

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
WYETH; WYETH
PHARMACEUTICALS, INC.; PFIZER,
INC.; AND PHARMACIA & UPJOHN
COMPANY LLC,
Respondents.

No. 55744

FILED

JUL 27 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *H. Linderson*
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order granting a motion to dismiss with prejudice a claim brought by the State of Nevada under Nevada's Deceptive Trade Practices Act (DTPA). Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

FACTUAL BACKGROUND

Appellant State of Nevada, represented by retained counsel, filed a complaint against respondents Pharmacia & Upjohn Company LLC, Pfizer, Inc., Wyeth, and Wyeth Pharmaceuticals, Inc. (collectively Wyeth). The complaint related to Wyeth's hormone replacement therapy drug (HRT) and alleged that Wyeth (1) engaged in false pretenses and intended to injure competitors under DTPA; and (2) engaged in ongoing fraud, false claims, fraudulent concealment, and deceit by concealment.

Wyeth sought to dismiss the lawsuit pursuant to NRCP 12(b)(5), asserting that the State failed to bring the lawsuit within the prescribed four-year statute of limitations. Wyeth argued that all the facts alleged in the State's complaint were objectively knowable to the State by 2004, as demonstrated by previously filed personal injury complaints brought by Nevada residents against Wyeth beginning in July 2004. Those previously filed complaints alleged personal injuries caused by HRT, which were brought by the same counsel that the State later

retained to bring its DTPA claims, and relied primarily on the same underlying facts. Wyeth attached the previous complaints to its motion to dismiss and argued that the district court should take judicial notice of the complaints. The State argued that the district court could not consider the previous complaints without converting the NRCP 12(b)(5) motion into a summary judgment motion, and thus, requested the district court to convert the motion and allow the State to provide countervailing evidence of inquiry notice.

Although the district court ultimately stated that its decision was based solely upon the State's complaint, it also stated that it was "relying on a lot of information that clearly [fell] outside the pleadings," and that it "suspected" that the State only initiated the lawsuit after being encouraged to do so by the private litigants' attorneys so that they could build momentum for the private litigants' cases. The district court dismissed the State's complaint pursuant to NRCP 12(b)(5).

The State now appeals and argues that the district court erred by considering matters outside the pleadings while refusing to convert Wyeth's NRCP 12(b)(5) motion to one for summary judgment. We agree. We conclude that the district court erred by considering the attached complaints and other materials submitted by Wyeth without converting the motion into a summary judgment motion and allowing the State to submit countervailing evidence of inquiry notice.¹ As such, we reverse the

¹The State also argues that this court should determine whether inquiry notice for a State DTPA claim is the same for an individual based on the same underlying facts and whether the continuing violations rule applies to DTPA claims. However, the record is insufficient to discuss substantive issues regarding inquiry notice for DTPA claims and the adoption of a continuing violation rule. See Carson Ready Mix v. First Nat'l Bk., 97 Nev. 474, 476, 635 P.2d 276, 277 (1981) (stating that this
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district court's dismissal and remand with instructions for further proceedings so that these issues on appeal may be further developed. The parties are familiar with the facts, and we do not recount them further here except as is necessary for our disposition.

DISCUSSION

The State argues that the district court erred by considering matters outside the pleadings while refusing to convert Wyeth's NRCP 12(b)(5) motion to one for summary judgment. We agree.

An order granting an NRCP 12(b)(5) motion to dismiss is reviewed de novo. Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). A decision dismissing a complaint pursuant to NRCP 12(b)(5) is rigorously reviewed on appeal with all alleged facts in the complaint presumed true and all inferences drawn in favor of the complaint. Id. at 227-228, 181 P.3d at 672. If "matters outside the pleading are presented to and not excluded by the court," a motion to dismiss, pursuant to NRCP 12(b)(5), "shall be treated as one for summary judgment and "all parties shall be given reasonable opportunity to present all material made pertinent to" a summary judgment motion. NRCP 12(b)(5).

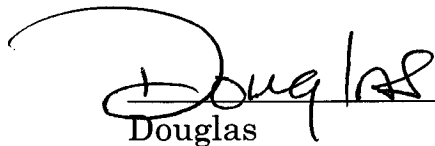
The district court stated that it was "relying on a lot of information that clearly [fell] outside the pleadings" and the parties both note that the district court took judicial notice of the documents that Wyeth attached to its complaint. Under these circumstances, the district court should have converted the motion to dismiss into a summary


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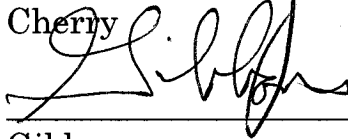
court has "no power to look outside of the record of a case") (quoting Alderson v. Gilmore, 13 Nev. 84, 85 (1878)).

judgment motion. See Blackjack Bonding v. City of Las Vegas Mun. Ct., 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000); Montesano v. Donrey Media Group, 99 Nev. 644, 648, 668 P.2d 1081, 1084 (1983). Absent a valid exception, clearly not present here, the district court was not entitled to consider matters outside of the pleadings. See Mack v. Estate of Mack, 125 Nev. 80, 91-92, 206 P.3d 98, 106 (2009); Breliant v. Preferred Equities Corp., 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993). We conclude that the district court erred by refusing to convert the NRCP 12(b)(5) motion into a summary judgment motion. See Montesano, 99 Nev. at 648-49, 668 P.2d at 1084. We remand this case to the district court so that this case may proceed and its substantive issues may be fully developed. Accordingly, we


ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.²

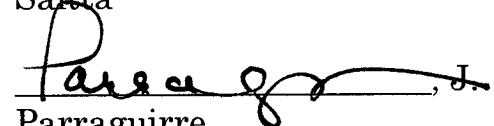
 _____, C.J.
Douglas

 _____, J.
Cherry

 _____, J.
Gibbons

 _____, J.
Hardesty

 _____, J.
Saitta

 _____, J.
Parraguirre

²The Honorable Kristina Pickering, Justice, voluntarily recused herself from participation in the decision of this matter.

cc: Hon. James M. Bixler, District Judge
Ara H. Shirinian, Settlement Judge
Attorney General/Consumer Protection Bureau/Las Vegas
White & Wetherall, LLP/Las Vegas
Littlepage Booth
Snell & Wilmer, LLP/Las Vegas
Lewis & Roca, LLP/Las Vegas
Eighth District Court Clerk