

IN THE SUPREME COURT OF THE STATE OF NEVADA

NUTRACEUTICAL DEVELOPMENT CORPORATION; THE ESTATE OF M. DWIGHT CANTRELL; DIANE DOTTAVIO, INDIVIDUALLY AND IN HER CORPORATE CAPACITY; AND MELISSA ROGERS, INDIVIDUALLY AND IN HER CORPORATE CAPACITY, Appellants,

vs.

DAVID P. SUMMERS, INDIVIDUALLY AND IN HIS DERIVATIVE CAPACITY AS SHAREHOLDER OF NUTRACEUTICAL DEVELOPMENT CORPORATION; AND JAMES D. DAVIDSON, INDIVIDUALLY AND IN HIS DERIVATIVE CAPACITY AS SHAREHOLDER OF NUTRACEUTICAL DEVELOPMENT CORPORATION, Respondents.

No. 53565

**FILED**

**JUL 01 2011**

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

ORDER AFFIRMING IN PART AND REVERSING IN PART

This is an appeal from a district court judgment after a bench trial in a corporations action and from a post-judgment order awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

FACTUAL BACKGROUND

Respondents David Summers and James Davidson invented a nicotine based muscle-building technology and assigned the technology to Endovasc Development, Inc. which later assigned the technology to appellant Nutraceutical Development Corporation ("NDC"). NDC exclusively licensed the technology to Western Holdings, Inc. in exchange for payments to NDC.

Purportedly, Summers was NDC's sole officer and director, and he and Davidson each retained NDC shares but transferred 48 million shares to Endovasc. Summers also purportedly transferred shares to appellants Dianne Dottavio and Dwight Cantrell, now represented by appellant Estate of Dwight Cantrell. Later, Summers contacted Dottavio, an officer at Endovasc, to vote his shares but Dottavio informed him that his shares were invalid. Dottavio subsequently filed documents with the Secretary of State to amend NDC's officers and replace the resident agent. Dottavio based her authority on a 2002 NDC share certificate that purportedly transferred all of NDC's 75 million shares to Endovasc.

Summers and Davidson sued in their individual and derivative capacities as shareholders of NDC, alleging civil conspiracy, fraud, and other claims. In 2008, appellants filed a suggestion of bankruptcy regarding Endovasc which stated that Endovasc solely owned NDC and thus, proceedings against NDC should be stayed. Yet, at trial Dottavio testified that Endovasc transferred its NDC shares to its attorney George D. Gordon in 2006.

Following a one-day bench trial the district court concluded that (1) the 2002 certificate was a forgery and Endovasc owned only 48 million shares of NDC, (2) Summers held 10,710,000 shares of NDC stock and Davidson held 7,100,000 shares of NDC stock, (3) appellants wrongfully took control of NDC, (3) Dottavio breached a fiduciary duty to NDC and its shareholders, (5) appellants' breach of fiduciary duties resulted in unreasonable expenses to NDC, and (6) appellants acted intentionally and in concert to fraudulently deprive respondents of the benefits of their shares by creating the 2002 certificate and using it to take control over NDC. The district court ordered the individual appellants to reimburse NDC and awarded actual damages and punitive damages to

respondents against Dottavio. The district court also awarded attorney fees and costs to respondents, which appellants failed to oppose.

Appellants contend on appeal that the district court erred by (1) rendering judgment without joining indispensable parties, (2) finding fraud against appellants, (3) finding that the expenses of the corporation constituted a breach of fiduciary duty without evidence and without application of the business judgment rule, (4) awarding respondents actual damages for alleged loss of dividends or alleged lost share value, (5) awarding punitive damages against appellant Dottavio, and (6) making findings of fact and conclusions of law that ignored contrary written acts of the corporation.<sup>1</sup>

We disagree with most of appellants' contentions but do agree that the district court erred by awarding punitive damages without holding a separate hearing. Thus, we reverse the district court's award of punitive damages but affirm the remainder of the district court's order.

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<sup>1</sup>We decline to address appellants' arguments regarding NRCP 23.1 and demand futility because they did not raise the issue below and are not entitled to raise it for the first time on appeal. Delgado v. American Family Ins. Group, 125 Nev. \_\_\_, \_\_\_, 217 P.3d 563, 567 (2009). We also decline to address appellants' challenge to attorney fees and costs because appellants did not raise this issue in district court and this does not amount to plain error. Issues raised for the first time on appeal are waived. Id. Waived issues are not addressed unless they constitute plain error. Bradley v. Romeo, 102 Nev. 103, 105, 716 P.2d 227, 228 (1986). Reversible error exists only if the complained error affects a party's substantial rights. Thomas v. Hardwick, 126 Nev. \_\_\_, \_\_\_, 231 P.3d 1111, 1112 (2010). Finally, we decline to address appellants' argument that the district court improperly precluded the testimony of handwriting expert Janet Masson because Masson's purported testimony clearly related to the validity of the 2002 certificate and appellants completely failed to disclose Masson as required by NRCP 16.1.

The parties are familiar with the facts, and we do not recount them further except as is necessary for our disposition.

## DISCUSSION

### Standard of review

This court reviews a district court's findings of fact for an abuse of discretion and will only reverse such conclusions if they are clearly erroneous or unsupported by substantial evidence. NOLM, LLC v. County of Clark, 120 Nev. 736, 739, 100 P.3d 658, 660-61 (2004). In a bench trial, a determination based on substantial evidence will not be reversed based on conflicting evidence. Edwards Indus. v. DTE/BTE, Inc., 112 Nev. 1025, 1031, 923 P.2d 569, 573 (1996). Substantial evidence is adequate to support the conclusion of a reasonable mind. Radakar v. Scott, 109 Nev. 653, 657, 855 P.2d 1037, 1040 (1993). A district court's findings are not set aside unless they are clearly erroneous. Id.

### Endovasc and Gordon were not indispensable parties

Appellants argue that the district court erred by failing to join Gordon and Endovasc because both were indispensable parties under NRCP 19. We disagree.

An indispensable party is a party that is necessary to an action. Potts v. Vokits, 101 Nev. 90, 92, 692 P.2d 1304, 1306 (1985). A party should be joined (1) if the party's absence would make complete relief among existing parties impossible or (2) if the potential party has a material interest in the subject matter such that its participation in the lawsuit is essential for the district court to issue a complete and binding decree that (a) does not impair or impede the party's ability to protect that interest or (b) subject the existing parties to a substantial risk of additional or inconsistent obligations. NRCP 19(a); see also Olsen Family Trust v. District Court, 110 Nev. 548, 553-54, 874 P.2d 778, 781-82 (1994)

(concluding that a trust was an indispensable party and should have been joined because it held legal title to disputed property).

Appellants argue that Endovasc and Gordon were indispensable parties because both claimed a direct interest in NDC through the ownership of NDC's 75 million shares. Appellants contend that the district court erred when it failed to join Gordon and Endovasc because their rights were adversely adjudicated in the instant proceedings. We disagree. Here, the district court did not order Gordon or Endovasc to transfer any property or title. Moreover, Endovasc had the opportunity to participate but its bankruptcy trustee chose not to participate. In fact, Endovasc did not include ownership of NDC within its bankruptcy filings and Gordon did not assert ownership until five days prior to trial. Importantly, Gordon testified at the trial, all of the issues between appellants and respondents were litigated, and the district court did not make any determinations regarding the interests of Endovasc and Gordon. We conclude that the district court granted complete relief to the parties, Gordon and Endovasc were able to protect their interests, and there is not a substantial risk of additional or inconsistent litigation. We hold that the district court did not err by failing to join Endovasc or Gordon to the litigation.

Sufficient evidence supported the fraud finding

Appellants argue that the district court erred by finding fraud. We disagree.

A fraudulent misrepresentation requires evidence that (1) the defendant made a false representation; (2) the defendant knew, believed, or had an insufficient basis for making the representation; (3) the defendant intended to induce the plaintiff to act or refrain from acting based on the misrepresentation; (4) the plaintiff justifiably relied on the misrepresentation; and (5) the damage to the plaintiff resulted from that

reliance. Lubbe v. Barba, 91 Nev 596, 599, 540 P.2d 115, 117 (1975). Justifiable reliance requires a causal connection between the inducement and the plaintiff's act or failure to act resulting in the plaintiff's detriment. Id. at 600, 540 P.3d at 118. Specifically, the misrepresentation must play "a material and substantial part in leading the plaintiff to adopt his particular course" of conduct. Id.

The forged certificate was a misrepresentation

Appellants appear to concede that the 2002 certificate was forged but argue that a forgery does not mean that there was fraud. Because appellants produced the 2002 certificate and alleged its validity in seeking to claim control of NDC as the officers of Endovasc, we conclude that sufficient evidence supported the district court's conclusion that appellants made a false representation.

There is sufficient evidence of appellants' knowledge of the falsity

Appellants argue that while Summers testified that someone forged the NDC certificate, respondents failed to identify the alleged forger and produced no evidence to connect the alleged forgery to appellants. Appellants also assert that they never made any sort of representation nor did they have knowledge that the stock certificate was false. In making this argument, appellants erroneously rely on the fact that the district court failed to make a finding that any particular individual forged the stock certificate.

Appellants fail to address the district court's conclusion that Dottavio and the other appellants acted in concert to create the 2002 certificate and deprive respondents of their NDC shares. Additionally, appellants' argument ignores the fact that they produced the forged certificate to represent Endovasc's ownership of NDC and to assert their control over NDC. Because the district court found that the 2002 certificate was forged and presented by appellants acting in concert, we

conclude that sufficient evidence supported the district court's finding that appellants had knowledge of the 2002 certificate's falsity.

There is sufficient evidence of appellants' intent to induce reliance

Appellants contend that there was no evidence that they intentionally sought to harm respondents by creating the stock certificate. Appellants contend that no evidence was presented to support the premise that they made a misrepresentation with the intent to induce the respondents to act on the representation or that there was any sort of reliance.

Respondents argue that appellants intended to induce respondents' reliance on the forged certificate by preventing them from participating as shareholders in NDC given the misrepresentation in the certificate. Respondents contend that the certificate was forged in order to make Endovasc the sole shareholder of NDC and thus place Dottavio and the other appellants in control of NDC without authority. Respondents assert that appellants intended and induced respondents' reliance by preventing respondents from participating as shareholders in NDC, which included voting their rights and collecting the royalties from the patented technology. Because the district court found that appellants knowingly forged the certificate and used it to deprive respondents of their NDC shares, we conclude that there was sufficient evidence that appellants intended to induce the respondents to refrain from exercising their rights as NDC shareholders.

There is sufficient evidence of respondents' justifiable reliance

Appellants argue that there was no justifiable reliance and point out that respondent Summers testified that he was the sole officer and director and that he knew that he had issued share certificates totaling 75 million authorized shares in a manner contrary to the certificate that memorialized a 100 percent ownership by Endovasc. While

Summers did not accept the forged certificate as valid and respondents sued based upon appellants' misrepresentation, appellants effectively forced respondents out of the company because, other than suing in their shareholder capacity, respondents justifiably refrained from exercising their rights in NDC. As such, appellants' misrepresentation materially and substantially caused the respondents to refrain from participating in NDC. See Lubbe, 91 Nev at 600, 540 P.2d at 118.

Because the district court found that appellants knowingly forged the certificate and used it to deprive respondents of their rightful involvement and benefits in NDC, in which respondents refrained from exercising their shareholder rights, we conclude that there was sufficient evidence that respondents justifiably relied on the appellants' representations. We hold that sufficient evidence supported the district court's finding that appellants committed fraud against respondents.

Substantial evidence supported the unreasonable expenditures calculation

Appellants argue that there was no evidence that they breached their fiduciary duties and that they were protected by the business judgment rule so that the district court erred in determining that appellants owed \$425,237 to NDC for unreasonable expenditures. We disagree because substantial evidence supported the district court's calculation of unreasonable expenditures and the business judgment rule does not apply to these expenses.

A breach of fiduciary duties is established by a preponderance of evidence. Bedore v. Familian, 122 Nev. 5, 12, 125 P.3d 1168, 1172 (2006). A directors' fiduciary relationship with the corporation and its shareholders imparts upon the directors duties of care and loyalty. Shoen v. SAC Holding Corp., 122 Nev. 621, 632, 137 P.3d 1171, 1178 (2006). The duty of care consists of an obligation to act on an informed basis and the duty of loyalty requires the board and its directors to maintain, in good



faith, the corporation's and its shareholders' best interests over anyone else's interests. Id. The business judgment rule “applies only in the context of valid interested director action, or the valid exercise of business judgment by disinterested directors in light of their fiduciary duties.” Id. at 635-36, 137 P.3d at 1181 (noting that “the subject of shareholder derivative complaints is not necessarily always a business decision by the directors”). NRS 78.138(7) provides that the business judgment rule does not apply to a “director’s or officer’s act or failure to act [which] constitute a breach of his or her fiduciary duties” and involve “intentional misconduct, fraud or a knowing violation of law.”

Appellants argue that there was no evidence that the NDC business expenditures were unreasonable. Appellants contend that Rogers had nothing to do with the decision to make expenditures on behalf of NDC and that there was no evidence that there was anything unreasonable about NDC’s corporate expenditures during 2005. Appellants also assert that the evidence failed to demonstrate that development reimbursement costs, management expenses, or professional fees during 2005 were unreasonable.

The district court found that NDC’s 2005 gross income was \$522,569 and that the \$425,237 in business expenses, which Dottavio testified to as the director, were unauthorized and unreasonable. The district court concluded that appellants were not the authorized directors of NDC because they unlawfully assumed their positions and the expenses were unreasonable because they were disproportionately high given NDC’s minimal operations. Dottavio testified that NDC was only maintaining the patent on the patented technology and accepting royalty checks, but claimed that all of the royalty payments were being used to pay the ministerial costs of running NDC.

The district court examined the 2005 Profit and Loss Statement for the figures it used to calculate NDC's reasonable business expenses for 2005. The district court calculated reasonable expenses using all of the expenses listed in the Profit and Loss statement except the \$425,236 listed as "development reimbursement costs, management expense, and professional fees." The district court found that the reasonable business expenses were \$18,759 based on expenses related to investor relations, reimbursable expenses, cost of goods sold, bank charges, general consulting, and press releases.

Because the district court found that appellants acted in concert to unlawfully take control of NDC's royalty payments and the district court calculated reasonable expenses based on the 2005 profit and loss statement by eliminating expenses attributed to appellants and not reasonably related to maintaining NDC, we conclude that substantial evidence supports the district court's finding that \$425,237 in expenses were unauthorized and thus unreasonable. See Bedore, 122 Nev. at 12, 125 P.3d at 1172-73 (concluding that directors breached their fiduciary duties by taking excessive salaries and usurping control of a corporate opportunity not belonging to them). We hold that the district court did not abuse its discretion by calculating the unreasonable expenses and did not err by failing to apply the business judgment rule.<sup>2</sup>

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<sup>2</sup>Appellants' argument that the business judgment rule applied to these expenses was waived and is otherwise without merit. See Delgado, 125 Nev. at \_\_\_, 217 P.3d at 567. This defense was not raised in appellants' answer and is only alluded to in appellants' motion for a new trial by an assertion that none of respondents' claims could be made against the corporation or its officers and directors based on NRS 78.138. But even if appellants preserved the issue, the rule did not apply because the district court determined that the unreasonable expenses resulted

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Substantial evidence supported the actual damages award

Appellants argue that the district court erred in awarding actual damages to appellants for the alleged loss of dividends or alleged lost share value. We disagree.

Wide discretion is given to a district court to calculate an award of damages and such award is not reversed unless there is an abuse of discretion. Asphalt Prods. v. All Star Ready Mix, 111 Nev. 799, 802, 898 P.2d 699, 701 (1995) (noting that a district court must find specific facts and state separately its conclusions of law).

Appellants argue that no evidence at trial demonstrated that NDC issued dividends, that NDC could issue dividends, or that the respondents somehow lost value as a result of any action by the appellants. Appellants argue that the district court made an illogical leap from concluding that certain expenses were unreasonable to the conclusion that respondents lost dividends or share value equal to their alleged ownership percentages of those expense amounts.

The district court determined that respondents were entitled to “their pro rata distribution of any dividends or distributions made to shareholders,” but that the actual award of damages was for the “breach of fiduciary duty, conspiracy and fraud against Defendant Dottavio.” The damages were based on NDC’s adjusted net income from its 2005 gross profits minus reasonable expenses, as itemized in the 2005 Profit and Loss statement, with the district court subtracting \$18,759 from the 2005 gross income and then awarding appellants a pro rata share of the adjusted net

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*... continued*

from Dottavio’s breach of fiduciary duties which involved fraudulent conduct. See NRS 78.138(7).

income. Because the district court based its award of damages to respondents on a pro rata share of NDC's 2005 royalties minus reasonable expenses and not on dividends or lost shares value, we conclude that substantial evidence supported the award of actual damages. We hold that the district court did not abuse its discretion in its award of actual damages to respondents.

Substantial evidence supported the district court's decision not to rely on the second December 2002 written consent produced by appellants

Appellants argue that the district court erroneously disregarded NDC's written corporate acts that contradicted the court's findings and conclusions. We disagree.

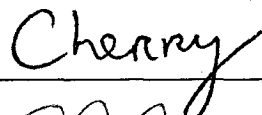
Appellants argue that there was no dispute at trial that a written consent was executed in which NDC issued the 75 million shares to Endovasc on December 5, 2002 and that respondents provided a 2003 agreement that memorialized the issuance of those shares to Endovasc. Appellants argue that Summers had no authority to act on behalf of NDC after December 2003 and he was never the sole director.


Yet, substantial evidence supported the district court's decision not to rely on the December 2002 written consent. Appellants cite to one version of the consent agreement, but neglect to acknowledge that they produced another version of the same document in their initial disclosures. Respondents argue that this discrepancy is another example of the inconsistencies, back dating, and forgery revealed in NDC's corporate records. Because the district court made a factual determination based on substantial albeit conflicting evidence, we hold that the district court did not abuse its discretion by refusing to rely on the 2002 written consent agreement.


The district court erred by awarding punitive damages without first holding a separate hearing

Appellants argue that the district court erred by failing to conduct a separate hearing on punitive damages, that there was no evidence to support punitive damages, and that the award violated due process. At oral argument, respondents conceded that the district court violated NRS 42.005(3) and requested this court reverse the district court's ruling rather than remand for further proceedings. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART.

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Pickering

cc: Hon. Elizabeth Goff Gonzalez, District Judge  
Stephen E. Haberfeld, Settlement Judge  
John Dean Harper  
Marquis & Aurbach  
Eighth District Court Clerk