

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALVARO LIZZARALDE, JR., AN  
INDIVIDUAL,  
Appellant,  
vs.  
AMERISTAR CASINO LAS VEGAS,  
INC., A NEVADA CORPORATION  
D/B/A THE RESERVE HOTEL &  
CASINO; AND CHRIS SCHMITZ, AN  
INDIVIDUAL,  
Respondents.

No. 46158

**FILED**

**OCT 18 2006**

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

ORDER OF REVERSAL

This is an appeal from a district court order, as amended upon remand, awarding attorney fees. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

On June 13, 2005, this court entered an order reversing and remanding the district court's previous attorney fee order in the underlying case.<sup>1</sup> In our June 13 order, we concluded that the district court had abused its discretion by awarding attorney fees without including supporting findings and specifying a basis for the award.

On remand, the district court entered an amended order, determining that fees were warranted under NRS 18.010(2)(b) (frivolous claims) and NRS 17.115(4) (obtaining a less favorable judgment than an earlier-rejected offer of judgment). Specifically, the court addressed each

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<sup>1</sup>See Lizzaralde v. Ameristar Casinos, Docket No. 41498 (Order Affirming in part, Reversing in part, and Remanding, June 13, 2005).

of the four allegations set forth in appellant's complaint, and explained why each allegation lacked merit, based on its finding that appellant failed to produce any evidence to support them at trial. Thus, the court concluded that all of appellant's claims were brought without reasonable ground and, citing NRS 18.010(2)(b) and 17.115, it awarded respondents \$19,254 in attorney fees. The amount awarded represented the fees incurred from the case's initiation. Appellant appeals from the amended order.

On appeal, appellant argues that his claims were not frivolous or groundless, as evidenced by the district court's denial of respondents' directed verdict motion based on its stated conclusion that appellant had presented sufficient evidence for the case to go to the jury. Respondents assert that the district court acted within its discretion in awarding them the full amount of attorney fees. Alternatively, respondents assert that they are entitled to \$8,464, the amount of fees incurred after their offer of judgment.

This court reviews the district court's award of attorney fees for an abuse of discretion.<sup>2</sup> Under NRS 18.010(2)(b), the district court may award attorney fees to a prevailing party when it finds that a claim was frivolous or brought or maintained without reasonable ground or to harass the prevailing party. For purposes of an attorney fee award under NRS

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<sup>2</sup>Miller v. Jones, 114 Nev. 1291, 1300, 970 P.2d 571, 577 (1998).

18.010(2)(b), a claim is frivolous or groundless if there is no credible evidence at trial to support it.<sup>3</sup>

Determining whether attorney fees should be awarded under NRS 18.010(2)(b) requires the court to inquire into the actual circumstances of the case, “rather than a hypothetical set of facts favoring plaintiff’s averments.”<sup>4</sup> Similarly, in ruling on a directed verdict motion, however, the district court must consider the evidence presented and then draw all inferences in the non-moving party’s favor.<sup>5</sup> In other words, a directed verdict motion requires the court to decide whether a party supported its claims with any credible evidence.

Here, in deciding respondents’ directed verdict motion, the court specifically found that appellant had “put forth sufficient showing,” including testimony, to allow all of appellant’s claims to proceed to the jury. Moreover, there is no evidence in the record that would indicate that appellant intentionally made false allegations, which is also a factor to be

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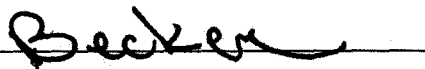
<sup>3</sup>Semenza v. Caughlin Crafted Homes, 111 Nev. 1089, 1095, 901 P.2d 684, 687-88 (1995); Allianz Ins. Co. v. Gagnon, 109 Nev. 990, 996, 860 P.2d 720, 724 (1993).

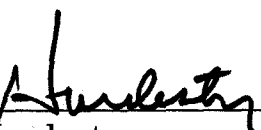
<sup>4</sup>Bergmann v. Boyce, 109 Nev. 670, 675, 856 P.2d 560, 563 (1993) (explaining that “the fact that the [plaintiffs’] complaint survived a 12(b)(5) motion to dismiss was irrelevant to the trial court’s inquiry as to whether the claims of the complaint were groundless”); Fountain v. Mojo, 687 P.2d 496, 501 (Colo. Ct. App. 1984) (noting that claims are groundless if the allegations in the complaint, while sufficient to survive a motion to dismiss for failure to state a claim, “are not supported by any credible evidence at trial”).

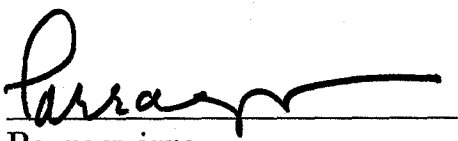
<sup>5</sup>University & Cmty. Coll. Sys. v. Sutton, 120 Nev. 972, 986103 P.3d 8, 18 (2004).

considered in determining whether a claim was frivolous when initiated.<sup>6</sup> As the court noted, there was conflicting testimony, requiring the jury to “assess and weigh the credibility of the various witnesses” in evaluating appellant’s claims. Therefore, because appellant’s claims were not groundless, the district court abused its discretion by awarding attorney fees to respondents under NRS 18.010(2)(b). Although the district court also purported to award fees under NRS 17.115, it made no relevant findings to support an award under NRS 17.115. Accordingly, we reverse the district court’s order awarding attorney fees under NRS 18.010(2)(b).

It is so ORDERED.

 J.  
Becker

 J.  
Hardesty

 J.  
Parraguirre

cc: Hon. Valorie Vega, District Judge  
G. Dallas Horton & Associates  
Pyatt Silvestri & Hanlon  
Clark County Clerk

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<sup>6</sup>Cf. Allianz, 109 Nev. at 996, 860 P.2d at 724 (noting that claims based on false representations, and not supported by evidence at trial, makes the case for awarding attorney fees even stronger).