

IN THE SUPREME COURT OF THE STATE OF NEVADA

SAM BAUM, AN INDIVIDUAL; JOE PELLEGRINO, AN INDIVIDUAL; SANDY BOUGHNER, AN INDIVIDUAL; BRAD CLARK, AN INDIVIDUAL; KEITH JACKSON, AN INDIVIDUAL; KAZI KALPONAI, AN INDIVIDUAL; LINDA MCLEISH, AN INDIVIDUAL; ZIGGY OBRYZKI, AN INDIVIDUAL; LAWRENCE ZIMMER, AN INDIVIDUAL; BELLA ZOMBORI, AN INDIVIDUAL; WADE TAYLOR, AN INDIVIDUAL; AND ALLEN DOUTHARD, AN INDIVIDUAL,  
Appellants,

vs.

ALAN WAXLER GROUP, INC., A NEVADA CORPORATION D/B/A AWG, INC.; ALAN WAXLER GROUP, LLC, A LIMITED LIABILITY COMPANY; ALAN WAXLER GROUP CHARTER SERVICES, LLC, A LIMITED LIABILITY COMPANY; AND AWG CORPORATE EVENTS, LLC, A LIMITED LIABILITY COMPANY,  
Respondents.

SAM BAUM, AN INDIVIDUAL; JOE PELLEGRINO, AN INDIVIDUAL; SANDY BOUGHNER, AN INDIVIDUAL; BRAD CLARK, AN INDIVIDUAL; KEITH JACKSON, AN INDIVIDUAL; KAZI KALPONAI, AN INDIVIDUAL; LINDA MCLEISH, AN INDIVIDUAL; ZIGGY OBRYZKI, AN INDIVIDUAL; LAWRENCE ZIMMER, AN INDIVIDUAL; BELLA ZOMBORI, AN INDIVIDUAL; WADE TAYLOR, AN INDIVIDUAL; AND ALLEN DOUTHARD, AN INDIVIDUAL,

No. 53156

**FILED**

OCT 04 2010

FRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

No. 53684

Appellants,  
vs.  
ALAN WAXLER GROUP, INC., A  
NEVADA CORPORATION D/B/A AWG,  
INC.; ALAN WAXLER GROUP, LLC, A  
LIMITED LIABILITY COMPANY;  
ALAN WAXLER GROUP CHARTER  
SERVICES, LLC, A LIMITED  
LIABILITY COMPANY; AND AWG  
CORPORATE EVENTS, LLC, A  
LIMITED LIABILITY COMPANY,  
Respondents.

ORDER AFFIRMING IN PART, VACATING IN PART, AND  
REMANDING

These are consolidated appeals from a district court summary judgment in an employment action and a post-judgment order awarding costs. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

Appellants are a class of past and present employee drivers of Alan Waxler Group, Inc. (AWG), a charter transportation company, who allege that AWG unlawfully retained customer tips/gratuities that were intended for the drivers. Following the publication of Baldonado v. Wynn Las Vegas, 124 Nev. 951, 194 P.3d 96 (2008), where this court held that there was no private right of action under NRS 608.160 for recovering unlawfully retained tips/gratuities, the district court granted AWG summary judgment.

Appellants raise three issues on appeal. First, they contend that the district court erred by granting AWG summary judgment because genuine issues of material fact remained as to whether the monies owed were wages or tips/gratuities, and thus Baldonado may not preclude their

cause of action in the district court. Second, appellants argue that the district court should have granted them leave to file a second amended complaint to allege various causes of action against Alan Waxler, the owner of AWG. Third, appellants contend that the district court erred by granting AWG costs. We disagree with appellants' first two contentions and therefore affirm the district court's summary judgment. However, for the reasons expressed below, we vacate the district court's post-judgment order awarding AWG costs and remand for specific findings as to the reasonableness of those costs.

Summary judgment was appropriate

Appellants contend that the district court erred by granting summary judgment in favor of AWG because there are genuine issues of material fact as to whether the disputed sums owed to them could be considered wages instead of tips/gratuities. Appellants contend that the monies owed could be considered "wages" sufficient to sustain a private right of action in the district court and, therefore, Baldonado, 124 Nev. 951, 194 P.3d 96, may not be dispositive. We disagree.<sup>1</sup>

We review appellants' challenge to the district court's summary judgment order de novo. See Baldonado, 124 Nev. at 957, 194 P.3d at 100 (stating that summary judgment is appropriate if, after reviewing the record in the light most favorable to the nonmoving party,

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<sup>1</sup>We emphasize that our decision is limited to the question of whether appellants have a private right of action in this case and, despite our conclusion that a private right of action does not exist, we note that appellants may nevertheless seek relief with the Labor Commissioner. See Baldonado, 124 Nev. at 954, 194 P.3d at 98.

no genuine issues of material fact remain and the moving party is entitled to judgment as a matter of law).

Prior to Baldonado's publication, appellants characterized the monies allegedly owed as tips/gratuities and all of appellants' causes of action stemmed from their allegation that AWG failed to pay its employees tips/gratuities pursuant to NRS 608.160. Following Baldonado's publication, appellants have attempted to recharacterize the monies allegedly owed as wages or service charges. Appellants, however, have never alleged that AWG violated NRS 608.140, Nevada's statute to recover unpaid wages.

Since appellants alleged that AWG violated NRS 608.160, a statutory provision that contains no private right of action, see Baldonado, 124 Nev. at 957-58, 964, 194 P.3d at 100, 105, the nature of the monies allegedly owed does not have any bearing on the ultimate determination that appellants have not alleged a private right of action in their complaint. We therefore reject appellants' attempt to create a genuine issue of material fact on appeal.<sup>2</sup>

The district court did not abuse its discretion in denying appellants' motion for leave to file a second amended complaint

Even assuming that their first amended complaint was barred by Baldonado, appellants contend that the district court erred by denying

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<sup>2</sup>We further disagree with appellants' assertion that Baldonado is limited to casino tip-pooling cases. In Baldonado, we answered the purely legal question of whether NRS 608.160 and other related wage and hour statutes conferred a private right of action. See 124 Nev. at 957-964, 194 P.3d at 100-05. Nothing in Baldonado suggests that the decision was limited to the unlawful retention of tips in casino tip-pooling cases.

them leave to file a second amended complaint to add various causes of action against AWG owner Alan Waxler because those claims were not precluded by Baldonado. Again, we disagree.

Although NRCP 15(a) provides that leave to amend a pleading shall be freely given when justice so requires, “[a] motion for leave to amend is left to the sound discretion of the trial judge, and the trial judge’s decision will not be disturbed absent an abuse of discretion.” University & Cmty. Coll. Sys. v. Sutton, 120 Nev. 972, 988, 103 P.3d 8, 19 (2004).

Prior to Baldonado’s publication, appellants sought to amend their complaint to add causes of action for RICO violations, breach of fiduciary duty, unjust enrichment, and conversion against Waxler. The district court denied appellants’ motion for leave to amend their complaint on the basis that the nexus of appellants’ proposed second amended complaint stemmed from their allegations regarding tips/gratuities and, therefore, their claims must first be directed to the Labor Commissioner.

We agree with the district court. Because all of appellants’ proposed causes of action depend upon their allegation that AWG unlawfully withheld their tips/gratuities, appellants do not have a private right of action. Cf. Allstate Ins. Co. v. Thorpe, 123 Nev. 565, 573, n.22, 170 P.3d 989, 995, n.22 (2007) (recognizing that derivative claims that are based upon a statute that does not have a private right of action are also subject to administrative exhaustion). It would be unreasonable to permit appellants to simply plead around this barrier by alleging derivative

causes of action that stem from purported violations of NRS 608.160. Accordingly, we conclude that the district court did not abuse its discretion in denying appellants' motion for leave to file a second amended complaint.

There is an insufficient record to support the district court's award of costs to AWG

Appellants argue that the district court abused its discretion in granting AWG \$33,550 in costs and requests that this court vacate or substantially reduce the award because AWG did not submit necessary documentation to recover costs under Nevada law.

We review a district court's award of costs for an abuse of discretion. See, e.g., Village Builders 96 v. U.S. Laboratories, 121 Nev. 261, 276, 112 P.3d 1082, 1092 (2005).

Under Nevada law, the prevailing party is entitled to recover costs incurred in litigation. See NRS 18.020. Those costs must be "actual and reasonable, 'rather than a reasonable estimate or calculation of such costs . . . .'" Bobby Berosini, Ltd. v. PETA, 114 Nev. 1348, 1352, 971 P.2d 383, 385-86 (1998) (quoting Gibellini v. Klindt, 110 Nev. 1201, 1206, 885 P.2d 540, 543 (1994)).

NRS 18.110(1) provides that to recover costs, the prevailing party must provide "a memorandum of the items of the costs in the action or proceeding, which . . . must be verified by . . . the party's attorney . . . stating that to the best of his or her knowledge and belief the items are correct, and that the costs have been necessarily incurred in the action or proceeding." The prevailing party must provide sufficient documentation that the costs were reasonable. See Village Builders 96,

121 Nev. at 277-78, 112 P.3d at 1093 (“[D]ocumentation is precisely what is required under Nevada law to ensure that the costs awarded are only those costs actually incurred.”); Berosini, 114 Nev. at 1352-53, 971 P.2d at 386 (reversing the district court’s costs award because the prevailing party failed to provide any itemization with respect to some of its alleged costs).

Here, AWG failed to supplement its memorandum of costs with any documentation required under Nevada law. Moreover, the documentation that AWG attached to its opposition to appellants’ motion to retax AWG’s costs did not sufficiently indicate whether the costs were reasonably incurred in defending appellants’ lawsuit.<sup>3</sup> Because of this deficiency, we are unable to adequately review whether AWG’s incurred costs were reasonable.

We therefore vacate the district court’s costs award and remand this matter to the district court to make specific findings as to the reasonableness of AWG’s costs.<sup>4</sup> Accordingly, we,

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<sup>3</sup>Although appellants motion to retax AWG’s costs appears to have been untimely filed with the district court, by entertaining all the moving papers associated with appellants’ motion, the district court impliedly granted appellants additional time to file their motion.

We also note that providing documentation in response to a motion to retax costs is not the same as providing the necessary documentation to support a memorandum of costs.

<sup>4</sup>Given our decision to vacate the district court’s costs award and remand for a specific determination as to the reasonableness of AWG’s costs, we do not address appellants’ related contention that the district court erred in granting costs for computerized research, outside professional services, and outside vendor scanning.

AFFIRM the district court's summary judgment order,  
VACATE the district court's post-judgment order awarding costs, and  
REMAND for additional proceedings consistent with this order.

Hardesty, J.  
Hardesty

Douglas, J.  
Douglas

Pickering, J.  
Pickering

cc: Hon. Jackie Glass, District Judge  
Ara H. Shirinian, Settlement Judge  
Ham Galliher, LLP  
Mainor Eglet Cottle, LLP  
Lewis & Roca, LLP/Las Vegas  
Eighth District Court Clerk