

IN THE SUPREME COURT OF THE STATE OF NEVADA

W. HARRISON MERRILL, AN INDIVIDUAL; JAMES W. AUSTELL, JR., AS SUCCESSOR TRUSTEE OF THE W. HARRISON MERRILL TRUST, A GEORGIA TRUST CREATED UNDER ITEM 9 OF THE WILL OF ARTHUR JESSE MERRILL; WHM COPPER MOUNTAIN HOLDINGS, LLC, A DELAWARE LIMITED LIABILITY COMPANY; JAMES W. AUSTELL, JR., AS THE TRUSTEE OF THE WHM COPPER MOUNTAIN TRUST, A GEORGIA TRUST; VANGUARD PROPERTIES, INC., A GEORGIA CORPORATION; RESORT HOTELS, INC., A GEORGIA CORPORATION; HUGH O. NOWELL, AS THE TRUSTEE OF THE HARRISON MERRILL-BRITTANY TRUST, DATED FEBRUARY 12, 2002, A GEORGIA TRUST; HUGH O. NOWELL, AS THE TRUSTEE OF THE HARRISON MERRILL-DANIEL TRUST, DATED FEBRUARY 12, 2002, A GEORGIA TRUST; HUGH O. NOWELL, AS THE TRUSTEE OF THE HARRISON MERRILL-HARRISON TRUST, DATED FEBRUARY 12, 2002, A GEORGIA TRUST; HUGH O. NOWELL, AS THE TRUSTEE OF THE HARRISON MERRILL-LINDSAY TRUST, DATED FEBRUARY 12, 2002, A GEORGIA TRUST; AND HUGH O. NOWELL, AS THE TRUSTEE OF THE HARRISON MERRILL-TINSLEY TRUST, DATED FEBRUARY 12, 2002, A GEORGIA

No. 57689

**FILED**

DEC 21 2012

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *H. Lindeman*  
DEPUTY CLERK

TRUST,  
Appellants/Cross-Respondents,  
vs.  
VREO XV, LLC, A NEVADA LIMITED  
LIABILITY COMPANY,  
Respondent/Cross-Appellant.

### ORDER OF AFFIRMANCE

This is an appeal from a district court amended judgment in a deficiency action. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Respondent VREO XV, LLC<sup>1</sup> brought a deficiency action against appellants, guarantors on a loan issued by VREO for the development of real property, after a default occurred under the terms of the loan agreement. Because appellants stipulated to their liability on the loan, the only issue before the district court was the amount due to VREO, specifically, the amount outstanding under the loan agreement at the time of default (the indebtedness) less the fair market value of 2,230 acres of vacant, unimproved land, which was provided as security for the loan and which VREO had purchased at a trustee's sale following the default in partial satisfaction of the indebtedness. The district court ultimately concluded that the indebtedness was \$21,852,928.56, not including attorney fees and certain costs, and that the fair market value of the property was \$13,639,026.83, resulting in a deficiency judgment against

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<sup>1</sup>VREO initially cross-appealed on the issue of whether the district court erred by failing to award it interest that accrued on the deficiency judgment following the foreclosure sale, but voluntarily withdrew the cross-appeal at oral argument. Accordingly, the cross-appeal is dismissed.

appellants of \$8,213,901.73 plus various fees and costs.<sup>2</sup> The court entered judgment accordingly, and this appeal followed.

On appeal, appellants contend that the district court's findings regarding the indebtedness, the fair market value, and the resulting deficiency must be set aside. We conclude that the district court did not err. See International Fid. Ins. v. State of Nevada, 122 Nev. 39, 42, 126 P.3d 1133, 1134-35 (2006) (giving deference to the district court's factual findings and upholding them "unless they are clearly erroneous and not based on substantial evidence").<sup>3</sup>

Appellants first contend that the findings regarding the indebtedness must be set aside because the district court imposed a heightened standard of credibility on respondent's witness as a discovery sanction, and the witness's testimony did not satisfy that heightened standard. We conclude that the district court did not modify any evidentiary standards, much less create a new credibility standard for use in this case. Instead, as a sanction for failing to disclose certain documents, the district court declined to admit those documents pursuant to NRCP 16.1(e), but nevertheless allowed witness testimony to establish the evidence contained in them. In doing so, the district court did not indicate that it would hold the testimony to a higher than normal standard of credibility. Moreover, at trial, appellants voluntarily allowed the excluded documents to be admitted through stipulation.

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<sup>2</sup>Prior to trial, the district court entered a default judgment against respondent WHM Copper Mountain Holdings, LLC, in the amount of \$20,509,767.27.

<sup>3</sup>The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition.

Appellants further assert that this court must reject the district court's factual findings underlying its ultimate conclusion regarding the indebtedness because of uncertainty in the testimony concerning the components of the debt calculation; improper inclusion of attorney fees; and the use of October 30, 2008, as the default date. Upon review of the record, we conclude that substantial evidence supported the district court's findings. In particular, the indebtedness calculations were supported by testimony and affidavits, the loan documents, and the admitted exhibits. As for the inclusion of attorney fees in the district court's finding setting out the indebtedness on the date of the trustee's sale, while appellants correctly point out that the district court deferred ruling on attorney fees and costs pursuant to NRCP 54, this finding was not an award of the fees and costs but merely a summation of indebtedness at the time of the trustee's sale, which necessarily included all debts. As appellants concede, the inclusion of attorney fees in the finding did not affect the district court's judgment as to the amount of the deficiency. Finally, regarding the default date, the district court's conclusion was supported by substantial evidence because, while there were multiple events of default, the record demonstrates that VREO called the loan into default on October 30, 2008. In sum, we conclude that the findings regarding the indebtedness are supported by substantial evidence and are not clearly erroneous. See International Fid. Ins., 122 Nev. at 42, 126 P.3d at 1134-35.

Concerning fair market value, appellants argue that the district court's findings improperly rely on post-sale data in violation of NRS 40.459, which states that fair market value is calculated as of the date of the trustee's sale. The statute provides that the value of the

property is set as of the date of the trustee's sale, and the district court's finding regarding fair market value indicated that the court considered the value of the property as of the sale date. Moreover, we conclude that parties can stipulate to the admission of post-sale data to determine fair market value on the date of the sale, as was the case here.

Appellants likewise argue that the evidence concerning the marketing efforts and offers made on the property did not support the district court's conclusion as to fair market value because the offers were too distant in time, one of the offers did not result in a sale, and the other offer had not closed at the time of trial. The district court, however, properly based its fair market value finding on evidence that appellants did not challenge upon admission. See Tahoe Highlander v. Westside Fed. Sav., 95 Nev. 8, 11, 588 P.2d 1022, 1024 (1979) (failure to object at trial to the testimony of an appraisal expert precludes appellate review of the contention that the testimony should have been disregarded); see also NRS 47.040 (stating that specific objections must be made regarding the admission of evidence).

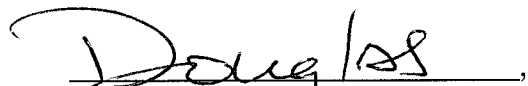
Appellants also contend that evidence did not support the district court's finding that the value of the property was determined to be adversely affected by a development agreement. Regardless of the district court's perception of the effect of the development agreement, we conclude that the district court's ultimate calculation of the fair market value was supported by substantial evidence and was, therefore, not clearly erroneous.


Finally, with respect to the deficiency judgment, appellants argue that because the district court's findings as to the indebtedness and the fair market value were insufficiently supported, this court must also

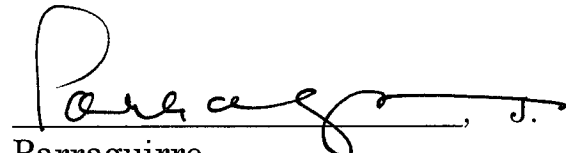
set aside the district court's calculation of the deficiency judgment. Because we have concluded that the district court did not err in calculating the fair market value or determining indebtedness, there is substantial evidence to support the district court's deficiency judgment calculation.

Because there is no error in the district court's findings, we conclude that the district court correctly calculated the amount of the deficiency judgment that VREO was entitled to collect from appellants. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Parraguirre

cc: Hon. Elizabeth Goff Gonzalez, District Judge  
Craig A. Hoppe, Settlement Judge  
Warner Angle Hallam Jackson & Formanek PLC  
Meier & Fine, LLC  
Shea & Carlyon, Ltd.  
Eighth District Court Clerk