [CPO] report, which the undisputed evidence shows would only have notated frame damage if a repair, if any, was not up to standard."

This reasoning begs the question, however, by assuming that Nevada Auto's certification standards are interchangeable with the statute's materiality standard—that a fact immaterial to CPO status is perforce immaterial under NRS 598.0923(2). The district court appeared to reason that had the damage been material under the statute, the truck would have been "not up to [certification] standard," and the damage would

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[5]Why the district court deemed the fact of the accident "the material fact" is unclear. NRS 598.0923(2) addresses "fail[ure] to disclose *a* material fact." (Emphasis added.) The indefinite article "a" implies an indefinite scope of potentially material facts. The district court appeared to limit that scope to a single material fact by using the definite article "the," which is inconsistent with the statute's plain language.

[6]Poole argues the district court misapprehended NRS 598.0923(2) when it found that he must have inquired about a fact before Nevada Auto assumed the duty to disclose it. Poole is correct—by its plain language, NRS 598.0923(2) does not require inquiry, but provides for an affirmative duty to disclose.

have been noted in the CPO report; and because the damage was not noted in the CPO report, it must not have been material. Thus, the court effectively replaced the legal standard that governs this issue—materiality under NRS 598.0923(2)—with Nevada Auto's self-imposed certification standards.[7] Such reasoning would allow a seller to determine the scope of its duty to disclose by dictating its own "certification" standards and prevail against an NRS 598.0923(2) claim simply by upholding those standards, however lax they may be. In Poole's words, this "establishe[s] a quasi-irrebuttable presumption." We agree, and we caution district courts against substituting a commercial certification standard for any legal standard.

Poole offered deposition testimony from himself and three Nevada Auto employees. In his own deposition, he testified that he asked the Nevada Auto salesperson about the collision and that the salesperson assured him that the collision was only "minor." Notably, two of Nevada Auto's own employees agreed with Poole that the nature and extent of the damage from a collision are as important to a buyer as the fact of the collision itself. The third testified that he "thoroughly reviewed" the ACE before purchasing the truck for Nevada Auto, suggesting that Nevada Auto considered the ACE's contents, which indicated the nature and extent of the damage, reasonably relevant to the truck's sale.

Viewed in a light most favorable to Poole, this evidence is such that a rational trier of fact could find that Nevada Auto failed to disclose a fact to which a reasonable person would attach importance in determining a choice of action in the transaction, such as the frame damage, and thus

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[7]Despite abandoning the statutory standard for Nevada Auto's CPO standard, the district court declined to consider "[t]he sufficiency of the CPO inspection standards" because it was "not at issue."

that Nevada Auto failed to disclose an objectively material fact. Alternatively, a rational trier of fact could find that Nevada Auto knew or had reason to know that Poole would regard or was likely to regard the extent of the damage, for instance, as important in determining his choice of action, even if a reasonable person would not attach importance to it, and thus that Nevada Auto failed to disclose a subjectively material fact. In either case, a rational trier of fact could find that Nevada Auto knowingly failed to disclose a material fact because it knew that it did not disclose that fact. We therefore conclude that a genuine issue of material fact exists such that the district court erred by granting summary judgment on this claim.

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

"A person engages in a 'deceptive trade practice' if, in the course of his or her business or occupation, he or she . . . [k]nowingly makes a false representation as to the . . . certification of goods or services for sale or lease," NRS 598.0915(2), or "[r]epresents that goods . . . are of a particular standard, quality or grade, or that such goods are of a particular style or model, if he or she knows or should know that they are of another standard, quality, grade, style or model," NRS 598.0915(7). Poole argues that a genuine issue of material fact exists under his claim that Nevada Auto knowingly made a false representation as to the truck's certification under NRS 598.0915(2), or misrepresented the truck's certified standard, quality, or grade under NRS 598.0915(7). He argues that he produced evidence that the extent of the damage from the collision precluded certification, including a declaration from an expert who inspected the truck and a statement from the Fiat Chrysler Automobiles (FCA) website indicating that the truck's repaired wheel may be inconsistent with certification standards. Respondents answer that Poole failed to produce evidence proving that the

truck's standard, quality, or grade was anything other than certified, that Nevada Auto did not inspect and certify the truck, or that Nevada Auto should not have certified it.

The district court concluded that because Nevada Auto certified the truck, "[Poole] cannot argue that [Nevada Auto] misrepresented that the vehicle was . . . certified, as it was. The sufficiency of the CPO inspection standards is not at issue for this argument, but rather that the vehicle was ultimately certified as pre-owned." We disagree. Poole did not argue that Nevada Auto *did not certify* the truck, but that Nevada Auto *should not have certified* the truck under the CPO standards, and thus made a false representation as to its certification and likewise misrepresented its standard, quality, or grade.

To prove that Nevada Auto should not have certified the truck, and thus violated NRS 598.0915(2) and NRS 598.0915(7) by doing so, Poole offered the ACE, an expert's declaration, and deposition testimony from the Nevada Auto mechanic who inspected the truck for certification purposes. The ACE indicates frame damage and lists a "reconditioned" wheel among the replacement parts. The expert opined that several of the truck's components remained misaligned after repair, and that the misaligned components, frame damage, and reconditioned wheel each should have precluded certification. The Nevada Auto mechanic testified that he could not recall whether he reviewed the ACE before inspecting the truck and confirmed the expert's opinion that frame damage precludes certification.

Viewed in a light most favorable to Poole, this evidence is such that a rational trier of fact could find that the certification was improper, and Nevada Auto knew that it certified the truck, and thus violated NRS 598.0915(2) by making a false representation as to the truck's certification

and NRS 598.0915(7) by misrepresenting the truck's standard, quality, or grade as a CPO vehicle. We therefore conclude that a genuine issue of material fact exists as to whether Nevada Auto violated NRS 598.0915(2) and NRS 598.0915(7), and thus that the district court erred by granting summary judgment on these claims.

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

Poole argues that a genuine issue of material fact exists as to whether Nevada Auto knowingly made any other false representation in a transaction under NRS 598.0915(15), which provides that "[a] person engages in a 'deceptive trade practice' if, in the course of his or her business or occupation, he or she . . . [k]nowingly makes any other false representation in a transaction." He argues that Nevada Auto "affirmatively mis[led]" him when, after Nevada Auto disclosed the fact of the collision, he asked about the collision and Nevada Auto answered that it was "minor." He notes that he offered several forms of evidence to prove that the collision was more than "minor," and that the district court did not address this issue in its order granting summary judgment.

Respondents answer that Poole failed to offer such evidence. They also argue that Poole "conceded" this issue by "neglecting this portion of the statute" in his opposition to their motion for summary judgment.[8]

Although the district court rendered summary judgment on all of Poole's claims, it did not expressly address this claim. We conclude, however, that a genuine issue of material fact exists here.

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[8]Respondents cite no authority for the proposition that Poole somehow conceded the issue, and their underlying claim is inaccurate—Poole addressed the issue in his opposition to the motion for summary judgment by alleging that Nevada Auto violated NRS 598.0915(15).

To prove that Nevada Auto made a false representation when it characterized the collision as only "minor," Poole offered the ACE, his expert's declaration, and deposition testimony from Nevada Auto's mechanic. The ACE lists each repaired and replaced part and its cost, and the total cost of $4,088.77. The expert opined that the extent of the damage left the truck's value substantially diminished. The Nevada Auto mechanic testified that only the collision—not ordinary wear—could account for the frame repair listed in the ACE.

Viewed in a light most favorable to Poole, this evidence is such that a rational trier of fact could find that Nevada Auto made a false representation by describing the collision as "minor," and did so knowingly because it knew that it gave the description. We therefore conclude that a genuine issue of material fact exists, and thus that the district court erred by granting summary judgment on this claim.

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

"It is a deceptive act or practice for any used vehicle dealer, when that dealer sells or offers for sale a used vehicle in or affecting commerce . . . [t]o misrepresent the mechanical condition of a used vehicle[.]" 16 C.F.R. § 455.1(a)(1). The FTCA, including 16 C.F.R. § 455.1(a)(1), does not provide a private cause of action. *See Dreisbach v. Murphy*, 658 F.2d 720, 730 (9th Cir. 1981) (explaining that the FTCA confers remedial power solely on the Federal Trade Commission). As Poole notes, however, the NDTPA provides a private cause of action for an FTCA violation. *See* NRS 598.0923(3) ("A person engages in a 'deceptive trade practice' when in the course of his or her business or occupation he or she knowingly . . . [v]iolates a state or federal statute or regulation relating to the sale or lease of goods or services.").

Poole argues that a genuine issue of material fact exists as to whether Nevada Auto misrepresented the truck's mechanical condition under 16 C.F.R. § 455.1(a)(1). He refers to the evidence that he offered for his claims under NRS 598.0915(2), (7), and (15). Respondents answer that he failed to offer any such evidence. Like Poole's NRS 598.0915(15) claim, the district court did not expressly address this claim. Again, however, we conclude that a genuine issue of material fact exists.

To prove that Nevada Auto misrepresented the truck's mechanical condition, Poole offered the ACE, the expert's declaration, and an FCA statement regarding the dangers of reconditioned wheels. The ACE lists a reconditioned wheel among the replacement parts. The expert opined that Nevada Auto should not have certified the truck because of the reconditioned wheel and misaligned components. The FCA position statement on reconditioned wheel usage confirms that reconditioned wheels are "not recommend[ed]" for use because the repairs "may alter mechanical properties" and "result in a sudden catastrophic wheel failure."

Viewed in a light most favorable to Poole, this evidence is such that a rational trier of fact could find that Nevada Auto misrepresented the truck's mechanical condition by certifying it despite mechanical conditions that preclude certification, and did so knowingly because it knew that it certified the truck despite those conditions. We therefore conclude that a genuine issue of material fact exists, and thus that the district court erred by granting summary judgment on this claim.

CONCLUSION

Because genuine issues of material fact exist as to each of Poole's statutory claims, we reverse the district court's order granting

summary judgment in its entirety.[9] Accordingly, we remand this case to the district court for further proceedings consistent with this opinion.

_____, C.J.
Gibbons

We concur:

_____, J.
Tao

_____, J.
Bulla

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[9]The district court also summarily disposed of Poole's equitable claims, finding that because it granted summary judgment for respondents on each of Poole's statutory claims, "there are no grounds to grant equitable relief." We note that our reversal of summary judgment reinstates Poole's equitable relief claims.

Further, the district court granted summary judgment in favor of Corepointe because it dismissed the claims against Nevada Auto. Because we reverse the district court's order granting summary judgment for Nevada Auto, we also reverse the order dismissing Poole's claims against Corepointe. The district court should also reexamine the award of attorney fees to respondents.