

IN THE SUPREME COURT OF THE STATE OF NEVADA

AARON LEIGH-PINK; and
TANA EMERSON,

Appellants,

v.

RIO PROPERTIES, LLC,

Respondent.

Supreme Court Case No. 82572

CERTIFIED QUESTION

From the United States Court of Appeals for the Ninth Circuit
Case No. 19-17556

**BRIEF OF AMICI CURIAE PUBLIC CITIZEN, NATIONAL
ASSOCIATION OF CONSUMER ADVOCATES, NATIONAL CONSUMER
LAW CENTER, AND PUBLIC JUSTICE IN SUPPORT OF APPELLANTS**

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NRAP 26.1 DISCLOSURE

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

Amici Curiae Public Citizen, National Association of Consumer Advocates, National Consumer Law Center, and Public Justice are nonprofit, non-stock corporations. They have no parent corporations, and no publicly held corporations have an ownership interest in them. These amici are represented by Keren E. Gesund of Gesund & Paillet, LLC. No other law firms have appeared for these amici in this case or are expected to appear for these amici in this Court.

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INTERESTS OF THE AMICI CURIAE

Amici curiae are non-profit organizations that work to protect the rights of consumers to seek redress in court for their injuries. Amici file this brief because the answer to the certified question will affect whether consumers who have been induced by a seller's fraudulent actions into buying a product they would not otherwise have bought are able to bring claims for fraudulent concealment or for violations of the Nevada Deceptive Trade Practices Act. A negative answer to the certified question would have significant ramifications for consumers who care about whether the products they buy satisfy religious requirements, are produced in accordance with fair labor or environmental standards, were made in the United States, or, as in this case, would place consumers at risk of harm by exposing them to dangerous chemicals, unsafe conditions, or deadly bacteria, such as *legionella*.

Public Citizen is a national, non-profit, consumer-advocacy organization that engages in research, education, lobbying, and litigation on a wide range of public-health and consumer-safety issues. Among other things, Public Citizen fights for the rights of consumers to access civil justice; for strong health, safety, and environmental protections; and for safe, effective, and affordable prescription drugs and health care. Public Citizen often represents consumer interests in litigation, including as amicus curiae in the United States Supreme Court, state supreme courts, and federal and state courts of appeals.

The **National Association of Consumer Advocates** (NACA) is a non-profit corporation formed in 1994 whose members are lawyers, law professors, and students whose practice or area of study involves consumer protection. NACA's mission is to promote justice for consumers by maintaining a forum for information sharing among consumer advocates and to serve as a voice for its members and consumers in the struggle to curb unfair and oppressive business practices.

The **National Consumer Law Center** (NCLC) is recognized nationally as an expert in consumer protection issues. For more than 51 years, NCLC has drawn on this expertise to provide information, legal research, policy analyses, and market insights to federal and state legislatures, administrative agencies, and the courts. NCLC also publishes a twenty-one volume Consumer Credit and Sales Legal Practice Series. Many of these volumes address consumer fraud issues including Unfair and Deceptive Acts and Practices (9th Ed., 2016). A major focus of NCLC's work is to increase public awareness of unfair and deceptive practices perpetrated against low-income and elderly consumers, and to promote protections against such practices. NCLC frequently appears as amicus curiae in consumer law cases before trial and appellate courts throughout the country. NCLC has an interest in seeking strong and effective enforcement of consumer protection laws.

Public Justice is a legal advocacy organization that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting corporate and

governmental misconduct. The organization maintains an Access to Justice Project that pursues litigation and advocacy efforts to remove procedural obstacles that unduly restrict the ability of workers, consumers, and people whose civil rights have been violated to seek redress for their injuries in the civil court system. As part of its Access to Justice Project, Public Justice has appeared on behalf of and as amicus in support of consumers seeking to ensure the civil justice system provides remedies for their injuries.

In accordance with Nevada Rule of Appellate Procedure 29(c), amici have filed a motion to file this amicus brief.

BACKGROUND AND SUMMARY OF ARGUMENT

In May 2017, the Southern Nevada Health District informed the Rio All-Suite Hotel and Casino that two guests were diagnosed with Legionnaires' disease—a life-threatening form of pneumonia caused by exposure to *legionella* bacteria—after staying at the Las Vegas hotel. Appellants' Appendix (App. Appx.) 46. Over the following months, the Rio continued to book hotel rooms, and when plaintiffs Aaron Leigh-Pink and Tana Emerson arrived and paid a resort fee for their stay, the hotel said nothing to them about the bacteria lurking in the water system. *Id.* at 47–48.

Plaintiffs brought this action on behalf of themselves and others who stayed at the hotel during the time that the hotel had *legionella* in its water system. *See id.* at 49. As relevant here, plaintiffs asserted a claim for fraudulent concealment and a

claim of consumer fraud under NRS § 41.600 for violating the Nevada Deceptive Trade Practices Act by failing “to disclose a material fact in connection with the sale or lease of goods or services.” NRS § 598.0923(2). *See* App. Appx. 52–55, 60–62. The federal district court dismissed the case for failure to state a claim, stating that plaintiffs had not “alleged facts demonstrating that they had sustained recoverable damages.” *Id.* at 3. In particular, the district court stated that, although “[g]enerally, out-of-pocket expenses are recoverable damages when plaintiffs incur the expenses as a result of defendant’s fraudulent conduct,” they are not recoverable “if the plaintiff received the ‘benefit of their bargain’ with the defendant,” and that the plaintiffs had received “the benefit of the resort fees,” which they had paid “to receive phone, internet, and fitness center access.” *Id.* at 4.

On appeal, the Ninth Circuit certified to this Court the question whether, for purposes of a fraudulent concealment claim and a consumer fraud claim under NRS § 41.600, a plaintiff has suffered damages if the defendant’s fraudulent actions caused the plaintiff to purchase a product or service that the plaintiff would not otherwise have purchased, even if the product or service was not worth less than what the plaintiff paid. App. Appx. 223–24.

This Court should answer the certified question in the affirmative. Consumers who buy products or services that they would not have bought absent the seller’s fraudulent actions suffer economic loss in the form of money they paid that they

would not have paid without the seller's fraud. The consumers should be able to be compensated for that loss through a damages award.

Although the plaintiffs here paid money they would not have paid had they known of the *legionella*, *see id.* at 62, the federal district court concluded that they had not sustained damages because they received the benefit of their bargain, *see id.* at 4. But consumers who purchase products they would not have purchased absent the seller's fraud do not receive the benefit of the bargain into which they entered: The fact that they were willing to pay to buy the product as it was represented, but would not have been willing to buy the product as it actually existed, demonstrates that the product the consumers received differs meaningfully from the product for which they bargained.

For the same reasons that plaintiffs who purchased products or services they would not have purchased without the defendant's fraudulent actions have sustained damages for the purpose of a fraudulent concealment claim, such plaintiffs have also sustained damages for the purposes of the statutory consumer fraud claim: they sustained economic loss and did not receive the benefit of their bargain. Moreover, the Court should hold that such plaintiffs suffer damages for the purposes of the statutory claim regardless of whether they suffer damages for common-law purposes. The consumer fraud statute is a remedial statute that must be liberally construed to accomplish its intent, and allowing plaintiffs to recover money they

would not have paid absent the defendant's fraud is an appropriate remedy for their loss. Furthermore, the statute provides a cause of action to any victim of consumer fraud, and plaintiffs who paid money they would not have paid without the fraud have suffered harm from such fraud.

Sellers fraudulently conceal harmful or unpopular information about their products and services precisely because they know that revealing the information may affect whether consumers are willing to buy those products and services and how much the consumers are willing to spend. A seller that conceals information that matters to consumers should not be able to avoid accountability by claiming, after consumers pay money that they would not otherwise have paid, that the consumers got what they paid for. This Court should hold that a plaintiff has suffered damages if the defendant's fraudulent actions caused the plaintiff to purchase a product or service that the plaintiff would not otherwise have purchased, regardless of whether the market value of the product or service was less than the amount paid.

ARGUMENT

I. Consumers who purchase products or services that they would not have purchased absent the seller's fraud suffer common-law damages.

Fraudulent concealment has five elements: (1) the defendant concealed a material fact; (2) the defendant had a duty to disclose the fact to the plaintiff; (3) the defendant intentionally concealed the fact with the intent to defraud the plaintiff; (4) the plaintiff would have acted differently if he or she knew the concealed fact; and

(5) the plaintiff sustained damages because of the concealment. *See Dow Chem. Co. v. Mahlum*, 114 Nev. 1468, 1485, 970 P.2d 98, 110 (1998), abrogated on other grounds by *GES, Inc. v. Corbitt*, 117 Nev. 265, 21 P.3d 11 (2001). The question in this case relates to the last element: whether plaintiffs sustain damages when a defendant's fraudulent actions cause them to purchase a product or service they would not otherwise have purchased.

This Court should hold that such plaintiffs sustain damages. Damages “compensat[e]” injured parties for their “loss or injury.” *Damages*, Black’s Law Dictionary (11th ed. 2019). Consumers who have been induced by a defendant’s fraudulent actions into buying products or services they would not otherwise have bought suffer economic loss in the form of the money they spent that they would not have spent absent the defendant’s fraud. As the Supreme Court of California has explained:

From the original purchasing decision we know the consumer valued the product as [represented] more than the money he or she parted with; from the [fact that the consumer would not have bought the product absent the fraud] we know the consumer valued the money he or she parted with more than the product as it actually is; and from the combination we know that because of the misrepresentation the consumer (allegedly) was made to part with more money than he or she otherwise would have been willing to expend, i.e., that the consumer paid more than he or she actually valued the product. That increment, the extra money paid, is economic injury[.]

Kwikset Corp. v. Superior Ct., 51 Cal. 4th 310, 330, 246 P.3d 877, 890–91 (2011).

Where the consumer would have not purchased the product at any price absent the defendant’s fraud, the economic injury is the full amount the consumer paid.

Here, the federal district court recognized that out-of-pocket expenses incurred as a result of a defendant’s fraud are generally recoverable damages, but nonetheless dismissed the plaintiffs’ fraudulent concealment claim on the ground that they received the “benefit of their bargain.” App. Appx. 4. As an initial matter, however, when a plaintiff purchases a product because a defendant’s fraud made the product appear to be worth more than it was worth in reality, the plaintiff has been deprived of the benefit of the bargain the plaintiff made, regardless of the market value of the product. “[T]he theory that the vendee must be satisfied if he got in land the worth of his money is altogether wrong. He was entitled to have what he bought and paid for[.]” *Estes v. Odum*, 91 Ga. 600, 18 S.E. 355, 357 (Ga. 1893). Similarly, where a plaintiff bargains for a product that is safe, but instead receives an unsafe product, the plaintiff has received a product that is worth less than the product for which the plaintiff bargained and has not received the benefit of that bargain.

Moreover, as the California Supreme Court explained in *Kwikset Corp. v. Superior Court*, consumers who purchase products or services they would not have bought absent the seller’s fraud have not received the benefit of the bargain even if “a court might objectively view the products as functionally equivalent.” 51 Cal. 4th

at 329, 246 P.3d at 890. In *Kwikset*, the court held that plaintiffs who had bought locksets labeled “Made in U.S.A.,” but that “in fact contained foreign-made parts or involved foreign manufacture,” suffered economic injury, although the plaintiffs had not “allege[d] the locksets were defective, overpriced, or of inferior quality.” *Id.* at 317, 331, 246 P.3d at 881, 891. “Plaintiffs selected [the defendant’s] locksets to purchase in part because they were ‘Made in U.S.A.’,” the court explained. *Id.* at 332, 246 P.3d at 892. “[T]hey would not have purchased them otherwise; and, it may be inferred, they value what they actually received less than either the money they parted with or working locksets that actually were made in the United States.” *Id.* Because they “bargained for locksets that were made in the United States,” but “got ones that were not,” the plaintiffs “ha[d] not received the benefit of [their] bargain.” *Id.*

Similarly, here, the plaintiffs bargained for a stay and amenities at a safe hotel—but instead the hotel was contaminated with *legionella*. Defendant’s fraudulent conduct induced the plaintiffs to pay for something that they did not actually receive, and the hotel room and amenities they did receive were worth less to them than what they paid. *See App. Appx. 62.* The plaintiffs were thus deprived of the benefit of their bargain.

The consequences of holding that a plaintiff has not suffered damages if the defendant’s fraudulent actions caused the plaintiff to purchase a product or service

that the plaintiff would not have purchased otherwise, as long as the market value of the product was not less than what the consumer paid, would extend far beyond the facts of this case and the “Made in U.S.A.” scenario in *Kwikset*. Many factors may cause a consumer to value one product more than another, or to consider a product that has value to other people to be entirely worthless. As explained in *Kwikset*:

Whether a particular food is kosher or halal may be of enormous consequence to an observant Jew or Muslim. Whether a wine is from a particular locale may matter to the oenophile who values subtle regional differences. Whether a diamond is conflict free may matter to the fiancée who wishes not to think of supporting bloodshed and human rights violations each time she looks at the ring on her finger. And whether food was harvested or a product manufactured by union workers may matter to still others.

51 Cal. 4th at 328–29, 246 P.3d at 889. Indeed, sellers often make representations about these sorts of attributes precisely because they understand that they are important to a segment of the public and may affect whether consumers are interested in buying the product. *See id.* at 333, 246 P.3d at 892 (explaining that the defendant labeled its products as being made in the U.S.A. because “it determined such marketing might sway reasonable people in their purchasing decisions”); *Hinojos v. Kohl’s Corp.*, 718 F.3d 1098, 1106 (9th Cir. 2013) (noting that sellers have an incentive to provide false information that is significant to consumers). When consumers buy a product based on the representation that it contains a desired attribute, that attribute is part of what the consumers are buying. Accordingly, “[t]he observant Jew who purchases food represented to be, but not in fact, kosher; the

Muslim who purchases food represented to be, but not in fact, halal; the parent who purchases food for his or her child represented to be, but not in fact, organic, has in each instance not received the benefit of his or her bargain.” *Kwikset*, 51 Cal. 4th at 332, 246 P.3d at 892.

Indeed, taken to its logical extreme, a holding that plaintiffs who purchased a product based on a defendant’s fraudulent actions have not suffered damages as long as the market value of the product they received was not less than the price they paid would have absurd consequences. Under that view, consumers would have no claim for damages if the defendant represented that the product was a non-refundable hotel room in Las Vegas when the room was actually in Reno, or represented that the room was a family suite that slept five people when it was actually a standard room for two—as long as the defendant generally charged the same amount for the rooms. Consumers would not even have a claim for damages if the defendant represented that it was selling them one product and then replaced that product with an entirely different one. It cannot seriously be argued, however, that a consumer who was led to believe she was buying a \$200 bicycle has received the benefit of her bargain if instead she is given a \$200 scarf.

In some instances, consumers may be able to sell the misrepresented items and recoup some of the money they lost. *See Kwikset*, 51 Cal. 4th at 333, 246 P.3d at 893 (noting that the argument that the plaintiffs received the benefit of their

bargain, even if they would not have bought the locksets without the misrepresentation, “is shorthand for the idea that they could as easily turn around and sell the locksets to someone else for the same price”). However, “there is no functioning aftermarket that would permit easy resale of, for example, perishable foodstuffs and small-ticket consumer goods.” *Id.* Similarly, purchased services—such as hotel rooms and airplane tickets—are often not transferable from one person to another. Moreover, even where there is an aftermarket, transactions costs may preclude resale of the product or service at its original price. Further, consumers may not learn of the misrepresentation until it is too late to try to resell the product or service. And the consumer may have “qualms—religious, ethical, or otherwise—that would preclude his or her partaking in resale” of the product or service, given the information that the consumer has since learned—information that would have kept the consumer from buying the product or service in the first place if not for the defendant’s fraudulent conduct. *Id.*

To be sure, not all consumers who receive items they would not have bought absent a defendant’s fraudulent actions will be able to recover damages. In some circumstances, a defendant will not have a duty to disclose information that might make a difference to a particular consumer’s purchasing decisions. Whether the defendant had a duty to disclose, however, is a separate element from whether the consumer has suffered damages, *see Dow*, 114 Nev. at 1485, 970 P.2d at 110, and is

not at issue here, *see Leigh-Pink v. Rio Props., LLC*, 849 F. App'x 628, 631 (9th Cir. 2021) (rejecting argument that Rio did not have a duty to disclose the *legionella*). Likewise, the information that was concealed might not be material, because a reasonable person would not attach importance to the information and the seller did not know or have reason to know that the consumer is likely to regard the information as important. *See* Restatement (Second) of Torts § 538 (Am. Law Inst. 1977) (discussing when a misrepresentation is material); *Kwikset*, 51 Cal. 4th at 332, 246 P.3d at 892 (noting that the argument that consumers like the plaintiffs in *Kwikset* received the benefit of the bargain may rest on the “unstated predicate[]” that “the misrepresentation at issue should be deemed not a material part of the bargain”). Like duty to disclose, however, whether the misrepresentation was material is a separate element of a fraudulent concealment claim than whether the consumer has sustained damages. *See Dow*, 114 Nev. at 1485, 970 P.2d at 110. And, here, it can hardly be questioned that the presence of a potentially deadly bacteria at a hotel would be material to a reasonable consumer's decision whether to use that hotel.

Recognizing that consumers who have purchased items they would not have purchased absent a defendant's fraudulent actions have sustained damages best serves the purpose of returning the consumers to the position they would have been in without the fraud. Moreover, allowing recovery under such circumstances

“provide[s] a significant deterrent” to sellers who otherwise might be inclined to “fraudulently mislead[] [people] under similar circumstances in the future.” *Davis v. Beling*, 128 Nev. 301, 318, 278 P.3d 501, 513 (2012) (citation omitted). Allowing defendants to escape liability when they engage in fraudulent actions that cause plaintiffs to buy products or services they otherwise would not buy risks incentivizing unscrupulous vendors to conceal safety hazards and other problems with the products they sell, gambling—potentially with the consumers’ health—that they will face no consequences. It also “place[s] those businesses that do not engage in misrepresentations at a competitive disadvantage.” *Kwikset*, 51 Cal. 4th at 331, 246 P.3d at 891. Requiring such defendants to compensate plaintiffs for the money they spent would deter them from misleading consumers in the future, better protect consumers’ health and safety, and help support a well-functioning marketplace.

II. Consumers who purchase products or services that they would not have purchased absent the defendant’s fraud suffer damages under NRS § 41.600.

The Nevada Deceptive Trade Practices Act defines a “deceptive trade practice” to include instances in which an entity, in the course of business, “[f]ails to disclose a material fact in connection with the sale or lease of goods or services.” NRS § 598.0923(2). NRS § 41.600, which provides a right of action for violations of the Deceptive Trade Practices Act, allows “any person who is a victim of consumer fraud” to sue. NRS § 41.600(1). If a plaintiff prevails, the court shall

award the claimant “[a]ny damages that the claimant has sustained,” “[a]ny equitable relief that the court deems appropriate,” costs, and reasonable fees. NRS § 41.600(3).

For the reasons discussed above with respect to fraudulent concealment, a plaintiff who has purchased a product or service based on a defendant’s fraudulent conduct that the plaintiff otherwise would not have purchased sustains damages for the purposes of a consumer fraud claim under NRS § 41.600. That plaintiff has suffered an economic loss and did not receive the benefit of the bargain.

Furthermore, even if the Court holds that such plaintiffs have not sustained damages for the purposes of common-law fraudulent concealment, the Court should hold that they have sustained damages for the purposes of a consumer fraud claim under NRS § 41.600. Nevada courts have recognized that plaintiffs may succeed on statutory fraud claims even when they could not do so at common law. *See Betsinger v. D.R. Horton, Inc.*, 126 Nev. 162, 165, 232 P.3d 433, 435 (2010) (holding that the preponderance of evidence standard applied to statutory fraud claims when a traditional common-law claim had to satisfy the clear and convincing standard); *Poole v. Nevada Auto Dealership Investments, Inc.*, 135 Nev. 280, 283–84, 287, 449 P.3d 479, 482–83, 485 (Nev. App. 2019) (holding that “knowingly” in the Nevada Deceptive Trade Practices Act means only “general intent,” not an intent to deceive, although an intent to deceive is an element of common-law fraud). The consumer

fraud statute provides for broad damages, stating that the court shall award “[a]ny damages that the claimant has sustained.” NRS § 41.600(3) (emphasis added); *see Hinojos*, 718 F.3d at 1108 (noting that the term “any damages” is “a capacious one”). And because the consumer fraud statute is part of “a remedial statutory scheme,” it must be afforded “liberal construction to accomplish its beneficial intent.” *Poole*, 135 Nev. at 286–87, 449 P.3d at 485 (quoting *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)); *see also Colello v. Adm’r of Real Est. Div. of State of Nev.*, 100 Nev. 344, 347, 683 P.2d 15, 17 (1984) (“Statutes with a protective purpose should be liberally construed in order to effectuate the benefits intended to be obtained.”). Here, interpreting “any damages” in NRS § 41.600 to include money paid by plaintiffs who would not have bought the defendant’s goods and services absent the defendant’s fraudulent conduct serves the statutory scheme’s remedial purpose.

Finally, regardless of whether plaintiffs who buy products they would not have bought absent a defendant’s fraudulent conduct are deemed to have sustained damages, they should be able to state a claim under NRS § 41.600. “The Nevada consumer fraud statute allows a cause of action for anyone who is a ‘victim’ of consumer fraud.” *Cruz v. Kate Spade & Co., LLC*, No. 219CV00952APGBNW, 2020 WL 5848095, at *5 (D. Nev. Sept. 30, 2020) (quoting NRS § 40.600(1)). Where a consumer “has alleged she would not have purchased the items but for [the

defendant's fraudulent conduct], she has sufficiently alleged harm that could be determined under some measure of restitution." *Id.* A consumer should not have to allege that "items are worth less than what she paid for them ... to survive a motion to dismiss." *Id.* The consumer's allegation that she would not have bought the items absent the defendant's fraudulent conduct should be sufficient to state a statutory claim.

CONCLUSION

This Court should answer the certified question in the affirmative and hold that, for purposes of a fraudulent concealment claim and consumer fraud claim under NRS § 41.600, a plaintiff has suffered damages if the defendant's fraudulent actions caused the plaintiff to purchase a product or service that the plaintiff would not otherwise have purchased, even if the product or service was not worth less than what the plaintiff paid.

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CERTIFICATE OF COMPLIANCE

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 been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14 point Times New Roman.

I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 4,231 words.

Finally, I hereby certify that I have read this amicus 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 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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date, the foregoing brief was electronically filed with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the Master Service List as follows:

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I further certify that on this date I caused a copy of the foregoing brief to be served on the following counsel through first-class mail, postage pre-paid:

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