

IN THE SUPREME COURT OF THE STATE OF NEVADA

BONNEVILLE SQUARE ASSOCIATES,
LLC, A NEVADA LIMITED LIABILITY
COMPANY AND UNION PLAZA
OPERATING COMPANY, D/B/A THE
PLAZA HOTEL AND CASINO, A
NEVADA CORPORATION; FOR
THEMSELVES AND OTHERS
SIMILARLY SITUATED,
Petitioners,

vs.

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

Respondents,

and

NEVADA POWER COMPANY, A
NEVADA CORPORATION,
Real Party in Interest.

No. 49101

FILED

APR 01 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DENYING PETITION
FOR A WRIT OF MANDAMUS OR PROHIBITION

This is an original petition for a writ of mandamus or prohibition challenging a district court order denying a class action certification of a deceptive trade practices and contracts action.

The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition.

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or

station or to control a manifest abuse of discretion, or an arbitrary or capricious abuse of discretion.¹ “A writ of prohibition may issue to arrest the proceedings of a district court exercising its judicial functions when such proceedings are in excess of its jurisdiction.”² As to class certification decisions, we review “certification decisions under an abuse of discretion standard.”³ However, a writ will issue only if there is no plain, speedy, and adequate remedy in the ordinary course of the law.⁴

Petitioners Bonneville Square Associates, LLC and Union Plaza Operating Company argue that the class certification of this matter was appropriate under NRCP 23 and that the district court erred in refusing to certify the proposed class. We disagree.

Real party in interest Nevada Power Company argues that the fraud and damage analysis for each proposed class member in the underlying action is too individualistic to allow for class treatment. Pursuant to our review of the actions of the district court, we are persuaded by Nevada Power’s arguments.⁵

¹NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981).

²Schuster v. Dist. Ct., 123 Nev. ___, ___, 160 P.3d 873, 875 (2007); NRS 34.320.

³Shuette v. Beazer Homes Holdings Corp., 121 Nev. 837, 846, 124 P.3d 530, 537 (2005).

⁴NRS 34.170; NRS 34.330.

⁵See Moore v. PaineWebber, Inc., 306 F.3d 1247, 1253 (2d Cir. 2002) (holding that “liability for fraudulent misrepresentations cannot be established simply by proof of a central, coordinated scheme . . . to recover for a defendant’s fraudulent conduct, even if that fraud is the result of a

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“Class action suits are designed to allow representatives of a numerous class of similarly situated people to sue on behalf of that class in order to obtain a judgment that will bind all.”⁶ NRCP 23(a) and (b) specify the circumstances under which a case is appropriately designated and maintained as a class action.⁷ “Under those subsections, [i]t is the

... continued

common course of conduct, each plaintiff must prove that he or she personally received a material misrepresentation, and that his or her reliance on this misrepresentation was the proximate cause of his or her loss”).

⁶Shuette, 121 Nev. at 846, 124 P.3d at 537.

⁷NRCP 23 provides in pertinent part:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members

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... continued

of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

plaintiffs' burden to prove that the case is appropriate for resolution as a class action."⁸

In the underlying action, the petitioners have alleged a claim for deceptive trade practices under NRS Chapter 598. As the basis for the petitioners' claims, NRS 598.0915 provides in pertinent part:

A person engages in a "deceptive trade practice" if, in the course of his business or occupation, he:

....

5. Knowingly makes a false representation as to the characteristics, ingredients, uses, benefits, alterations or quantities of goods or services for sale or lease or a false representation as to the sponsorship, approval, status, affiliation or connection of a person therewith.

....

7. Represents that goods or services for sale or lease are of a particular standard, quality or grade, or that such goods are of a particular style or model, if he knows or should know that they are of another standard, quality, grade, style or model.

....

15. Knowingly makes any other false representation in a transaction.

Further, NRS 598.0923 provides in pertinent part:

A person engages in a "deceptive trade practice" when in the course of his business or occupation he knowingly:

⁸Shuette, 121 Nev. at 846, 124 P.3d at 537 (quoting Cummings v. Charter Hospital, 111 Nev. 639, 643, 896 P.2d 1137, 1140 (1995) (modification in the original)).

....

2. Fails to disclose a material fact in connection with the sale or lease of goods or services.

3. Violates a state or federal statute or regulation relating to the sale or lease of goods or services.⁹

As reflected in the aforementioned statutes, misrepresentations are a central part of the petitioners' claim for deceptive trade practices.

As such, we conclude that the district court did not abuse its discretion in determining that the alleged misrepresentations as to each proposed class member would not be common and typical. Thus, class certification was inappropriate here because the answers to the following questions, among others, were not necessarily common and typical to the proposed class members: (1) what were the actual misrepresentations, (2) when were the alleged misrepresentations made, (3) did the proposed class members rely on these alleged misrepresentations, (4) what damages did each of the proposed class members face, (5) when should the proposed class members have realized the alleged misrepresentations, and (6) did the statute of limitations lapse for any of the proposed class members.

Consequently, we conclude that the proposed class members' claims for deceptive trade practices present unique and distinct questions that are not common and may not hold true for all proposed class members; having to prove justifiable reliance for each proposed class

⁹The petitioners alleged a violation of NRS 704.040 (statute stating that charges for services must be just and reasonable).

member would be an unduly burdensome task for the district court.¹⁰ Even though “commonality” may be satisfied by a single common question of law or fact,¹¹ we conclude that the prerequisites under NRCP 23(b) cannot be met either because of the individualistic nature of each proposed class member’s claim for deceptive trade practices.¹² Thus, the proposed class members’ claims for deceptive trade practices are so particular and individualistic that class certification would have thwarted the goals of class action suits.¹³

Additionally, the record indicates that the proposed class members are not necessarily the parties who originally contracted with Nevada Power to undergo secondary side metering; the record is devoid of

¹⁰While the petitioners assert that some of their consumer fraud claims do not require the proof of justifiable reliance, the petitioners have failed to demonstrate why their claims for deceptive trade practices do not require the showing of justifiable reliance for each proposed class member.

¹¹See Shuette, 121 Nev. at 848, 124 P.3d at 538.

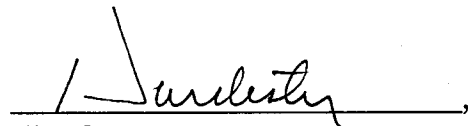
¹²Nevada Power has asserted that none of the unnamed proposed class members have come forward with any facts in any affidavit in support of class certification. While the record does not reveal whether the unnamed proposed class members support class certification, the petitioners have not demonstrated otherwise—as it is the petitioners’ burden to prove that their case is appropriate for resolution as a class action. In any case, we conclude that the petitioners have not demonstrated how proceeding with separate and individual lawsuits would impair the proposed class members from obtaining any redress; the petitioners have not demonstrated that the proposed class members’ individual claims are too small or too widely dispersed for which class certification would be appropriate. See Shuette, 121 Nev. at 846, 124 P.3d at 537.

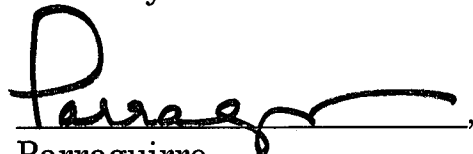
¹³See Shuette, 121 Nev. at 846, 124 P.3d at 537.

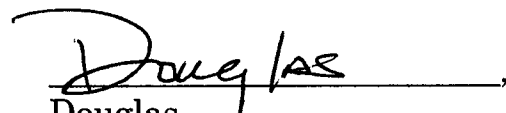
whether the proposed class members have any privity to the original contracting parties as to being misrepresented by Nevada Power.

Therefore, we are not satisfied that the court's intervention by way of extraordinary relief is warranted at this time; the district court did not manifestly abuse its discretion in pragmatically determining that the petitioners have not satisfied the requirements of "commonality" and "typicality" for class certification.¹⁴ Consequently, we conclude that the district court did not manifestly abuse its discretion in refusing to certify the proposed class.¹⁵ Accordingly, we

ORDER the petition DENIED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

¹⁴See NRCP 23(a); Shuette, 121 Nev. at 848-49, 124 P.3d at 538-39.

We note that in seeking writ relief, the petitioners have argued as to conditional class certification. As with overall class certification, we conclude that the district court did not manifestly abuse its discretion in not providing conditional class certification under NRCP 23(c).

¹⁵See Shuette, 121 Nev. at 846, 124 P.3d at 537.

cc: Hon. Jennifer Togliatti, District Judge
Cisneros & Thompson, Chtd.
Law Offices of Lawrence T. Osuch
Lewis & Roca, LLP/Las Vegas
Morris Pickering Peterson & Trachok/Reno
Eighth District Court Clerk