IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CARMEN PORRAS DE MENDOZA, AN INDIVIDUAL,
Appellant/Cross-Respondent,
vs.
JERRY'S NUGGET, A NEVADA DOMESTIC CORPORATION,
Respondent/Cross-Appellant.

No. 69077

ORDER OF AFFIRMANCE

Carmen Porras de Mendoza appeals the district court's order upholding the final determination of the short trial judge. Jerry's Nugget cross-appeals the district court's order upholding the short trial judge's denial of attorney fees. Eighth Judicial District Court, Clark County; Joseph Hardy, Jr., Judge.[1]

Carmen Porras de Mendoza sued Jerry's Nugget for injuries sustained when she fell while walking through the casino. An arbitrator found for Porras de Mendoza, but the jury in a subsequent short trial found for Jerry's Nugget.[2] Porras de Mendoza appeals, arguing the short trial judge abused his discretion by denying her motion for a new trial under NRCP 59(a). Specifically, Porras de Mendoza contends Jerry's Nugget's decision to change its defense shortly before trial constituted unfair surprise and defense counsel's comments in opening and closing argument constituted misconduct. Jerry's Nugget cross-appeals, arguing the short trial judge abused his discretion by denying its motion as to attorney fees

[1]The short trial judge, Michael A. Royal, made the rulings at issue in this appeal, and the district court ultimately affirmed these rulings.

[2]We do not recount the facts except as necessary to our disposition.

without addressing the factors in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969). We disagree with both parties.

We review the trial court's decision to deny a motion for a new trial for an abuse of discretion. *Michaels v. Pentair Water Pool & Spa, Inc.*, 131 Nev. ___, ___, 357 P.3d 387, 395 (Ct. App. 2015). In so doing, this court views "the evidence and all inferences most favorably to the party against whom the motion is made." *Id.*

We first consider whether Jerry's Nugget's conduct constituted "surprise" under NRCP 59(a)(3). Porras de Mendoza claimed at arbitration and at trial that she slipped on duct tape. Until shortly before the short trial, Jerry's Nugget conceded duct tape was present in the area where Porras de Mendoza fell. But, in reviewing the video surveillance and incident report photographs in preparation for the short trial, Jerry's Nugget realized the duct tape was not in fact present at the time of the fall. Jerry's Nugget changed its defense accordingly.

NRCP 59(a)(3) allows a trial court to grant a new trial on the basis of "surprise which ordinary prudence could not have guarded against" if the surprise "materially affect[s] the substantial rights of an aggrieved party." NRCP 59(a). In *Havas v. Haupt*, the Nevada Supreme Court explained that such surprise "must result from some fact, circumstance, or situation in which a party is placed unexpectedly, to his injury, without any default or negligence of his own, and which ordinary prudence could not have guarded against." 94 Nev. 591, 593, 583 P.2d 1094, 1095 (1978). If the plaintiff knows of the new development in advance of trial and fails to take action to protect her own interests, inaction will preclude a claim of surprise. *Id.* at 593, 583 P.2d at 1095-96.

We conclude the short trial judge did not abuse his discretion by denying the motion for a new trial under these facts. Jerry's Nugget

timely disclosed the video surveillance and black and white photographs of the subject area during discovery.[3] Porras de Mendoza had access to evidence showing the absence of the tape long before trial and was aware of Jerry's Nugget's decision to change its defense during the week prior to trial. Furthermore, Porras de Mendoza failed to take sufficient action to protect her interests, such as requesting a continuance[4] or a limiting instruction. And unlike the plaintiff in *Havas*, Porras de Mendoza was able to present the desired evidence, thereby countering the defense, through reviewing deposition testimony establishing the tape's presence and by cross-examining the defense witnesses. Taking the evidence and inferences in the light most favorable to Jerry's Nugget, *see Michaels*, 131 Nev. at ___, 357 P.3d at 395, we conclude this is not clearly a situation of "surprise" as contemplated by NRCP 59(a), and the short trial judge was not required to grant a new trial on this ground.

We next consider whether the defense counsel's comments in opening and closing arguments constituted attorney misconduct warranting a new trial under NRCP 59(a)(2). A trial court may grant a

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[3]We note the district court excluded from evidence the color photographs from the incident report, which Jerry's Nugget did not disclose during discovery.

[4]Porras de Mendoza asserts the district court previously denied a continuance and implies the district court indicated it would not grant a later continuance or allow further discovery. She further argues she could not have received a continuance under NSTR 13. However, as Porras de Mendoza provides this court with neither record citations nor relevant authority, we do not consider this argument. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (stating that this court need not consider arguments not adequately briefed, not supported by relevant authority, and not cogently argued); *see also* NRAP 28(a)(10)(A) (requiring the appellant to cite to the pages of the record upon which the appellant relies).

new trial on the basis of "[m]isconduct of the jury or prevailing party" if the misconduct "materially affect[s] the substantial rights of an aggrieved party." NRCP 59(a). If a party objects to misconduct and the judge sustains the objection and admonishes the jury and counsel, "a party moving for a new trial bears the burden of demonstrating that the misconduct is so extreme that the objection and admonishment could not remove the misconduct's effect." *Lioce v. Cohen*, 124 Nev. 1, 17, 174 P.3d 970, 981 (2008). Harmless error will not warrant a new trial. *See* NRCP 61.

Here, the short trial judge sustained Porras de Mendoza's objections and twice admonished the jury to disregard defense counsel's representations of what a bystander to the incident said or thought. At the close of trial, the short trial judge further instructed the jury that counsels' statements, arguments, and opinions are not evidence and the jury must consider only the testimony, exhibits, and facts admitted at trial. The short trial judge also instructed the jury to disregard any evidence to which an objection was sustained. We presume the jury followed these instructions, *see Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006), and we therefore conclude the short trial judge did not abuse his discretion by denying Porras de Mendoza's motion for a new trial on this ground. We further note that any error was harmless here and did not affect Porras de Mendoza's substantial rights, as the objected-to statements did not provide the jury with any new information.[5] *See* NRCP 61.

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[5]We are likewise unpersuaded by Porras de Mendoza's assertion the district court reversibly erred by failing to make additional admonishments, or by her arguments regarding unobjected-to misconduct. *See Lioce*, 124 Nev. at 19, 174 P.3d at 981-82 (unobjected-to misconduct will provide grounds for a new trial only where it arises to plain error; that is,

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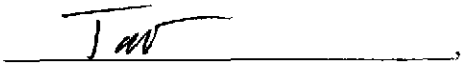
Therefore, the short trial judge did not abuse his discretion by denying the motion for a new trial.

Finally, we conclude the short trial judge did not abuse his discretion by failing to address the *Brunzell* factors when denying Jerry's Nugget's motion for attorney's fees. Because the judge concluded Porras de Mendoza's decision to decline the offer of judgment was not unreasonable, the short trial judge did not need to address the reasonableness of Jerry's Nugget's fees. *See Frazier v. Drake*, 131 Nev. ___, ___, 357 P.3d 365, 373 (Ct. App. 2015) (explaining that if the district court concludes the first three *Beattie*[6] factors weigh against awarding fees, the reasonableness of the claimed fees "becomes irrelevant"). Moreover, Nevada law does not require a court to evaluate the *Brunzell* factors before denying a motion for attorney fees. *See Stubbs v. Strickland*, 129 Nev. 146, 152 n.1, 297 P.3d 326, 330 n.1 (2013). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao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Gibbons

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where the misconduct so infected the trial that "no other reasonable explanation for the verdict exists." (internal quotations omitted)).

[6]*Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983).

cc: Hon. Joseph Hardy, Jr., District Judge
Persi J. Mishel, Settlement Judge
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Thorndal Armstrong Delk Balkenbush & Eisinger/Reno
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Eighth District Court Clerk