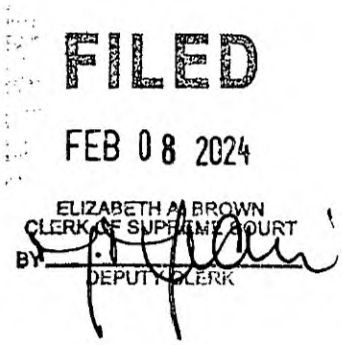
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PROMETHEUS & ATLAS REAL ESTATE DEVELOPMENT, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND JAMES KALHORN, AN INDIVIDUAL,
Appellants,
vs.
CABALLOS DE ORO ESTATES, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Respondent.

No. 84104-COA



ORDER OF AFFIRMANCE

Prometheus & Atlas Real Estate Development, LLC and James Kalhorn appeal from a district court order awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

Andy Pham, a real estate developer, created the respondent company, Caballos de Oro Estates, LLC, in 2005 and used the company to purchase an undeveloped property (the property), which is the subject of the dispute in the underlying case. Csaba Meiszburger met Pham through another land development project in 2015. Pham told Meiszburger about the property and thereafter, allegedly without Pham's knowledge, Meiszburger and two other men, Jihad Zogheib and Robert Krilich (collectively the associates), came up with a scheme to obtain loans using the property in order to pay off their respective debts.

In December 2015, Krilich introduced Meiszburger and Zogheib to Kalhorn, and they told Kalhorn that Meiszburger and Zogheib were the owners of the property, purportedly appraised at over two million dollars at that time, and that Pham was their "front man" who managed properties

for them. They convinced Kalhorn to obtain two private loans totaling $1,750,000, using the property as collateral so that they could use the money to pay their debts. To facilitate obtaining the loans, Zogheib and Meiszburger took steps to change Caballos' managing member listing with the Nevada Secretary of State from Pham to Kalhorn so that Kalhorn was able to encumber the property. Although Kalhorn did not initially know that Zogheib had listed him as the managing member of Caballos, he later learned that had occurred and was apparently not concerned because he believed the deal was legitimate. Based on their deal, Meiszburger and Zogheib would repay Kalhorn within 45 days and they would also pay Kalhorn $50,000 from the proceeds of the loans. If they failed to repay the loans, Kalhorn would be entitled to keep the property as well as the promised $50,000. To further perpetuate the scheme, Zogheib and Meiszburger produced various documents with forged signatures from both Pham and Kalhorn.

Because the managing member of Caballos had been changed from Pham to Kalhorn, the Secretary of State emailed Pham, alerting him that a filing had been completed for Caballos and to click on a link for further information. Pham was apparently unaware of the email and later learned it had been delivered to his office manager's spam folder.

During the loan process, Kalhorn obtained an opinion letter from an attorney, which concluded that Kalhorn was authorized to encumber the property and incur debt in the name of Caballos. Further, Kalhorn relied on a title policy confirming Caballos' ownership of the property.

Ultimately, Kalhorn took out two loans, totaling $1,750,000, on behalf of Caballos, which he personally guaranteed. Meizsburger and

Zogheib defaulted on the loans, so Kalhorn, now believing he owned the property, began to develop it. Kalhorn also thought he was the managing member of Caballos, so he subsequently transferred the property from Caballos to Prometheus, his own Limited Liability Company. Although the Secretary of State sent several email notifications to Pham informing him that filings had been completed for Caballos, Pham did not learn about the aforementioned events until December 2016. Although Pham initially believed that the managing member change was an error with the Secretary of State, in early 2017 Pham received a foreclosure notice for the property and learned that it had been transferred from Caballos to Prometheus.

Caballos thereafter filed an action against Kalhorn and Prometheus, among others, for quiet title, declaratory relief, slander of title, unjust enrichment, and conversion. And Kalhorn and Prometheus (appellants) filed an answer and counterclaims for, in pertinent part, declaratory relief, quiet title, civil conspiracy, and aiding and abetting, alleging that Pham participated in the scheme regarding the loans, and that Meiszburger and Zogheib had apparent authority to act on Pham's behalf.

In May 2018, Caballos filed a motion for partial summary judgment quieting title, asserting that Kalhorn was never the lawful owner, manager, or agent of Caballos; Zogheib and Meiszburger were never agents of or had apparent authority to act on behalf of Pham or Caballos; and Kalhorn's belief that Zogheib had authority to appoint him as Caballos' managing member or transfer him membership interest in Caballos was objectively unreasonable. Appellants opposed the motion, alleging Pham was a participant in the scheme and arguing that summary judgment was premature because discovery had not yet been completed and there were genuine issues of material fact regarding Zogheib's and Meiszburger's

authority to transfer Caballos to Kalhorn. After the court deferred ruling on the motion to allow further discovery, in February 2019 the district court denied the motion for partial summary judgment in a minute order, noting there were several issues of material fact surrounding the circumstances of the case, the court would be forced to make a credibility determination in making a summary judgment determination, and additional discovery would not resolve the issues of fact. A summary written order denying the motion was later entered.

The case proceeded to a five-day bench trial. On the second day of trial, a federal district court in Colorado issued an order resolving a separate case between Pham and Kalhorn, which involved many of the same facts as the instant case. As a result, on the third day of trial, the parties stipulated to various facts set forth in the federal court's order, including that Pham was not a participant in the scheme, although there was evidence of his inattention to matters concerning Caballos because he ignored various notices that, had he investigated them, would have alerted him to the scheme earlier.

Following the trial, the district court entered judgment in favor of Caballos on its causes of action for quiet title and declaratory relief and against Caballos on its claims for slander of title, unjust enrichment, and conversion. Further, the court entered judgment against appellants on all their counterclaims. Caballos then moved for attorney fees pursuant to NRS 18.010(2)(b), and appellants opposed the motion.

Following a hearing, the district court entered a written order concluding Caballos was the prevailing party and awarding it $240,396.57 in attorney fees after considering the factors set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). The court

found that, while appellants initially had reasonable grounds to defend against Caballos' claims and assert their counterclaims, their position that Zogheib, Krilich, and Meiszburger had apparent authority to transfer control of Caballos and the property to Kalhorn eventually became frivolous once they should have realized there was no evidence to support that position. The court noted that once the parties entered into the stipulation of facts on the third day of trial, appellants lacked an evidentiary basis to reasonably maintain their apparent authority argument. Further, the court determined that appellants should have known that they had no evidence to establish that Pham took any action to convey apparent authority to the associates following the completion of the depositions of Pham, Kalhorn, Krilich, and Meiszburger. Thus, the district court awarded Caballos a portion of the attorney fees it incurred following the completion of Krilich's deposition on January 27, 2019, through the filing for attorney fees following trial. This appeal followed.

On appeal, appellants challenge the district court's decision to award Caballos attorney fees pursuant to NRS 18.010(2)(b) for claims "brought or maintained without reasonable ground or to harass" the prevailing party. Specifically, the district court awarded fees as sanctions for maintaining their apparent authority defense and assertion that Pham participated in the scheme without reasonable grounds.

The decision whether to award attorney fees lies within the district court's sound discretion "and will not be overturned absent a manifest abuse of discretion." *Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 485, 851 P.2d 459, 464 (1993) (internal quotation marks omitted). Under NRS 18.010(2)(b), the district court may award attorney fees as sanctions to the prevailing party when it determines that a claim was "brought or

maintained without reasonable ground or to harass the prevailing party." Further, "[t]he court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations," as "[i]t is the intent of the Legislature that the court award attorney's fees . . . and impose sanctions . . . in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses." *Id.* "For purposes of NRS 18.010(2)(b), a claim is frivolous or groundless if there is no credible evidence to support it." *Rodriguez v. Primadonna Co.*, 125 Nev. 578, 588, 216 P.3d 793, 800 (2009). In determining whether an award of attorney fees under NRS 18.010(2)(b) is appropriate, the actual circumstances of the case must be considered. *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1095, 901 P.2d 684, 688 (1995). Also, a district court is required to make findings regarding the basis for awarding attorney fees and the reasonableness of an award of attorney fees. *Stubbs v. Strickland*, 129 Nev. 146, 152 n.1, 297 P.3d 326, 330 n.1 (2013).

Here, in awarding attorney fees to Caballos under NRS 18.010(2)(b), the district court concluded that appellants initially had a reasonable basis to defend against Caballos' claims and assert counterclaims, but that their position was maintained without reasonable grounds once they should have become aware that they had no evidence to support their position that the associates had apparent authority to transfer Caballos and the property. The district court concluded that the date on which appellants knew or should have known their position was unreasonable to maintain was January 27, 2019, which was the date that the depositions for Kalhorn, Pham, Meiszburger, and Krilich were completed.

Appellants contend that they presented credible evidence to maintain their apparent authority defense and their argument that Pham participated in the scheme. In particular, they allege certain evidence demonstrates their position was reasonably maintained, including that Meiszburger marketed the property, Pham provided Meiszburger with documents to market the property, Pham and Meiszburger had a close personal relationship, Pham failed to act on the notifications from the City of Las Vegas and the Nevada Secretary of State, and the title insurance involved in the loans and an attorney opinion letter determined that Kalhorn had authority to act on behalf of Caballos. Appellants further argue that, by denying Caballos' motion for partial summary judgment, the district court necessarily recognized that their position was reasonable. Caballos responds that defeating a summary judgment motion does not automatically render the defense reasonable, and the denial was based on the fact that the district court could not make a credibility determination at that stage.

"Apparent authority is that authority which a principal holds his agent out as possessing or permits him to exercise or to represent himself as possessing, under such circumstances as to estop the principal from denying its existence." *Simmons Self-Storage v. Rib Roof, Inc.*, 130 Nev. 540, 550, 331 P.3d 850, 857 (2014) (internal quotation marks omitted). "[T]here can be reliance only upon what the principal himself has said or done . . . . The acts of the agent in question cannot be relied upon as alone enough to support [this theory]." *Ellis v. Nelson*, 68 Nev. 410, 419, 233 P.2d 1072, 1076 (1951). Where an alleged agent's acts are relied upon, "there must also be evidence of the principal's knowledge and acquiescence in them." *Id.*

A party claiming apparent authority of an agent "must prove (1) that he subjectively believed that the agent had authority to act for the principal and (2) that his subjective belief in the agent's authority was objectively reasonable." *Great Am. Ins. Co. v. Gen. Builders, Inc.*, 113 Nev. 346, 352, 934 P.2d 257, 261 (1997). "[R]easonable reliance is a necessary element." *Id.* (citing *Ellis*, 68 Nev. at 418, 233 P.2d at 1076). "The party who claims reliance must not have closed his eyes to warnings or inconsistent circumstances." *Id.* (internal quotation marks omitted).

Here, the district court's conclusion that appellants' position became unreasonable to maintain following the depositions was supported by substantial evidence. *See Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015) (providing that an award of attorney fees will generally be upheld if supported by substantial evidence); *see also Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007) (explaining that substantial evidence is that which a reasonable person may accept as adequate to sustain a judgment). Although this case initially involved conflicting assertions as to Pham's role in the scheme, following the depositions, the evidence showed that Pham was not aware of and did not acquiesce to Meiszburger and Zogheib's actions. *See Ellis*, 68 Nev. at 419, 233 P.2d at 1076. Specifically, Pham testified repeatedly that he did not receive the Secretary of State and city notifications, but when he was made aware, he filed a complaint with the Secretary of State, changed the managing member filing, and sent Kalhorn a cease-and-desist letter informing Kalhorn that he was the managing member of Caballos. *See Great Am. Ins. Co.*, 113 Nev. at 352, 934 P.2d at 261.

Further, while Meiszburger testified in his deposition that he marketed and showed the property, he also testified that Pham had

informed him he was looking to sell or develop the property and only asked what Meiszburger thought about the property. Meiszburger also testified that he and Pham did not discuss compensation, he did not expect any compensation for his efforts, and that he brought Pham a single offer, which Pham rejected. Thereafter, Meiszburger acknowledged that he did not bring any further offers to Pham and did not mention Zogheib to Pham.

Pham, for his part, testified in his deposition that he merely asked Meiszburger if he knew of anyone interested in buying the property and sent Meiszburger documentation related to the property in response to Meiszburger's representation that he had a potential buyer. Pham further testified in his deposition that he asked several other business contacts what they thought of the property and sent the same documentation to others, which tends to show that he was not conveying authority to Meiszburger. *See Simmons Self-Storage*, 130 Nev. at 550, 331 P.3d at 857 There was also no evidence that Pham knew either Zogheib or Krilich, and Pham's signature was forged on the various Caballos documents used to further the scheme. Further, any evidence of a personal relationship between Meiszburger and Pham does not reasonably demonstrate that Meiszburger could act on Pham's behalf. Taken together, this evidence does not show that Pham conveyed authority to Meiszburger, Krilich, or Zogheib or that appellants could reasonably rely on such evidence to support their belief that any of the associates had apparent authority. *See Great Am. Ins. Co.*, 113 Nev. at 352, 934 P.2d at 261.

Additionally, Kalhorn acknowledged that he had never spoken to Pham and did not know him prior to this litigation. While appellants cite to evidence that Kalhorn may have relied on in following through with the arrangement, such as the attorney opinion letter and the title companies'

failure to identify any issue with ownership of the property, and they argue that Meiszburger's conduct could be construed as holding himself out as an agent of Pham, none of this evidence shows any action taken by Pham. Therefore, this evidence is insufficient to show apparent authority. As previously noted, Kalhorn would have had to rely on acts of the principal, here Pham, or evidence that Pham had knowledge of and acquiesced to the associates' conduct in order to establish they had apparent authority. *See Ellis*, 68 Nev. at 419, 233 P.2d at 1076.

Thus, the district court specifically found that, following the depositions, appellants should have known that they could not support an apparent authority defense.[1] Accordingly, the district court made sufficient findings to support the award of attorney fees based on appellants maintaining their position without reasonable grounds and as to the point at which it became unreasonable. *See Stubbs*, 129 Nev. at 152 n.1, 297 P.3d at 330 n.1. Although the district court denied summary judgment shortly after the conclusion of the depositions, it did so because it could not assess the witnesses' credibility at that point in the proceedings. However, following trial, and once the court had the opportunity to consider the evidence, weigh credibility, and draw appropriate inferences therefrom, it concluded that there was no credible evidence that existed at the time the depositions were completed to support an apparent authority defense. *See*

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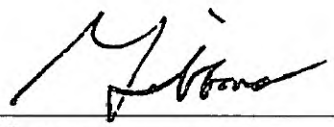
[1]We note that the record does not contain complete copies of the relevant deposition transcripts, and we therefore presume the missing portions support the district court's decision. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 600, 172 P.3d 131, 133 (2007) (explaining that it is the appellant's responsibility to ensure an accurate and complete record on appeal, and "missing portions of the record are presumed to support the district court's decision.").

Rodriguez, 125 Nev. at 588, 216 P.3d at 800. Under these circumstances, we conclude that appellants failed to demonstrate that the district court abused its discretion by granting Caballos' motion for attorney fees and affirm that decision.

We, therefore,

ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Gibbons

_____, J.
Westbrook

BULLA, J., dissenting:

I respectfully dissent because I disagree with the majority that the district court properly awarded attorney fees pursuant to NRS 18.010(2)(b). This statute encourages courts to award fees to "punish for and deter frivolous or vexatious claims and defenses" under the genesis of NRCP 11. To secure an award of attorney fees pursuant to this statute, a party must demonstrate that, as applicable to this case, a "defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party." To determine whether an award of attorney fees is appropriate under NRS 18.010(2)(b), the district court is required to make specific findings to support its decision. *See Stubbs v. Strickland*, 129 Nev. 146, 152 n.1, 297 P.3d 326, 330 n.1 (2013) (noting that district courts

in granting a motion for attorney fees under NRS 18.010(2)(b) and NRCP 11(c) are required to make specific findings regarding the basis for awarding the fees and the reasonableness of the award). Because the district court failed to make sufficient specific findings in this case, before imposing a significant attorney fee award to punish appellants for their conduct, I would reverse and remand to the district court to make such findings.

By way of background, it is undisputed that on the third day of trial in May 2021, the parties entered a stipulation, based on other court proceedings, that Pham was never involved in a fraudulent scheme that both parties on appeal became susceptible to and, therefore, appellants were no longer able to maintain their affirmative defense of apparent authority against respondent, ultimately resulting in a judgment against them. The district court subsequently granted respondent's request for attorney fees under NRS 18.010(2)(b) dating back to January 27, 2019—the date key depositions were completed.

However, the district court failed to make specific findings to support that *before* the third day of trial, when it became clear that appellants could no longer maintain its affirmative defense of apparent authority, that appellants had in fact maintained their defense against respondent without reasonable ground or to harass—and specifically had done so since January 2019. This is particularly troubling in light of the fact the district court had previously denied partial summary judgment in Pham and respondent's favor because the court concluded that there were genuine disputes of fact and credibility issues regarding Pham's role—and the order denying partial summary judgment was *after* the aforementioned depositions were completed in January 2019.

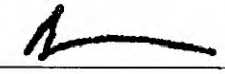
Here, the district court had the same facts regarding the parties' understanding of Pham's role after the completion of the depositions in January 2019, when it denied Pham and respondent's partial summary judgment motion, and, indeed, even up to the start of trial. There are no specific findings identified in the district court's order to support that between the denial of the partial summary judgment motion and the third day of trial, when the parties stipulated to Pham's lack of involvement, that appellants were maintaining an affirmative defense without reasonable ground or to harass to warrant the imposition of attorney fees under NRS 18.010(2)(b). In imposing such a fee award, without making these specific findings, the district court appears to have engaged in a retrospective review of the appellants' knowledge and conduct. And, in doing so, the district court ignored a principle of NRCP 11 that a court should avoid employing the "wisdom of hindsight" to impose an award of fees in conjunction with NRCP 11. *Cf. Marshall v. Eighth Jud. Dist. Ct.*, 108 Nev. 459, 465, 836 P.2d 47, 52 (1992).

Under these circumstances, I am genuinely concerned about affirming an attorney fee award under NRS 18.010(2)(b) without specific findings by the district court to justify one. Here, both parties were essentially the victims of bad actors, and both arguably failed to undertake measures that might have detected the fraudulent scheme at an earlier date. Other than by requesting an award of attorney fees under NRS 18.010(2)(b), respondent had no other means by which to recover its fees. This is because Nevada follows the American rule for attorney fees, which provides that each party assumes their own fees, "absent a statute, rule, or contract authorizing such award." *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006); *Pardee Homes of Nev. v. Wolfram*, 135

Nev. 173, 178, 444 P.3d 423, 426 (2019). Although NRS 18.010(2)(b) is one such statute that provides an avenue for attorney fees where the American rule would otherwise not permit them, in order to "punish for and deter frivolous . . . claims and defenses," the district court must make specific findings to safeguard against an improper use of the statute and to prevent circumventing the American rule. *Stubbs*, 129 Nev. at 152 n.1, 297 P.3d at 330 n.1.

In this case, where there was a reasonable basis to initially support appellants' position and the district court permitted the case to proceed beyond the summary judgment stage, combined with the lack of sufficient specific findings by the court to support that appellants maintained their position unreasonably or to harass after depositions were completed in January 2019, in my view, renders the award of attorney fees contrary to the intent of both NRS 18.010(2)(b) and the American rule.

Therefore, I would reverse and remand to the district court to make specific findings to support its award of attorney fees under NRS 18.010(2)(b). Specifically, the district court should make findings that appellants maintained the affirmative defense of apparent authority as of January 2019—or some date earlier than the third day of trial—without reasonable ground or to harass. Otherwise, I fear that, retrospectively, any losing party could unfairly be subject to a fee award under NRS 18.010(2)(b) based on the outcome at trial.



_____, J.
Bulla

cc: Hon. Eric Johnson, District Judge
Robinson Waters & O'Dorisio, P.C./Denver
David J. Merrill, P.C.
Brown Mishler, PLLC
The Ticktin Law Group/FL
Eighth District Court Clerk