

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LUCAS FIOLA,

Appellant,

vs.

AMBER HARLEY,

Respondent.

No. 71863

LUCAS FIOLA,

Appellant,

vs.

AMBER HARLEY,

Respondent.

No. 72487

FILED

OCT 15 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER AFFIRMING IN PART AND REVERSING IN PART

Appellant Lucas Fiola appeals from a judgment entered pursuant to a jury verdict and from an order granting attorney fees and costs. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Fiola and Oscar Gatez jointly sued Amber Harley for injuries following a car accident. Harley admitted liability for the car accident but contested causation regarding Fiola's and Gatez's injuries. Prior to trial, Harley made offers of judgment to both Fiola and Gatez, but neither accepted. At trial, Harley presented expert testimony demonstrating that Fiola's and Gatez's injuries were not caused by the accident and raised numerous inconsistencies in Fiola's and Gatez's testimonies. Harley also presented various pictures, including still photographs from a pornographic video, showing Gatez undertaking various activities inconsistent with his claimed injuries. Harley further presented medical records suggesting that

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Fiola's preexisting injuries were the sole cause of Fiola's medical condition. The jury found for Harley.¹

On appeal, Fiola argues reversal is required because (1) the district court abused its discretion by awarding attorney fees and costs jointly and severally against himself and Gatez without analyzing whether fees should be apportioned, (2) the district court abused its discretion by awarding attorney fees and costs without analyzing the *Brunzell*² factors, and (3) the district court erred by admitting the pornographic photos without *sua sponte* giving a limiting instruction. We agree the district court abused its discretion by awarding attorney fees.

We decline to consider Fiola's first and third arguments. Fiola did not raise apportionment below,³ nor did he object to the jury instructions given or ask the district court for a limiting instruction.⁴ We therefore deem

¹We do not recount the facts except as necessary to our disposition.

²*Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

³We note that any error here is harmless, as the record shows that Harley's defenses against Fiola and Gatez were inextricably intertwined such that it would be impracticable or impossible to apportion fees and costs in this particular case. See *Mayfield v. Koroghli*, 124 Nev. 343, 353, 184 P.3d 362, 369 (2008) (citing *Abdallah v. United Savings Bank*, 51 Cal.Rptr.2d 286, 293 (1996), and concluding that apportionment is not mandatory if the claims are too intertwined to separate and assign costs to particular parties).

⁴While Fiola objected to the admission of the photographs, he does not provide relevant authority to support his third argument. See *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (this court need not consider arguments that are not supported by relevant authority). Fiola relies entirely on *Meek v. State*, 112 Nev. 1288, 930 P.2d 1104 (1996) to support his position. But, *Meek* is easily distinguishable from the present case, as *Meek* and its progeny address prior

these arguments waived on appeal. See *Schuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434, 437, 245 P.3d 542, 544 (2010) (noting “parties may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below”) (internal quotations omitted); *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (“A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.”).

Turning to Fiola’s remaining argument, we consider whether the district court reversibly erred by failing to analyze the *Beattie*⁵ and *Brunzell* factors in its order granting Harley’s motion for attorney fees and costs. We review the district court’s decision to award attorney fees and costs for an abuse of discretion. *McCarran Int’l Airport v. Sisolak*, 122 Nev. 645, 673, 137 P.3d 1110, 1129 (2006). In deciding a motion for attorney fees and costs, in the context of an offer of judgment, the district court must consider the factors set forth in *Beattie* and *Brunzell*. *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 81, 319 P.3d 606, 615-16 (2014). While Nevada appellate courts do not require that the district courts make explicit findings on each factor, the record must nonetheless demonstrate that the court considered the factors and that the award is supported by substantial evidence. See *MEI-GSR Holdings, L.L.C. v. Peppermill Casinos, Inc.*, 134 Nev. ___, ___, 416 P.3d 249, 259 (2018); *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015);

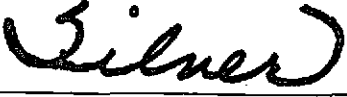
bad act evidence admitted under NRS 48.045(2) against a criminal defendant, *Id.* at 1292-93, 930 P.2d at 1107; see also, *Rhymes v. State*, 121 Nev. 17, 24, 107 P.3d 1278, 1282 (2005); *Tavares v. State*, 117 Nev. 725, 730-31, 30 P.3d 1128, 1131-32 (2001), whereas here the defendant in a civil lawsuit presented the evidence to counter a plaintiff’s claimed injuries.


⁵*Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983).


see also *Lioce v. Cohen*, 124 Nev. 1, 24-25, 174 P.3d 970, 985 (2008) (holding that, on appellate review, the court was unable to determine whether the district court abused its discretion because the court failed to make any findings in resolving the matter before it).

Here, the district court failed to reference *Beattie* or make any findings on the *Brunzell* factors in awarding attorney fees. The district court's failure to analyze these factors leaves us unable to determine here whether the district court in fact considered the appropriate factors in making its decision. Notably, not only did the district court fail to analyze the four *Brunzell* factors in awarding Harley's requested attorney fees, the court did not evaluate Harley's offer of judgment and Fiola's decision to reject that offer, as required by *Beattie*. See *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983) (setting forth factors the district court must evaluate when considering attorney fees and costs); see also *Stubbs v. Strickland*, 129 Nev. 146, 152 n.1, 297 P.3d 326, 330 n.1 (2013) (explaining that a district court must "make findings regarding the basis for awarding attorney fees and the reasonableness of an award of attorney fees"). Accordingly, we must conclude that the district court abused its discretion by awarding attorney fees. We therefore reverse the district court's order granting attorney fees and remand this matter to the district court for further proceedings consistent with this order. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Ronald J. Israel, District Judge
Garman Turner Gordon
Ranalli Zaniel Fowler & Moran, LLC/Henderson
Eighth District Court Clerk