

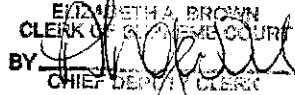
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DONNA SCHMIER,
Appellant,
vs.
MORPHEUS INVESTMENT INC. D/B/A
TIRE WORKS,
Respondent.

No. 72460

FILED

JUN 18 2018

ETHEL BROWN
CLERK OF DISTRICT COURT
BY 
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Donna Schmier appeals from a district court order dismissing her complaint. Eighth Judicial District Court, Clark County; Sally Loehrer, Senior Judge.

Schmier filed a complaint against respondent Morpheus Investment, Inc. d/b/a Tire Works (hereinafter "Tire Works"), alleging violations of Nevada's unfair trade practices statutes. Schmier claimed that Tire Works violated NRS 598.092(3) by recommending she replace the catalytic converter in her car when later diagnostic work showed that an internal vacuum leak on the intake manifold needed repair. Schmier also claimed that Tire Works violated NRS 598.0915(15) by ignoring its obligations under warranty for its initial services on her vehicle and instead focusing on the catalytic converter repair. Tire Works moved to dismiss the complaint for failure to state a claim for relief under NRCP 12(b)(5), and the district court granted its motion. This appeal followed.

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, 227-28, 181 P.3d 670, 672 (2008); see also *Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 256, 321 P.3d 912, 914 (2014). A decision to dismiss a

complaint under 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. *Buzz Stew*, 124 Nev. at 227-28, 181 P.3d at 672. Dismissing a complaint is appropriate “only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief.” *Id.* at 228, 181 P.3d at 672.

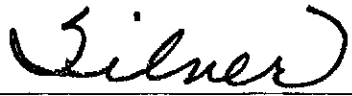
Schmier argues on appeal that the district court’s order dismissing her complaint wrongfully required her to test the catalytic converter from her car to state a claim. In response, Tire Works claims that Schmier’s unfair trade practices claim cannot stand as it did not receive any payment for the work relating to Schmier’s catalytic converter, and thus, there was no transaction that could form the basis for a claim under NRS 598.092(3).

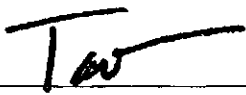
NRS 598.092(3) states that “[a] person engages in a ‘deceptive trade practice’ when in the course of his or her business or occupation he or she . . . [k]nowingly states that services, replacement parts or repairs are needed when no such services, replacement parts or repairs are actually needed.” The statute does not require payment as asserted by Tire Works, and none of the authority cited by Tire Works require payment for the claim to be made.

Further, at the motion to dismiss stage, Schmier is not required to provide evidence of her claims; we only consider whether the alleged facts, which are presumed true, would entitle the plaintiff to relief if proven true. *See Buzz Stew*, 124 Nev at 228, 181 P.3d at 672. Our review of Schmier’s complaint reveals sufficient alleged facts to establish each of the elements required for a claim under NRS 598.092 by Schmier claiming that Tire Works knew that the catalytic converter was not the cause of her car’s

problems, and yet Tire Works still stated that the catalytic converter was the issue. *See id.* While Schmier must ultimately demonstrate the existence of her deceptive trade practices claims by a preponderance of the evidence to recover any relief, *see Betsinger v. D.R. Horton, Inc.*, 126 Nev. 162, 166, 232 P.3d 433, 436 (2010), she has plead sufficiently to survive a motion to dismiss pursuant to NRCP 12(b)(5).¹ 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.
Silver


_____, J.
Tao


_____, J.
Gibbons

¹To the extent that the district court appeared to require more than alleged facts that might lead to relief on Schmier's claim, this was improper as the district court did not convert the NRCP 12(b)(5) motion to a motion for summary judgment and, as such, any evidentiary substantiation requirement at this stage exceeds the requirements to defeat an NRCP 12(b)(5) motion to dismiss. *See Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672.

²Schmier's reply brief, filed September 18, 2017, was not considered in this appeal and it is stricken as requested by Tire Works, as it presents matters outside the scope of the appeal. *See Carson Ready Mix, Inc. v. First Nat'l Bank of Nev.*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981) ("We cannot consider matters not properly appearing in the record on appeal.").

cc: Hon. Elizabeth Gonzales, Chief Judge
Hon. Sally Loehrer, Senior Judge
Donna Schmier
Hogan Hulet PLLC
Eighth District Court Clerk