IN THE SUPREME COURT OF THE STATE OF NEVADA

AARON LEIGH-PINK; and TANA EMERSON, Appellants, vs. RIO PROPERTIES, LLC Respondent.	Supreme Court Case No. 82572 United States Court of Appeals for the Ninth Circuit: Case No. 19-17556 United States District Court for the District of Nevada Case No. 2:17-cv-02910-GMN-VCF

ON THE CERTIFIED QUESTION FROM THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Appellants AARON LEIGH-PINK and TANA EMERSON ("Appellants") submit this reply brief in response to the points and arguments made by Respondent RIO PROPERTIES, LLC, (hereinafter "Respondent" or "the Rio") and to assist this Court in answering the Certified Question from the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit").

II. DISCUSSION

A. APPELLANTS DID NOT RECEIVE THE "BENEFIT OF THE BARGAIN" BECAUSE THEY PAID FOR A GUEST ROOM IN A HOTEL WHERE THEY WOULD NOT OTHERWISE HAVE STAYED HAD THEY KNOWN THE TRUE MATERIAL FACT THAT THERE WAS AN UNCONTROLLABLE *LEGIONELLA* BACTERIA CONTAMINATION OF THE HOTEL'S WATER SYSTEM INCLUDING IN THE GUEST ROOMS

Would a reasonable consumer knowingly agree to pay money to stay in a hotel room when it is disclosed by the hotel operator the hotel's water system is uncontrollably contaminated with deadly *Legionella* bacteria to which the guest would be exposed while in their room taking a hot shower, washing their hands, or even brushing their teeth? More poignantly, how much would a reasonable consumer agree to pay, if anything, to stay in that hotel room after knowing the disclosed material facts? Would a reasonable consumer agree to pay the full amount demanded by the hotel operator, even if only a Resort Fee, knowing all the

material facts? Or, would a reasonable consumer refuse to pay the amount demanded, or refuse to pay anything at all for that matter, since a guest room in a hotel that exposes them to known serious health risks, including death, is worth nothing, or certainly not worth the same amount, when compared to a room in a clean, sanitary, disease-free, and safe hotel?

Now, what if the hotel operator actively and purposely conceals from consumers looking to stay at its hotel, as the Rio did here, that the hotel's water system which supplies water to guest rooms is uncontrollably contaminated with *Legionella* bacteria? And, the hotel operator charges, and collects, from its guests who are unaware of the concealed material fact the full amount to stay in the room, even if only a Resort Fee?[1] Has the consumer received the benefit of the bargain by paying full price for something that is worth nothing, or substantially less, when the true material facts are known?

It is axiomatic that consumers who pay money to stay in a hotel room have a reasonable expectation the hotel and its amenities and facilities (which include necessarily the running water in their hotel room) to be disease-free, clean, safe,

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[1] Appellants reemphasize for the Court that it is undisputed all guests must pay the charged Resort Fee in order to be allowed to stay in a guest room regardless of whether their rooms have been "comp'ed" by the hotel as was the case with Appellants.

free of known health hazards, and will not expose them to a deadly bacteria contamination; unless they are told otherwise by the hotel operator. Appellants, and all reasonable consumers throughout Nevada, and indeed the United States, therefore have a justified expectation they will receive the benefit of their bargain when they pay full value for a good, service or product, including a hotel room. When consumers do not receive the benefit of the bargain, to wit: a room in a hotel that is disease-free, and those consumers pay the fully-demanded amount without knowing all the material facts, they have suffered recoverable damage even if they had an uneventful stay because they paid for something they would not otherwise have purchased, or which is at least worth considerably less.

Moreover, it must not be overlooked that hotel operators, such as Respondent, have an affirmative legal duty under Nevada law "to inform and/or warn its guests and invitees, such as Appellants, of hazards or conditions existing on the premises which are known to the property owner/manager and which expose Plaintiffs to foreseeable harm, injury or damage, including illness and death." See, *Lee v. GNLV Corp., D/B/A/ Golden Nugget Hotel and Casino*, 117 Nev. 291, 295 (2001).

This Court has long held that when the fraudulent conduct is perpetrated by a party with an affirmative duty to disclose, such as a fiduciary (like the real estate

agent in *Davis*), that party "has a broad responsibility to compensate his or her clients for the difference in what they paid versus what they received. *Davis v. Beling*, 128 Nev. 301, 318 (2012) (citing, *Strebel v. Brenlar Investments, Inc.*, 37 Cal.Rptr.3d at 708). Because Appellants have alleged (*see*, Appx. at pg. 47, ln. 16-19 and pg. 57, ¶50) they would not have stayed at the Rio at all, or would have paid less for the hotel room had they known the true fact, they have suffered recoverable damages because they paid for something they would not have purchased, or paid more for it than it's true value.

B. THIS COURT HAS ESTABLISHED THAT UNJUST ENRICHMENT DAMAGES, IN THE FORM OF THE DIFFERENCE BETWEEN WHAT WAS PAID AND THE VALUE RECEIVED, ARE RECOVERABLE UNDER THE NDTPA AND NRS 41.600

Contrary to Respondent's assertion, Appellants are not conflating recovery of unjust enrichment damages, on equitable grounds, with damages recoverable in an action for violation of common law fraud or NRS 41.600 of the NDTPA. See, Respondents Answering Brief at p. 47, Sec. III ("First, an equitable claim of unjust enrichment and legal claims under NRS 41.600 and for fraudulent concealment are inherently incompatible.") Appellants, rather, simply reiterate the state of Nevada law that damages in the form of the difference between what was paid and the value of the product, good, or service received, are recoverable whether on an

unjust enrichment theory, based on fraudulent concealment, or a violation of the NDTPA, and specifically NRS 41.600's "any damages" provision.

Under either theory of recovery well-settled Nevada law recognizes that recoverable damages are the reasonable value of the product received versus what was paid. See, *Asphalt Products Corp. v. All Star Ready Mix, Inc.*, 111 Nev. 799, 802 (Nev. 1995) (holding that, "in a case with a[n] ... unjust enrichment theory of recovery, *the proper measure of damages* is the 'reasonable value of [the] services.'"); see also, *Poole v. Nevada Auto Dealership Investments, LLC*, 135 Nev. 280, fn 9 (2019) ("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 [violations of the NDTPA], 'there are no grounds to grant equitable relief.' We note that our reversal of summary judgment reinstates Poole's equitable relief claims.")

Thus, based on the state of the law in Nevada, recovery of damages measured by the difference between the value of the good, service, or product purchased and the amount paid are recoverable on theories of unjust enrichment, fraudulent concealment, or violations of the NDTPA.

C. THE DAMAGES SOUGHT BY APPELLANTS ARE NOT PUNITIVE IN NATURE BUT RATHER ARE TO COMPENSATE THEM THE MONEY THEY PAID FOR A VALUE THEY DID NOT RECEIVE

Appellants' claim for damages is not designed to punish Respondents.[2] Rather, Appellants' claim for damages is to compensate them for having paid for something they would not have purchased had they known the true material facts, or paid more for a good, service or product that it is worth.

In an attempt to shift the focus from their wrongdoing and the financial harm suffered by Appellants and the putative class, Respondent sounds a cry of alarm that, rather than seeking to recover the benefit of their bargain and the difference between what they paid and the value of what was received, Appellants seek to punish them by recovering money they paid to Respondents which Appellants would never have paid in the first place had Respondents been honorable and truthful and not actively concealed material facts about the hotel.

Respondent's argument is little more than a purposeful distraction. Appellants have never advanced an argument, in the district court or before the Ninth Circuit, nor in their Opening Brief to this Court, that they are attempting to

[2] Although a jury may ultimately believe punitive damages are separately justified based on Respondent's intentional concealment of the condition of the hotel for the purposes of duping guests into staying at the Rio as opposed to taking their business elsewhere.

punish Respondents as opposed to recovering the monetary damages they are entitled to legally recover under the NDTPA, fraudulent concealment, or unjust enrichment.

D. RESPONDENT'S "CHICKEN LITTLE, THE SKY IS FALLING" ARGUMENT IS SPECIOUS AND LACKS MERIT

Respondent attempts to scare this Court with a specious and baseless warning that, "[a]nswering the Certified Question in the affirmative would have a *catastrophic effect* on those who do business in the State of Nevada because it would result in limitless liability in so-called 'no injury' class action." *See*, Respondent's Answering Brief at pg. 2 (emphasis added). In so arguing, Respondent's look to instill a sense of panic in this Court, just as Chicken Little did in the children's fable when claiming "the sky is falling." Not so; the sky is not falling and answering the Certified Question in the affirmative will not have a "catastrophic" effect on Nevada businesses.

To the contrary, answering the Certified Question in the affirmative will serve to instruct those conducting business in Nevada that the law does not countenance practices whereby they conceal from their customers material facts about the products, goods, or services being sold at full price when those businesses know the goods services or products have less value because of a

concealed condition or defect. Realistically, the only businesses who will feel any effect from this Court answering the Certified Question in the affirmative are those businesses, like Respondent, who lie to their customers, conceal material facts, and nonetheless sell their products to their unwitting customers at full value so they can maximize revenue and profit from duping their customers into paying more for a good, service, or product than it is actually worth. What Respondent wants is for this Court to grant them free license to engage in unscrupulous, fraudulent business practices that violate the NDTPA without consequence.

Respondent asks this Court to bless in the law a business practice which sacrifices to revenue and profit Nevada consumers' right to know important material facts about what they are buying so they can make informed decisions whether to purchase the product, good, or service in the first place, or whether what they are paying is equal to the value they are receiving. Neither Nevada law, the Legislative intent behind the NDTPA, general principals of fairness, good-faith and fair-dealing, nor protection of the public are accomplished by such a result.

Shielding businesses from legal liability for fraudulent concealment and deceptive business practices which violate the NDTPA may indeed have catastrophic effects – however, not on businesses but rather on consumers and the

public. Unscrupulous businesses will be emboldened to perpetuate business practices in Nevada where not only must consumers "beware," but they are left without legal recourse or remedy when defrauded of their money.

This Court should not bless such a result because the Legislative purpose behind NRS 41.600 is to introduce regulations conducive to the public good. *Poole v. Nevada Auto Dealership investments, LLC*, 449 P.3d 479, 485, citing, *Sellinger v. Freeway Mobile Home Sales, Inc.*, 110 Ariz. 573 (1974). After all, NRS 41.600 is designed to protect public welfare. *Poole v. Nevada Auto Dealership investments, LLC*, 449 P.3d 479, 485, citing, *Welfare Div. of State Dep't of Health, Welfare & Rehab. v. Washoe Cty. Welfare Dep't*, 88 Nev. 635, 637.

E. AUTHORITY FROM OTHER JURISDICTIONS CITED BY RESPONDENT IS DISTINGUISHABLE AND INAPPOSITE

1. *Massachusetts Law*

Contrary to the citations relied upon by Respondent, controlling Massachusetts law from the Supreme Judicial Court holds a consumer may recover the difference between the price paid by the consumer and the true market value of the misrepresented product they actually received. See, *Aspinall v. Philip Morris Companies, Inc.* 442 Mass. 381, 813 N.E.2d 476 (2004). In *Aspinall*, smokers claimed they paid more for "light" cigarettes than they were worth based

on fraudulent representations the "light" cigarettes delivered less nicotine and tar. *Id* at 382. The Supreme Judicial Court agreed the plaintiffs stated a claim for damages, holding, "[t]his is a variation on the traditional 'benefit of the bargain' rule that awards a defrauded party the monetary difference between the actual value of the product at the time of purchase and what its value would have been if the representations had been true. (Internal citations omitted). We agree that 'the benefit of the bargain' damages, if proved with reasonable certainty, would be appropriate in this case." *Id.* 442 Mass. at 399.)

This Court should follow the precedent established by the sister states of California, Arizona, Florida, Kansas, Massachusetts, South Carolina, Texas, Wisconsin and Vermont and hold Nevada law permits a plaintiff to recover damages if the defendant's fraudulent conduct caused a plaintiff to purchase a product they would not otherwise have purchased.

F. WHICH AMENITIES OR FACILITIES, ASIDE FROM RUNNING WATER IN GUEST ROOMS, WERE AFFECTED BECAUSE OF THE UNCONTROLLED *LEGIONELLA* CONTAMINATION IS SUBJECT TO DISCOVERY

If this Court is at all swayed by Respondent's argument the *Legionella* bacteria contamination did not interfere with Appellants' or any other guests' use or benefits of the facilities or amenities at the Rio, it must be noted there has been

zero discovery conducted in this case. The case was dismissed on a F.R.Civ.P. Rule 12 motion before discovery as to what facilities, aside from running water in the guest rooms, were affected because of the uncontrolled *Legionella* bacterial contamination.

There has thus been no discovery to determine what the Resort Fee is actually charged for, what is the full compliment of facilities or amenities (if any) that are covered by the Resort Fee, and what portions of the hotel were closed or unavailable because of the uncontrollable *Legionella* bacteria contamination in the water system, outside of contamination of the entire water system including in guest rooms. Without providing any evidence in support, because the averment is made in Respondent's motion(s) to dismiss, Respondents have repeatedly claimed the Resort Fee was to pay for "use of internet, telephone, and the fitness center for two guests." See, Appx. at pg. 74, ln. 6-8 (Respondent's Motion to Dismiss TAC). Whether this is, in fact, true - or that the resort Fee is limited to paying for those specified items - is subject to validation through discovery which has not yet taken place in this action.

Nonetheless, what Respondent does not, and indeed cannot, refute is that all customers are *required* to pay the mandatory Resort Fee to be allowed to stay in a guest room regardless of whether they use any of the claimed amenities or

facilities.[3] Most importantly, it is in the guest rooms where customers are exposed to the *Legionella* bacteria contamination of the water system and payment of any money, regardless of how it is categorized or titled, constitutes damages because guests are not getting the benefit of their bargain since they are paying to stay in a room in a disease-free hotel but are not receiving one regardless of what "amenities" may be covered by a Resort Fee.

III. CONCLUSION

Based on the plain language of NRS 41.600 authorizing the recovery of "any damages" and the fact well-settled Nevada law permits recovery of damages based on a defendant's unjust enrichment, as well as the foregoing analysis supporting Appellants' theory of recovery that they would not have parted with their money to stay at the Rio Hotel at all, or they paid more for the hotel room

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[3] In reality, and as recognized by one judge on the Ninth Circuit panel during oral argument, a Resort Fee is little more than another way for a hotel to charge customers more money without raising the "room rate." Moreover, and as a practical matter, every guest at the Rio over the past 15 years has surely had their own personal cellular telephone with internet access. So who needs to pay for "telephone and internet access" provided by the hotel? This also begs the question posed during oral argument before the Ninth Circuit panel which was, would the Rio allow a customer to not pay the Resort Fee if the customer says they will not be using the telephone, internet, or fitness center? Appellants proffer the Rio would still impose the Resort Fee even if a customer attempted to negotiate not paying it because they would not use those amenities or facilities.

than it was worth, this Court should answer the certified question posed by the Ninth Circuit in the affirmative - NRS 41.600, as well as a claim for fraudulent concealment under Nevada law, does authorize recovery of damages under Appellants' theory.

Respectfully submitted,

Dated: November 18, 2021

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CERTIFICATE OF COMPLIANCE NRAP 28.2 AND 32

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 has ben prepared in a proportionally spaced typeface using WordPerfect X9 in 14 font size and Times New Roman font face.

I further certify this Brief complies with the page requirements of NRAP 32(a)(7)(A)(i) and (ii) in that it does not exceed 15 pages, or 7,000 words, excluding the Table of Contents and Table of Authorities and required certificates.

I hereby certify that I have read this Brief and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further 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 number and volume number, if any, of the transcript of appendix where the matter relied upon is to be found.

I understand that I may be subject to sanctions in the event that this Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: November 18, 2021

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CERTIFICATE OF SERVICE

This is to certify that on November 18, 2021, a true and correct copy of the foregoing **APPELLANTS' REPLY BRIEF** was submitted for filing via the Court's eFlex electronic filing system and that such is served on interested parties in this action by serving VIA EMAIL (Wiznet/Eflex) pursuant to the NRAP and that electronic notification will be sent to the following:

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