

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERT WINEMILLER TRUST;  
DEBRA A. WINEMILLER REVOCABLE  
FAMILY TRUST; ALBERT  
WINEMILLER, INC.; AND XENEZ,  
INC.,

Appellants,

vs.

DAN K. SHAW; KENNETH M.  
WOOLLEY; TIMOTHY W. CLARK; W.  
MARK BUCSIS; MONT BLANC  
LIMITED PARTNERSHIP; MONT  
BLANC MANAGEMENT CORP.; MONT  
BLANC APARTMENTS (ISSUER)  
MANAGEMENT, INC.; MONT BLANC  
APARTMENTS VI LIMITED  
PARTNERSHIP; MONT BLANC  
APARTMENTS VI (PROPERTY)  
MANAGEMENT, INC.; MONT BLANC  
APARTMENTS VIII LIMITED  
PARTNERSHIP; MONT BLANC  
APARTMENTS VIII (PROPERTY)  
MANAGEMENT, INC.; MONT BLANC  
APARTMENTS IX LIMITED  
PARTNERSHIP; MONT BLANC  
APARTMENTS IX (PROPERTY)  
MANAGEMENT, INC.; CANTERBURY  
ESTATES LIMITED PARTNERSHIP;  
WMB INVESTMENTS (USA) 1996,  
INC.; 4068 INVESTMENTS, LTD.; 4069  
INVESTMENTS, LTD.; FLOWER HILL  
LIMITED PARTNERSHIP; 4068  
INVESTMENTS LIMITED  
PARTNERSHIP; FLOWER HILL  
SERVICES, INC.; OCEAN COLINAS  
INVESTORS, INC.; CANTERBURY  
ESTATES SERVICES, INC.; WMB  
HOLDINGS (1995), INC.; JOHN M.  
KEILLY, INDIVIDUALLY AND D/B/A

No. 47933

**FILED**

OCT 02 2008

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY A. Anderson  
DEPUTY CLERK

JMK INVESTMENTS, LTD.;  
INVESTORS MORTGAGE  
CORPORATION, A NEVADA  
CORPORATION; RICHARD J.  
ANDERSON, INDIVIDUALLY AND AS  
PRESIDENT OF INVESTOR'S  
MORTGAGE CORPORATION; ANGELA  
S. GALINDO, INDIVIDUALLY;  
CHICAGO TITLE AGENCY OF  
NEVADA, INC., F/K/A UNITED TITLE  
OF NEVADA, INC., A NEVADA  
CORPORATION; JOHN E. HAM; MIKE  
HANLEY; AL WHALEN; THE WHALEN  
GROUP; AND WHALEN-RUSSO  
FAMILY TRUST,  
Respondents.

#### ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a motion to set aside a stipulated dismissal with prejudice. Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge.

Appellants Albert Winemiller Trust, Debra A. Winemiller Revocable Family Trust, Albert Winemiller, Inc., and Xenex, Inc.<sup>1</sup> (collectively referred to as “the Winemiller Group”), filed a district court action, along with other plaintiffs, including James Hoepfner,<sup>2</sup> alleging, among other things, that respondents defaulted on a loan made by the plaintiffs and breached the loan agreement. The Winemiller Group was

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<sup>1</sup>These four entities are owned or controlled by Albert and Debra Winemiller.

<sup>2</sup>Hoepfner is also the Winemiller Group’s tax attorney and accountant.

originally represented by attorney Charles Lybarger. Sometime in 2004, according to co-plaintiff James Hoepner, the Winemiller Group authorized him to act on their behalf and to obtain a dismissal of the Winemiller Group's claims.

Under this alleged authority, Hoepner hired attorney Jerome Bowen to represent the Winemiller Group and to complete the dismissal of the Winemiller Group's claims. Hoepner represented to Bowen that he had authority to act on behalf of the Winemiller Group. Accordingly, Bowen announced at a hearing that he was assuming representation of some of the plaintiffs. Lybarger was in attendance at that hearing and did not contradict Bowen's representation. Subsequently, Bowen contacted Lybarger and requested that Lybarger execute a substitution of counsel. Lybarger signed the substitution of counsel. According to Bowen, Hoepner signed the substitution of counsel, as a corporate officer of one entity and as an attorney-in-fact of the other entities, prior to Lybarger's execution of the substitution. Thereafter, Bowen negotiated a settlement of the Winemiller Group's claims with respondents' counsel and on March 9, 2005, Bowen filed a stipulation dismissing the Winemiller Group's claims with prejudice.<sup>3</sup>

After the dismissal of the remaining plaintiffs, Lybarger moved the district court under NRCP 60(b)(1) and (3) to set aside the Winemiller Group's dismissal. The Winemiller Group argued that Hoepner lacked authority to authorize the dismissal of the Winemiller

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<sup>3</sup>According to some respondents, they agreed to dismiss various counterclaims they asserted against Hoepner and others due to the dismissal of the Winemiller Group's claims.

Group's claims and that the powers of attorney that Hoepfner presented to Bowen were forged. Respondents opposed the motion on the bases that

(1) the motion was untimely; (2) there was no mistake, and even if a mistake existed, it was created by the Winemiller Group, their attorneys or agents, and not by respondents; (3) that Hoepfner had apparent and actual authority—from direct conversations with the Winemiller Group and written powers of attorney—to act for the Winemiller Group; and (4) no fraud was committed on the court by any adverse party, i.e., the respondents.

The district court ultimately denied the motion for relief. This appeal followed.

This court generally reviews a district court's order declining to set aside a judgment pursuant to NRCP 60(b) for an abuse of discretion.<sup>4</sup> In addition, this court will defer to the district court's findings unless they are clearly erroneous or not based upon substantial evidence.<sup>5</sup> Substantial evidence is evidence that "a reasonable mind might accept as adequate to support a conclusion."<sup>6</sup> This court reviews questions of law, such as the interpretation of Nevada agency law, de novo.<sup>7</sup>

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<sup>4</sup>Price v. Dunn, 106 Nev. 100, 103, 787 P.2d 785, 787 (1990).

<sup>5</sup>Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 238, 955 P.2d 661, 664 (1998).

<sup>6</sup>Id. (internal quotations and citations omitted).

<sup>7</sup>SIIS v. United Exposition Services Co., 109 Nev. 28, 30, 846 P.2d 294, 295 (1993).

An attorney is considered the agent of his client; thus, the law of agency governs the attorney-client relationship.<sup>8</sup> Under agency law, an agent “must have actual authority, express or implied, or apparent authority” to bind the principal.<sup>9</sup> Apparent authority exists when the principal places an agent in such a position that the agent appears to have the authority claimed or exercised.<sup>10</sup> The party claiming that apparent authority existed “must prove (1) that [it] subjectively believed that the agent had authority to act for the principal and (2) that [its] subjective belief in the agent’s authority was objectively reasonable.”<sup>11</sup>

Having reviewed the parties’ appellate arguments and supporting documentation in light of these principles, we conclude that the district court did not abuse its discretion in refusing to set aside the dismissal.<sup>12</sup> Accordingly, we

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<sup>8</sup>See Blanton v. Womancare, Inc., 696 P.2d 645, 649 (Cal. 1985).

<sup>9</sup>Dixon v. Thatcher, 103 Nev. 414, 417, 742 P.2d 1029, 1031 (1987).

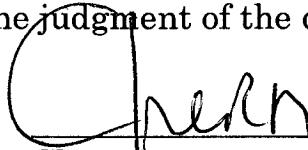
<sup>10</sup>Id.

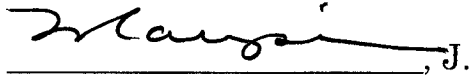
<sup>11</sup>Great American Ins. v. General Builders, 113 Nev. 346, 352, 934 P.2d 257, 261 (1997).

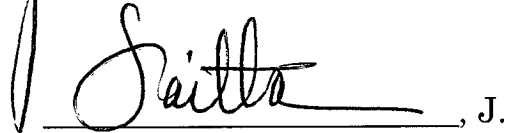
<sup>12</sup>See SCR 45(1) (providing that a lawyer shall have authority to bind his client in procedural matters during an action or proceeding); Blanton, 696 P.2d at 651 (recognizing that it is “accepted practice . . . for attorneys to rely upon representations made by other attorneys”); see also Pryor v. U.S. Postal Service, 769 F.2d 281, 287 (5th Cir. 1985) (providing that “a party has a duty of diligence to inquire about the status of a case, and that Rule 60(b) relief will be afforded only in unique circumstances” (internal quotations and citations omitted)); see Rothman v. Fillette, 469 A.2d 543 (Pa. 1983) (providing that, generally, a principal must bear the

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ORDER the judgment of the district court AFFIRMED.<sup>13</sup>

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

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Saitta

cc: Hon. Jennifer Togliatti, District Judge  
Howard Roitman, Settlement Judge  
Law Office of Charles J. Lybarger  
Goold Patterson Ales & Day  
Larry C. Johns  
Kummer Kaempfer Bonner Renshaw & Ferrario/Las Vegas  
McDonald Carano Wilson LLP/Las Vegas  
John H. Pilkington  
Rooker Mohrman Rawlins & Bailey LLP  
Rooker, Rawlins & Bailey  
Sklar Warren Conway & Williams, LLP  
Ronald L. Warren  
Eighth District Court Clerk

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*... continued*

loss of the agent's unlawful act); Casey v. GAF Corp., 828 A.2d 362, 369 (Pa. Super. 2003) (same).

<sup>13</sup>Having considered appellants' remaining arguments, we conclude that they lack merit and do not warrant reversal of the district court's order.

We make no comment on any claims that the Winemiller Group may have against Lybarger, Bowen, or Hoepner.