IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ENERGY ENHANCEMENT SYSTEM, LLC; AND SANDRA MICHAEL,
Appellants,
vs.
THE STATE OF NEVADA DEPARTMENT OF BUSINESS AND INDUSTRY, CONSUMER AFFAIRS DIVISION,
Respondent.

No. 79192-COA

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

Energy Enhancement System, LLC, and Sandra Michael appeal from a district court order denying a petition for judicial review in an administrative agency matter. Eighth Judicial District Court, Clark County; David M. Jones, Judge.

Sandra Michael is the developer and founder of Energy Enhancement System, LLC (EES), which operates out of her home located on La Casita Avenue (La Casita) in Las Vegas. Barbara Pinder met Michael while attending an alternative medicine conference. At the conference, Michael invited Pinder to stay at La Casita, where Pinder experienced the EESystem.[1] The EESystem consists of certain software, monitors, and "lasers," which "put out energy and heal[s] ill cells in your body and ma[kes]

[1]We do not recount the facts except as necessary to our disposition.

21-12180

things right."[2] After sampling the EESystem, Pinder became interested in the EESystem as a method of curing her mother's cancer.

On Pinder's second visit to La Casita, she expressed interest in purchasing an EESystem. Michael apparently suggested that Pinder purchase a 12-unit system because it was strong enough to combat cancer. Michael quoted the 12-unit system at $60,000, requiring a $20,000 deposit. At the end of Pinder's second stay at La Casita, Michael gave Pinder an invoice and EES's account information. Pinder confirmed her purchase of the 12-unit system by wiring the required $20,000 deposit into EES's account. Upon making the deposit, Pinder was given a deposit receipt by the bank, but neither Michael nor EES provided Pinder with any additional documentation related to the sale, such as a sales deposit receipt, sales agreement, or sales contract for the transaction; nor were the terms of the purchase further discussed.

Pinder visited La Casita a few more times after she made the deposit. Pinder received, among other things, meals, salt baths, and additional services during the visits, but was never quoted, charged, or otherwise asked to pay for these services; nor was she informed that the services were being provided free of charge because she was buying an EESystem.

Soon after she made the deposit, Pinder told Michael that her mother was installing new floors and the installation of the EESystem had to be delayed. Thereafter, Pinder discovered that EES's website advertised

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[2]More specifically, the EESystem consists of what appear to be computer monitors that surround a chair or bed. The monitors display different colors and purportedly generate energy fields and "scalar waves," which promote wellness, healing, and relaxation to those in the chair, bed, or general area.

its 12-unit EESystem as requiring only an $8,000 deposit, rather than the $20,000 that she paid.

At some point, Pinder's mother decided she did not want the EESystem, so Pinder requested a refund from Michael. Michael directed Pinder to Michael Bertolacini, CEO of EES and Michael's son. Bertolacini informed Pinder that EES had a "no refund" policy, and that this policy was explained in the Research License Agreement (RLA). Pinder requested a copy of the RLA, stating that she never received one and had not been informed of a no-refund policy. Pinder was not immediately provided with a copy of the RLA, but eventually received an unsigned copy about 15 months after paying the $20,000 deposit.

As a compromise, Michael offered Pinder a smaller 4-unit system in exchange for her $20,000 deposit, which Pinder rejected. Later, EES and Michael's former counsel sent Pinder a letter demanding payment of the remaining balance of $44,800 plus $2,800 for Pinder's stay at La Casita, which Pinder rejected, requesting a refund.

Several months later, Pinder sent a letter to Michael and EES (collectively appellants), demanding the return of her deposit. After appellants failed to respond, Pinder filed a complaint with the Nevada Department of Business and Industry, Consumer Affairs Division (NCA). Appellants answered the complaint and contested the allegations therein.

At the administrative hearing, the administrative law judge (ALJ) ordered appellants to cease and desist from engaging in deceptive trade practices in violation of NRS 598.0923(1) (failure to obtain a Clark County business license), NRS 598.0915(15) (false representation of the requisite deposit), NRS 598.092(12) (failure to inform Pinder that EES does not allow refunds or exchanges by printing such on lease or receipt, price

tag, or by signage), and two counts of NRS 598.0923(2) (failure to disclose to Pinder that EES had a no-refund policy and that she was being charged for her stay at La Casita), as well as ordering them to pay for the costs of the investigation, administrative fines, and $20,000 in restitution to Pinder. Thereafter, appellants filed a petition for judicial review in district court. The district court affirmed the ALJ's ruling in its entirety, finding that the decision was not arbitrary and capricious, and was supported by substantial evidence.

On appeal, appellants primarily argue that the ALJ erred because (1) the ALJ did not find appellants' conduct was done *knowingly*, pursuant to NRS 598.0923(1) (operating without the required license); (2) appellants' retroactive demand for compensation from Pinder was justified under a theory of quantum meruit; (3) appellants did not violate NRS 598.092(12) and NRS 598.0923(2) because Michael verbally informed Pinder of EES's no-refund policy; and (4) appellants never knowingly made a false representation pursuant to NRS 598.0915(15) because Pinder never used the EES website in connection with her purchase.

"Like the district court, we evaluate the agency's decision for clear error or an arbitrary and capricious abuse of discretion." *Law Offices of Barry Levinson, P.C. v. Milko*, 124 Nev. 355, 362, 184 P.3d 378, 383-84 (2008). An administrative decision may be set aside if it is "affected by error of law," *Dredge v. State, Dep't of Prisons*, 105 Nev. 39, 43, 769 P.2d 56, 58 (1989), *overruled in part on other grounds by O'Keefe v. State, Dep't of Motor Vehicles*, 134 Nev. 752, 431 P.3d 350 (2018), or if the decision is arbitrary or capricious or constitutes an abuse of discretion, *Helms v. State, Div. of Envtl. Prot.*, 109 Nev. 310, 313, 849 P.2d 279, 281 (1993). We defer to the agency's findings of fact if they are supported by substantial evidence;

however, questions of law are reviewed de novo. *Rio All Suite Hotel & Casino v. Phillips*, 126 Nev. 346, 349, 240 P.3d 2, 4 (2010). Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion. *State Emp't Sec. Dep't v. Hilton Hotels Corp.*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986).

First, we conclude the ALJ's finding that appellants violated NRS 598.0923(1) was not arbitrary and capricious and is supported by substantial evidence. NRS 598.0923(1) provides that "[a] person engages in a 'deceptive trade practice' when in the course of his or her business or occupation he or she *knowingly* . . . [c]onducts the business or occupation without all required state, county or city licenses." (Emphasis added.) In *Poole v. Nevada Auto Dealership Investments, LLC*, this court defined the term "knowingly" to mean that "the defendant is aware that the facts exist that constitute the act or omission." 135 Nev. 280, 284, 449 P.3d 479, 483 (Ct. App. 2019).

Here, the record reflects that appellants knew they were conducting business from La Casita without a Clark County business license. The ALJ was not required to find that the appellants knew they were required to have a Clark County business license. Instead, the ALJ was *only* required to find that the appellants knew they were operating a business in Clark County without a license, which he did.[3] *See Poole*, 135

[3]Appellants' additional arguments regarding the requisite "knowingly" mens rea are erroneous, as appellants fail to make any cogent argument that the *Poole* definition does not apply to the instant case. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority).

Nev. at 283-84, 449 P.3d at 482-83. Thus, the ALJ's finding that appellants violated NRS 598.0923(1) was supported by substantial evidence and therefore not arbitrary and capricious.

Second, the ALJ correctly applied the law and possessed substantial evidence in finding that appellants violated NRS 598.092(12) and NRS 598.0923(2). The latter provides that "[a] person engages in a 'deceptive trade practice' when in the course of his or her business or occupation he or she knowingly . . . [f]ails to disclose a material fact in connection with the sale or lease of goods or services," NRS 598.0923(2); whereas the former provides that a person engages in a deceptive trade practice when in the course of their trade or business they fail to inform their customers of a no-refund policy by "(a) [p]rinting a statement on the face of the lease or sales receipt; (b) [p]rinting a statement on the face of the price tag; or (c) [p]osting in an open and conspicuous place a sign at least 8 by 10 inches in size with boldface letters, specifying that no refunds or exchanges are allowed,"[4] NRS 598.092(12).

Appellants contend that the ALJ erroneously found them in violation of NRS 598.092(12) and NRS 598.0923(2) because prior to Pinder making the deposit, Michael provided Pinder with a copy of the RLA and verbally reviewed with Pinder the no refund statement contained therein.[5] However, the record reflects that Pinder learned of EES's no-refund policy

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[4]Appellants do not argue on appeal that the no-refund policy was not a material fact and this court will not address it herein.

[5]Even if there were credible evidence that Michael verbally reviewed EES's no-refund policy with Pinder, verbal communication of a no-refund policy does not fall within one of the delineated requirements of NRS 598.092(12).

several months after she made the deposit. Additionally, the record contains substantial evidence supporting the ALJ's finding that Michael's testimony on the matter was not credible. Thus, this court will defer to the ALJ's finding that appellants violated NRS 598.092(12) and NRS 598.0923(2).[6]

Third, the ALJ possessed substantial evidence in finding that appellants violated NRS 598.0923(2) by failing to disclose that Pinder would be charged for her stay at La Casita.[7] On appeal, appellants argue that there was a "tacit understanding that [appellants] would not charge [Pinder] as long as she consummated the purchase agreement." Appellants further argue that charging Pinder was not a violation of NRS 598.0923(2) under theories of unjust enrichment and quantum meruit.[8]

There is substantial evidence in the record supporting the finding that appellants never disclosed to Pinder that she would be charged for her stay at La Casita. For example, Michael testified that she opened up her home to Pinder as a guest out of appreciation for Pinder's former employer and that it had "nothing to do with trying to sell her anything."

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[6]Appellants attempt to argue that the ALJ's decision raises a multiplicity-of-punishment issue; however, appellants' argument on appeal is not cogently argued nor supported by persuasive law. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

[7]Appellants do not argue on appeal that appellants' failure to disclose to Pinder that she was being charged for her time at La Casita was not a material fact.

[8]We decline to consider the issues of quantum meruit and unjust enrichment, as appellants raise them for the first time on appeal. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

Further, the record on appeal shows that Pinder never received a bill or invoice related to her stay at La Casita. Indeed, it was not until after Pinder requested a refund that the appellants' former attorney sent a letter to Pinder retroactively demanding payment for services rendered at La Casita. Thus, the record supports the ALJ's conclusion that appellants violated NRS 598.0923(2).

Fourth, the ALJ's finding that appellants violated NRS 598.0915(15) was not supported by substantial evidence and amounted to a mistake of law. NRS 598.0915(15) generally provides that a person engages in a deceptive trade practice when he or she knowingly makes false representations in a transaction. Because the Nevada Deceptive Trade Practices Act (NDPTA) does not define "false representation," we look to the phrase's plain and ordinary meaning. *Jones v. Nev. State Bd. of Med. Exam'rs*, 131 Nev. 24, 28, 342 P.3d 50, 52 (2015).

Black's Law Dictionary defines false representation as, "[t]he act or an instance of making a false or misleading assertion about something, [usually] with the intent to deceive." *Misrepresentation, Black's Law Dictionary* (11th ed. 2019); *see also Representation, Black's Law Dictionary* (11th ed. 2019) ("A presentation of fact—either by words or by conduct—made to induce someone to act, [especially] to enter into a contract . . . ."). Thus, a representation, false or otherwise, ordinarily requires some sort of inducement and/or reliance on the part of the person to whom the representation was made—in this case, Pinder.

Here, the ALJ found that Michael's verbal instruction to Pinder that she must pay a larger deposit than what was advertised on EES's website amounted to false representation. The ALJ focused on Pinder's transaction not being effectuated in written form, as well as the failure to

provide Pinder with an invoice that referenced the required deposit. However, the record is devoid of any evidence showing that appellants falsely represented the deposit amount to Pinder.

Appellants' supposed false representation stems from an advertisement on its website titled, "Our Products," which listed and described EES's products with the corresponding prices, as well as a link saying, "Buy Now." The website further advertised an "$8,000 DEPOSIT toward a purchase of a 4, 8, 12, or 24 unit EESystem" was required to begin the process. The ALJ noted that the only reference to a deposit amount was posted on the EES website, and thus, requiring Pinder to pay a larger amount than $8,000 was a false representation. But an advertisement for the sale of goods is not always an offer, and generally advertisers are free to modify prices and terms prior to the completion of a sale. *See, e.g.*, 77A C.J.S. *Sales* § 44 (2019) (providing that "[a]n advertisement for the sale of goods generally does not constitute an offer" and "[u]ntil a contract has been made, the advertiser may *modify* or *revoke* the *prices* or *terms*" (emphases added)); *see also* Restatement (Second) of Contracts § 26 cmt. b (Am. Law Inst. 1981) (same).

Pinder also testified that she requested expedited installation, providing further justification for an upward deviation in the deposit amount. And, more importantly, the ALJ did not find, and there is no indication in the record, that appellants intended to induce Pinder into contract with the advertised deposit amount. In fact, the ALJ found that Pinder never relied on or even saw the $8,000 deposit listed on EES's website until after she made the $20,000 deposit and entered into a contract to buy the EESystem. *Cf.* 1 Williston on Contracts § 4:16 (4th ed. 2020) ("As a general principle, an offeree cannot actually assent to an offer unless the

offeree knows of its existence."). Thus, the ALJ's finding that appellants made a false representation is not supported by substantial evidence and is clearly erroneous. For the foregoing reasons, we

AFFIRM in part, REVERSE in part, and REMAND this matter to the district court with instructions to VACATE the portion of the ALJ's order concluding that EES violated NRS 598.0915(15) and any fine or penalty related thereto.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. David M. Jones, District Judge
Compan Law Offices
Attorney General/Carson City
Eighth District Court Clerk