

IN THE SUPREME COURT OF THE STATE OF NEVADA

---

Electronically Filed  
Aug 15 2022 03:40 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation, individually,  
and as successor-by-merger to LORILLARD TOBACCO COMPANY and as  
successor-in-interest to the United States tobacco business of BROWN &  
WILLIAMSON TOBACCO CORPORATION, which is the successor-by-merger  
to THE AMERICAN TOBACCO COMPANY,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE  
NADIA KRALL, DISTRICT COURT JUDGE,

Respondents,

- and -

SANDRA CAMACHO, individually; ANTHONY CAMACHO, individually;  
PHILIP MORRIS USA, INC., a foreign corporation; LIGGETT GROUP, LLC, a  
foreign corporation; and ASM NATIONWIDE CORPORATION d/b/a  
SILVERADO SMOKES & CIGARS, a domestic corporation,

Real Parties in Interest.

---

District Court Case No. A-19-807650-C, Department IV

---

**PETITION FOR PANEL REHEARING**

---

DENNIS L. KENNEDY, Nevada Bar No. 1462  
JOSEPH A. LIEBMAN, Nevada Bar No. 10125  
REBECCA L. CROOKER, Nevada Bar No. 15202

**BAILEY ♦ KENNEDY**

8984 Spanish Ridge Avenue  
Las Vegas, Nevada 89148-1302  
Telephone: 702.562.8820  
Facsimile: 702.562.8821  
DKennedy@BaileyKennedy.com  
JLiebman@BaileyKennedy.com  
RCrooker@BaileyKennedy.com

VALENTIN LEPPERT

*(Admitted Pro Hac Vice)*

**KING & SPALDING LLP**

1180 Peachtree Street, NE  
Atlanta, Georgia 30309  
Telephone: 404.572.4600  
Facsimile: 404.572.5100  
VLeppert@kslaw.com

URSULA MARIE HENNINGER

*(Admitted Pro Hac Vice)*

**KING & SPALDING LLP**

300 S. Tryon Street, Suite 1700  
Charlotte, North Carolina 28202  
Telephone: 704.503.2631  
Facsimile: 704.503.2622  
UHenninger@kslaw.com

*Attorneys for Petitioner*

*R.J. Reynolds Tobacco Company*

**August 15, 2022**

---

The panel should vacate its merits determination and allow the full Court to decide the merits questions presented in this case. As Justice Pickering explained in her concurrence, whether the NDTPA provides a private cause of action against a product manufacturer, even when the plaintiff never bought or used the manufacturer's product, "presents a close, open, and to some extent fact-dependent question of Nevada law." *R.J. Reynolds Tobacco Co. v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 138 Nev. Adv. Op. 55 at \*8 (2022). But the majority nevertheless answered the merits of this close question "by a two-to-one vote of a three-justice panel." *Id.* at \*10. In so doing, the majority misapprehended important issues that the full Court should address.

1. The NDTPA's "direct-harm" test for private claims requires a causal link stronger than what Plaintiffs pleaded in their complaint and the majority held in its decision. *See Reynolds Pet.* at 11-13. To meet NRS 41.600(1)'s standing requirements, a victim must have suffered "direct harm" from the deceptive practice. *Del Webb Communities, Inc. v. Partington*, 652 F.3d 1145, 1152 (9th Cir. 2011). The alleged "deception and injury cannot be too attenuated." *Guerra v. Dematic Corp*, No. 3:18-CV-0376-LRH-CLB, 2020 WL 5995496, at \*3 (D. Nev. Oct. 8, 2020). The majority of the panel found the required link satisfied because Plaintiffs "allege that Sandra relied on those representations to smoke generally." *Id.* at \*4. But Reynolds's advertisements and other actions did not convince Ms. Camacho to

purchase or use even a single Reynolds cigarette and Plaintiffs do not plead otherwise. Actions that allegedly contributed to Mrs. Camacho's decision to "smoke generally" and use a different manufacturer's product is far too attenuated to qualify as *direct* harm.

The full Court should consider whether "direct harm" requires a closer nexus. Under the panel majority's broad understanding of this term, the NDTPA allows virtually anyone to bring a private cause of action for what may be considered an unfair trade practice. All a claimant needs to allege is that he or she was aware of the defendants' practices and somehow suffered some type of harm—regardless of whether the alleged harm flowed "*directly*" from the defendants' practices to the claimant. If left standing, this published opinion will make Nevada a go-to jurisdiction for attenuated claims brought by private attorneys looking for a quick buck.

2. Similarly, the panel majority failed to consider whether an expansive reading of who qualifies as a victim under NRS 41.600(1) comports with the Legislature's carefully crafted balance between public and private enforcement of consumer fraud. *See* Reynolds Pet. at 14-15. As Justice Pickering notes, the full Court should decide whether the distinction between private and governmental action matters. *R.J. Reynolds*, 138 Nev. Adv. Op. 55 at \*11. For example, there is an important question of whether NRS 598.094's "attempt to sell" reference "applies

to government enforcement actions, as opposed to private actions by victims seeking damages.” *R.J. Reynolds*, 138 Nev. Adv. Op. 55 at \*11. In other words, the full court should assess whether the Legislature really intended to allow any bystander to act as a private attorney general by way of a civil lawsuit under the NDTPA. *Id.* at \*4.

3. The panel majority also failed to consider Reynolds’s argument that the “NDTPA should be construed consistent with the common law because nothing in its text directs otherwise,” which Justice Pickering thought merited further consideration from the full Court. *R.J. Reynolds*, 138 Nev. Adv. Op. 55 at \*10; *see* Reynolds Pet. at 14-16. Well-established common law requires a showing of product use to maintain a products liability claim. *See, e.g., Moretti v. Wyeth, Inc.*, No. 2:08-CV-00396-JCMGWF, 2009 WL 749532, at \*4 (D. Nev. Mar. 20, 2009); *Baymiller v. Ranbaxy Pharms., Inc.*, 894 F. Supp. 2d 1302, 1305 (D. Nev. 2012). While the majority cursorily found that Reynolds’s “alleged knowing misrepresentation of the dangers of smoking . . . is distinct from a products-liability claim,” *Reynolds*, 138 Nev. Adv. Op. 55 at \*10, it did not consider statutory commands and precedent directing the Court to interpret the NDTPA consistent with the common law. *See* NRS 1.030; *Leigh-Pink v. Rio Props., LLC*, 138 Nev., Adv. Op. 48, 512 P.3d 322, 328 (2022).

4. The majority summarily stated that Plaintiffs “pleaded sufficient facts of a direct harm, as they contended that Sandra would not have smoked cigarettes and

developed cancer but for all defendants’ including Reynolds’-deceptive trade practices.” *Reynolds*, 138 Nev. Adv. Op. 55 at \*5. But the majority provided no citation to the complaint in support of its conclusion. That is because none exists. *See Reynolds Pet.* at 18-19. Plaintiffs’ complaint never identifies a single allegedly deceptive statement made by Reynolds nor explains how Reynolds’s alleged NDTPA violation supposedly impacted Mrs. Camacho. No part of the NDTPA allegations in the complaint even contends that she saw any materials produced by Reynolds. 1 PA 99–101. In fact, even assuming *arguendo* an “attempt to sell” can confer NDTPA standing to a private litigant, no allegation in the complaint indicates how Reynolds attempted to sell its cigarettes to Mrs. Camacho. The majority misapprehended what Plaintiffs actually alleged, as opposed to what they claimed in their appellate briefs.

As these legal and factual questions make clear, if this panel does not vacate its decision on the merits now, it risks “creating confusion and inconsistency,” as Justice Pickering cautioned, “should the issue come to the en banc court on appeal from an eventual final judgment” and the full court decides to “depart from or refine the panel’s merits determination.” *Id.* (cleaned up). And that risk is high. These cases implicate significant policy considerations that are being closely watched throughout the country. *See Michael A. Mora, Florida Lawyer Beats Big Tobacco in Nevada Supreme Court, Creating Nationwide Blueprint*, DBR.com (Aug. 3, 2022, 03:04 PM), <https://bit.ly/3SzuTLn>; Debra Cassens Weiss, *Smoker can sue tobacco*

*company for consumer fraud, even though she didn't use its products, state supreme court says*, ABAJournal.com (Aug. 4, 2022, 10:47 AM), <https://bit.ly/3SLLlbt>.<sup>1</sup> Plenary review, by the full Court, would be the more appropriate vehicle to weigh in on these questions in the first instance.

5. Finally, Justice Pickering was right to conclude that this case is now “sufficiently advanced that the advantages plenary review on direct appeal affords outweigh the need for immediate writ review.” *R.J. Reynolds*, 138 Nev. Adv. Op. 55 at \*10. Reynolds filed its petition over eight months ago, on November 4, 2021, immediately after Judge Krall’s reconsideration decision brought Reynolds back into the case—and well after this Court had already been considering the same issues raised by Plaintiffs in their original petition for mandamus, which was filed over sixteen months ago, on March 23, 2021. Reynolds’s petition raised procedural arguments, *see* Reynolds Pet. at 9-10; 22-23, that, had this panel agreed with, would have led to quick resolution of an already pending mandamus petition and could have saved Reynolds the burden of needlessly proceeding through discovery and pretrial motion practice.

Now, due to the passage of time, the balance of considerations weighs against mandamus review. As Justice Pickering noted, “the proceedings in district court

---

<sup>1</sup> *See also* <https://www.abajournal.com/news/article/smoker-can-sue-tobacco-company-for-consumer-fraud-even-though-she-didnt-use-its-products-court-says>.

have progressed well beyond the motion-to-dismiss stage,” and the merits questions would benefit from full, plenary review after a decision on the merits. *Reynolds*, 138 Nev. Adv. Op. 55 at \*10.

### CONCLUSION

For the foregoing reasons, the panel should vacate its decision on the merits.

DATED this 15th day of August, 2022.

Respectfully submitted,

BAILEY ❖ KENNEDY

By: /s/ Dennis L. Kennedy

DENNIS L. KENNEDY

JOSEPH A. LIEBMAN

REBECCA L. CROOKER

VAL LEPPERT

*Admitted Pro Hac Vice*

URSULA MARIE HENNINGER

*Admitted Pro Hac Vice*

KING & SPALDING LLP

*Attorneys for Petitioner*

R.J. REYNOLDS TOBACCO  
COMPANY



## **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:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 ProPlus in 14-sized font Times New Roman.

2. I 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] Proportionately spaced, has a typeface of 14 points or more and contains 1,237 words;

3. Finally, I hereby certify that I have read this Petition for Panel Rehearing, 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 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 15th day of August, 2022.

BAILEY ❖ KENNEDY

By: /s/ Dennis L. Kennedy

DENNIS L. KENNEDY

JOSEPH A. LIEBMAN

REBECCA L. CROOKER

VAL LEPPERT

*Admitted Pro Hac Vice*

URSULA MARIE HENNINGER

*Admitted Pro Hac Vice*

KING & SPALDING LLP

*Attorneys for Petitioner*

R.J. REYNOLDS TOBACCO  
COMPANY

## CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY ❖ KENNEDY and that on the 15<sup>th</sup> day of August, 2022, service of the foregoing **PETITION FOR PANEL REHEARING** was made by electronic service through Nevada Supreme Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

Sean K. Claggett, Esq.  
Matthew S. Granda, Esq.  
Micah S. Echols, Esq.  
CLAGGETT & SYKES LAW FIRM  
4101 Meadows Lane, Suite 100  
Las Vegas, Nevada 89107  
sclaggett@claggettlaw.com  
mgranda@claggettlaw.com  
michah@claggettlaw.com

Kimberly L. Wald, Esq.  
Michael A. Hersh, Esq.  
KELLEY I UUSTAL  
500 N. Federal Highway, Ste. 200  
Fort Lauderdale, Florida 33301  
klw@kulaw.com  
mah@kulaw.com

*Attorneys for Real Parties in Interest Sandra Camacho and Anthony Camacho*

D. Lee Roberts, Jr., Esq.  
Phillip N. Smith, Jr., Esq.  
Daniela LaBounty, Esq.  
WEINBERG, WHEELER, HUDGINS,  
GUNN & DIAL, LLC  
6385 South Rainbow Blvd., Suite 400  
Las Vegas, Nevada 89118  
lroberts@wwhgd.com  
psmith@wwhgd.com  
dlabounty@wwhgd.com

Jennifer Kenyon, Esq.  
Brian A. Jackson, Esq.  
Bruce R. Tepikian, Esq.  
SHOOK, HARDY & BACON L.L.P.  
2555 Grand Boulevard  
Kansas City, MO 64108  
jbkenyon@shb.com  
bjackson@shb.com  
btepikian@shb.com

*Attorneys for Real Parties in Interest  
Philip Morris USA, Inc. and ASM  
Nationwide Corporation*

*Attorneys for Real Party in Interest  
Philip Morris USA, Inc.*

Daniel F. Polsenberg, Esq.  
J. Christopher Jorgensen, Esq.  
LEWIS ROCA ROTHGERBER  
CHRISTIE LLP  
3993 Howard Hughes Parkway  
Suite 600  
Las Vegas, Nevada 89169  
dpolsenberg@lrrc.com  
cjorgensen@lrrc.com

*Attorneys for Real Party in Interest  
Liggett Group, LLC*

Kelly Anne Luther, Esq.  
KASOWITZ BENSON TORRES LLP  
1441 Brickell Avenue, Suite 1420  
Miami, FL 33131  
kluther@kasowitz.com

*Attorneys for Real Party in Interest  
Liggett Group, LLC*

I further certify that the foregoing **PETITION FOR PANEL  
REHEARING** was mailed via U.S. Mail to the following:

Honorable Nadia Krall, District Court Judge  
Eighth Judicial District Court  
Department 4  
200 Lewis Avenue  
Las Vegas, Nevada 89155

*Respondents*

/s/ Sharon L. Murnane  
Employee of BAILEY ❖ KENNEDY