IN THE SUPREME COURT OF THE STATE OF NEVADA

MARK ALTSCHULER,
Appellant/Cross-Respondent,
vs.
PROPERTIES PLUS, INC., A NEVADA CORPORATION; STEVE RHODES, AN INDIVIDUAL; ANDY BAUER, AN INDIVIDUAL; SHONI HETLAND, AN INDIVIDUAL; AND JOE SHERRY, AN INDIVIDUAL,
Respondents/Cross-Appellants.

No. 38515

FILED

APR 0 8 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal and cross-appeal from a judgment entered pursuant to a bench trial, in a real estate action.

Appellant Mark Altschuler engaged in land speculation and advised his real estate agents, respondents Andrew Bauer and Steve Rhodes, to find undervalued land at a reasonable price so that he could purchase and sell it for a profit within six months to one and one-half years. With the help of his agents, Altschuler, along with several investors, purchased four properties. Although all four properties eventually sold for a profit, Altschuler encountered difficulties in selling them within the expected time frame. Altschuler also contended that the profit was substantially less than anticipated and below the instructions for acquisition of investment properties given to Bauer and Rhodes.

Before Altschuler sold the properties, he filed suit against Bauer, Rhodes, and respondent Properties Plus for various claims. The complaint was filed in Altschuler's name individually, but included claims for damages related to other investors. Subsequently, Altschuler obtained

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signed documents entitled "Limited Power[s] of Attorney for Litigation Purposes," from some of the other investors. Altschuler then filed an amended complaint, indicating he was an assignee of the other investors. The amended complaint also added as additional defendants the owners of Property Plus, Shoni Hetland and Joe Sherry.

After a bench trial, respondents prevailed, and they filed and served a memorandum of costs. Repondents also sought attorney fees pursuant to an offer of judgment. Altschuler filed an untimely motion to retax costs and opposed the award of attorney fees. The district court entered judgment for respondents and against Altschuler and his assignors, jointly and severally, for costs as well as attorney fees since the offer of judgment.

Altschuler first argues the district court erred in entering a judgment for attorney fees and costs on Altschuler and his assignors jointly and severally.

"Questions of law are reviewed de novo."[1] A district court does not have jurisdiction to enter judgment for or against a non-party to an action.[2] However, a principal is bound by the acts of its agent while acting in the course of his employment, and a principal is liable for those acts

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[1]SIIS v. United Exposition Services Co., 109 Nev. 28, 30, 846 P.2d 294, 295 (1993).

[2]Young v. Nevada Title Co., 103 Nev. 436, 442, 744 P.2d 902, 905 (1987) (concluding the district court erred in entering judgment in favor of non-parties); see also C.H.A. Venture v. G. C. Wallace Consulting, 106 Nev. 381, 385, 794 P.2d 707, 710 (1990).

within the scope of the agent's authority.[3] If Altschuler was truly an assignee, then the district court lacked authority to enter a judgment for costs and attorney fees on the assignors. If, however, Altschuler was simply an agent authorized to litigate an action on behalf of the other investors, then the other investors were properly the subject of the costs and fees. Whether Altschuler acted as an assignee or an agent of the investors is a question of law.

Although the documents the investors signed were titled "Limited Power[s] of Attorney for Litigation Purposes," the documents' plain language indicates an assignment. The documents contain the language "[t]his assignment," and "assign and transfer my demands and claims." The amended complaint stated Altschuler was the "designated assignee" of the investors. During trial, defense counsel represented that "all of the assignments allow a lawsuit," and the judgment, prepared by defense counsel, refers to the investors as Altschuler's "assignors."

We conclude the district court erred in entering judgment against the investors, who were non-party assignors. Accordingly, we reverse that portion of the district court's judgment.

Next, Altschuler argues he is entitled to a new trial because the district court's pre-trial ruling eliminating Altschuler's benefit-of-the-bargain theory of damages was erroneous, and the error influenced the district court's review of the evidence and conclusions regarding the misrepresentation and fraud claims.

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[3]Nevada Nat'l Bank v. Gold Star Meat Co., 89 Nev. 427, 429, 514 P.2d 651, 653 (1973).

Prior to trial, the district court indicated that benefit-of-the-bargain damages would not be considered and that the only issue was whether the investors had incurred lost profits. We have previously indicated that benefit-of-the-bargain damages are permissible in cases involving fraudulent misrepresentation:[4]

> The measure of damages for fraudulent misrepresentation can be determined in one of two ways. The first allows the defrauded party to recover the 'benefit-of-his-bargain,' that is, the value of what he would have if the representations were true, less what he had received. The second allows the defrauded party to recover only what he has lost 'out-of-pocket,' that is, the difference between what he gave and what he actually received.[5]

We agree with Altschuler that the district court erred in concluding that Altschuler could not argue benefit of the bargain damages given that the complaint stated a claim of fraudulent misrepresentation. However, the point is moot because the district court did not find misrepresentation or fraud.

"Findings of fact of the district court will not be set aside unless clearly erroneous."[6] A district court's findings will not be disturbed on appeal unless they are clearly erroneous and are not based on

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[4]See Randono v. Turk, 86 Nev. 123, 130, 466 P.2d 218, 223 (1970).

[5]Id. at 130, 466 P.2d at 222-23.

[6]Hermann Trust v. Varco-Pruden Buildings, 106 Nev. 564, 566, 796 P.2d 590, 591-92 (1990).

substantial evidence.[7] "Substantial evidence is that which 'a reasonable mind might accept as adequate to support a conclusion.'"[8] This court must assume that the jury believed the evidence favorable to the victorious party and made all reasonable inferences in that party's favor.[9]

In this case, the district court entered the following findings of fact: (1) respondents did not commit any misrepresentation or negligence in representing that the projects in the chart would take place, (2) there was no misrepresentation as to the value of the properties, and (3) there was no justifiable reliance on the defendants' opinions to make a finding of fraud.

We conclude substantial evidence supported the district court's findings of fact. Because the elements of fraud were not established, the district court's pre-trial ruling on the issue of damages is moot.

Altschuler, however, contends that the mistaken pre-trial ruling placed the district court in an erroneous frame of reference when considering the fraud claim. In essence, Altschuler argues that the district court's prejudgment that the investors had no lost profits influenced the district court's subsequent review of the evidence on the misrepresentation and fraud issues. Based upon the record, we reject this claim. We conclude that the erroneous ruling on the benefit of the bargain

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[7]See NRCP 52(a); Gibellini v. Klindt, 110 Nev. 1201, 1204, 885 P.2d 540, 542 (1994).

[8]Bally's Employees' Credit Union v. Wallen, 105 Nev. 553, 556 n.1, 779 P.2d 956, 957 n.1 (1989) (quoting State Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986)).

[9]See id. at 555, 779 P.2d at 957.

damages did not deprive Altschuler of a fair trial. We therefore affirm the judgment of the district court as it relates to Altschuler.

Turning to the cross-appeal, cross-appellants first argue the district court erred in considering Altschuler's untimely motion to retax costs.

NRS 18.110(4) provides that a motion to retax costs must be filed within three days after service of the memorandum of costs.[10] Whenever possible, this court will interpret a rule or statute in harmony with other rules and statutes.[11] This court has concluded that NRS 18.110(1)'s requirement that a memorandum of costs must be filed by a prevailing party within five days after the entry of judgment or within "such further time as the court or judge may grant," is not a jurisdictional requirement.[12]

To remain consistent with this court's previous determination that NRS 18.110(1) is procedural, we conclude the three-day filing requirement of NRS 18.110(4) is also procedural. Thus, we conclude a

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[10]NRS 18.110(4) states:

> Within 3 days after service of a copy of the memorandum, the adverse party may move the court, upon 2 days' notice, to retax and settle the costs, notice of which motion shall be filed and served on the prevailing party claiming costs. Upon the hearing of the motion the court or judge shall settle the costs.

[11]Allianz Ins. Co. v. Gagnon, 109 Nev. 990, 993, 860 P.2d 720, 723 (1993).

[12]Eberle v. State ex. Rel. Redfield Trust, 108 Nev. 587, 590, 836 P.2d 67, 69 (1992).

district court has the discretion to consider an untimely motion to retax costs. Although the motion to retax costs was untimely by four days, we conclude the district court did not arbitrarily or capriciously abuse its discretion in granting the motion.

Finally, cross-appellants argue the district court abused its discretion in not awarding attorney fees from the inception of the lawsuit.

"[A]ttorney's fees are not recoverable absent a statute, rule or contractual provision to the contrary."[13] NRS 18.010(2)(b) provides in pertinent part that attorney's fees may be awarded to a prevailing party when the court finds that a claim was brought without reasonable ground or to harass the prevailing party. Unless there is a manifest abuse of discretion, a district court's award of attorney fees will not be disturbed on appeal.[14] An award made in clear disregard of guiding legal principles may constitute an abuse of discretion.[15] The proper inquiry in analyzing NRS 18.010(2)(b) is whether the claim was brought without reasonable grounds.[16] "A claim is groundless if 'the allegations in the complaint . . . are not supported by any credible evidence at trial.'"[17] If an action was not

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[13]Rowland v. Lepire, 99 Nev. 308, 315, 662 P.2d 1332, 1336 (1983).

[14]Nelson v. Peckham Plaza Partnerships, 110 Nev. 23, 26, 866 P.2d 1138, 1139-40 (1994).

[15]See Allianz, 109 Nev. at 995, 860 P.2d at 724.

[16]See Duff v. Foster, 110 Nev. 1306, 1308, 885 P.2d 589, 591 (1994), overruled on other grounds by Halbrook v. Halbrook, 114 Nev. 1455, 971 P.2d 1262 (1998).

[17]Allianz, 109 Nev. at 996, 860 P.2d at 724.

frivolous when it was initiated, the fact that it later becomes frivolous will not support an award of attorney fees.[18]

Here, although the district court determined that Altschuler failed to prove any damages or any causes of action, nothing in the record on appeal indicates the lawsuit was brought to harass respondents. We conclude the district court did not abuse its discretion in only awarding attorney fees from the offer of judgment, not from the inception of the lawsuit. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

_____, J.
Shearing

_____, J.
Leavitt

_____, J.
Becker

cc: Hon. Kathy A. Hardcastle, District Judge
Kerr & Associates
Darrell Lincoln Clark
Clark County Clerk

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[18]See Duff, 110 Nev. at 1309, 885 P.2d at 591.