

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DEAN Y. KAJIOKA,
Appellant,
vs.
RENE N. KAJIOKA,
Respondent.

No. 66560

FILED

NOV 25 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
Tracie K. Lindeman
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order awarding attorney fees in a post-judgment proceeding in a divorce case. Eighth Judicial District Court, Family Court Division, Clark County; Cynthia Dianne Steel, Judge.

Appellant Dean Kajioka asserts three assignments of error on appeal,¹ each related to the district court's order of attorney fees and costs in favor of respondent Rene Kajioka. First, Dean argues the district court abused its discretion in awarding Rene fees because Rene filed her motion after the expiration of the 20-day time period set forth in NRCP 54(d)(2)(B). Second, he contends the district court abused its discretion in awarding Rene costs because Rene did not file a verified memorandum of costs, as required by NRS 18.110. Third, Dean argues the district court abused its discretion in awarding Rene attorney fees and

¹While Dean's opening brief identifies four assignments of error, we consolidate the last two because they each relate to the court's failure to review counsel's billing records.

costs because it did not review counsel's billing records and also refused to allow the parties to attach billing records to their pleadings.

Dean and Rene filed for divorce in late 2012. They stipulated and agreed to the terms of their divorce, except for the issue of attorney fees and costs. At the prove-up hearing on December 10, 2013, they agreed to attempt to resolve the issue of attorney fees without court intervention. While in court, Rene agreed to send Dean her counsel's billing records and Dean agreed to send Rene a proposal by January 1, 2014. The court then granted the parties' divorce, but did not sign the decree because the parties did not have it prepared at that time. Rene agreed to prepare the decree and the court explained, "we will carve out the attorney fee issue in case it's not agreed to before you guys send the decree to me. You guys work something out, you can always put it in there."

The parties did not file the decree until April 24, 2014, over four months after the prove-up hearing. Notice of entry of the decree was entered and served by Rene the same day. At that time, the parties still had not reached an agreement as to fees. Although Dean received redacted billing records from Rene in December 2013, he did not send her a proposal as agreed. Thus, on May 16, 2014, Rene filed a motion for attorneys' fees and costs, supported by an "Affidavit of Counsel and Memorandum Re: Attorneys' Fees and Costs." In the affidavit, Rene requested \$71,740.82 in attorney fees and costs, but did not separate fees from costs. Dean opposed the motion, arguing against the necessity and reasonableness of the fees and requesting the court to award no more than \$7,500.00 if it awarded fees.

The court held a hearing on June 18, 2014. The court did not review Rene's counsel's billing records or receive any evidence. Rather, the court said Dean's \$7,500.00 offer was too low "in light of the amounts that's still outstanding in [the] case." After hearing arguments of counsel, the court awarded Rene \$71,740.82, the full amount of fees and costs requested, minus interest, penalties, and \$1,000.00, which it previously ordered Rene's counsel to pay Dean's counsel for lack of presence at a status check hearing. The court's order specified an award of \$65,818.01 in attorney fees, pursuant to *Sargeant v. Sargeant*, 88 Nev. 223, 495 P.2d 618 (1972), and reduced the amount to judgment. Dean now appeals.

Whether Rene filed her motion for attorney fees within the time period required by NRCP 54(d)(2)(B)

Dean first contends the district court abused its discretion in awarding Rene attorney fees because she did not file her motion within 20 days of service of notice of entry of the decree, as required by NRCP 54(d)(2)(B). Dean, however, failed to raise this issue before the district court and thus, he presents it for the first time on appeal. While generally a party's failure to raise an argument before the district court constitutes a waiver of that argument, this court may, in some instances, consider arguments that go to the jurisdiction of the court. *See 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 waived and will not be considered on appeal.").

We are not convinced, however, that NRCP 54(d)(2)(B) creates a jurisdictional issue that we may consider when raised in the first instance on appeal. Nevada courts have not yet addressed this issue. Although the Nevada Supreme Court recently analyzed NRCP 54(d)(2)(B)'s 20-day period in *Barbara Ann Hollier Trust v. Shack*, 131

Nev. ___, ___, 256 P.3d 1085, 1091 (2015), the court did not address whether NRCP 54(d)(2)(B) operates as a jurisdictional bar such that a party can raise the issue of timeliness for the first time on appeal.

Moreover, Dean did not clearly argue this as a jurisdictional issue in his opening brief. Because Dean first identified it as a jurisdictional issue in his reply brief, Rene did not have the opportunity to respond and fully argue this narrow but critical point. But even in raising the issue in his reply brief, Dean failed to cite any supporting authority. Accordingly, we need not consider this argument. *See Francis v. Wynn Las Vegas*, 127 Nev. 657, 671 n.7, 262 P.3d 705, 715 n.7 (2011) (“arguments raised for the first time in an appellant’s reply brief need not be considered”).

Additionally, even if we were to conclude NRCP 54(2)(d)(B) is jurisdictional, that determination would not be dispositive in this appeal because Rene argues the district court extended the time period before it expired. Rene’s argument, if true, would make the issue of NRCP 54(2)(d)(B)’s jurisdictional character moot. Under the Nevada Rules of Civil Procedure and local court rules, a party may obtain an extension of time through stipulation or court order. NRCP 6; EDCR 2.25. NRCP 6 allows parties to extend a period of time prescribed in the rules by written stipulation. Additionally, NRCP 6 allows the court to grant an extension of time if the party makes a request (with or without motion) before the expiration of the period originally prescribed. EDCR 2.25 further permits parties to move for or to stipulate to an extension of time, provided the motion or stipulation is in writing and includes the information outlined in the rule.

Here, the record does not show the parties filed a written stipulation extending the time for a motion for attorney fees, that Rene requested an extension of time, or that the court granted the parties an extension of time. Rene argues, however, that the decree evinces both a stipulation by the parties to an extension of time and the court's grant of an extension of time. The decree provides:

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Rene's claim for attorney fees shall rest with the sound discretion with the Court. The parties if they are unable to settle the issue, will submit briefs to the Court for a determination of the appropriate amount of fees to be awarded or placed on calendar for argument and decision.

"Historically, this court defers to a trial court's interpretation of its own decrees." *Rivero v. Rivero*, 125 Nev. 410, 444, 216 P.3d 213, 237 (2009) (Pickering, J., dissenting); see *Grenz v. Grenz*, 78 Nev. 394, 401, 374 P.2d 891, 895 (1962) ("It is the province of the trial court to construe its judgments and decrees."). The district court in this case did not address whether it intended the decree's language to extend the 20-day period in NRCP 54(d)(2)(B) because, as discussed, Dean did not raise the issue of timeliness before the district court. Therefore, even if NRCP 54 (d)(2)(B) is jurisdictional and considered by this court on appeal, a remand is necessary for the district court to consider the timeliness of Rene's motion for attorney fees.²

²We emphasize that this court, through this order, is not expressing an opinion either way on whether NRCP 54(d)(2)(B) is jurisdictional. We note that NRCP 54(d)(2)(B)'s federal counterpart is not jurisdictional. See *Figueroa v. Buccaneer Hotel, Inc.*, 188 F.3d 172, 183 (3rd Cir. 1999)
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Whether the district court abused its discretion in awarding fees

Even if a remand were not necessary on the question of timeliness, we conclude that the district court abused its discretion in awarding attorney fees to Rene. Dean contends the district court abused its discretion in awarding Rene attorney fees because the district court (1) did not review the billing records, (2) did not make any findings with respect to the *Brunzell* factors,³ (3) did not consider the respective income of the parties under *Wright*,⁴ or (4) require the parties to submit updated financial disclosure forms pursuant to EDCR 5.32. We agree.

Before granting an award of attorney fees, the district court must identify the legal basis for the award and determine the reasonable amount of attorney fees to award. *Miller v. Wilfong*, 121 Nev. 619, 623, 119 P.3d 727, 730 (2005). This court reviews de novo the district court's

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(restating that FRCP 54(d)(2)(B)'s time requirements are not jurisdictional and thus, need not be considered if raised for the first time on appeal); *Tancredi v. Metro. Life Ins. Co.*, 378 F.3d 220, 227 (2nd Cir. 2004) (explaining that "by its very terms, the fourteen-day deadline of Rule 54 is not a fatal jurisdictional deadline"). The Nevada rule, however, while containing similar language, is not identical to its federal counterpart. In particular, the federal rule contains no language that prevents the district court from granting an extension after the 14-day time period has expired. Cf. *Barbara Ann Hollier Trust*, 131 Nev. at ___, 356 P.3d at 1091 (analyzing NRCP 54(d)(2)(B) and holding that "[o]nce the 20-day period expires . . . the extra sentence in [the rule] would prohibit any type of extension").

³*Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 455 P.2d 31 (1969).

⁴*Wright v. Osburn*, 114 Nev. 1367, 970 P.2d 1071 (1998).

legal basis for an award of attorney fees. *JED Prop. v. Coastline RE Holdings NV Corp.*, 131 Nev. ___, ___, 343 P.3d 1239, 1240 (2015). It is well settled that “attorney fees are not recoverable unless allowed by express or implied agreement or when authorized by statute or rule.” *Miller*, 121 Nev. at 623, 119 P.3d at 730 (internal quotation marks omitted). In the context of divorce proceedings, the district court may award preliminary attorney fees pursuant to NRS 125.040(1), final attorney fees pursuant to NRS 125.150(3), and also under *Sargeant* where a party presents a financial hardship. *See id.* at 624, 119 P.3d at 730.

Here, the district court granted attorney fees to Rene under *Sargeant* without making any findings as to whether she would experience financial hardship without the court’s assistance. Neither party attached an affidavit of financial condition to their motion, as required by EDCR 5.32. Although the parties filed financial disclosure forms in December 2013, each was filed prior to the prove-up hearing and entry of the decree. According to Dean’s financial disclosure form, he had a net monthly income of \$3,934.00, monthly expenses of \$9,211.00, \$150,000.00 in net assets, and a total net worth of \$200,000.00. According to Rene’s financial disclosure form, she had no monthly income, monthly expenses of \$8,086.00, and a net worth of \$30,000.00.

Because the parties did not attach updated financial disclosure forms, it is difficult to accurately determine whether Rene could afford to pay her attorney fees, in part or in full, without court intervention. Although Rene argued in her motion that she is left “with a significantly negative net worth based solely upon the fees she currently owes her counsel” and “should not have to pay 100% of the property she was awarded to her attorneys,” arguments of counsel are not evidence.

See Nev. Ass'n Servs., Inc. v. Eighth Judicial Dist. Court, 130 Nev. ___, ___, 338 P.3d 1250, 1255 (2014). The record here does reveal a disparity in net worth, but it is not the gross disparity described in *Sargeant*. *See Sargeant*, 88 Nev. at 226, 495 P.2d at 620 (upholding award of \$52,500.00 in fees to wife where wife only had a savings of \$42,000 in stock and \$2,200 in her bank accounts and husband had a net worth of \$3,000,000). Based on the parties' December 2013 financial disclosure forms, Rene's attorney fees exceed her net worth, but both parties have monthly expenses in excess of their monthly income. Without updated financial disclosure forms or any findings by the district court with respect to the parties' post-divorce financial conditions, we cannot conclude whether the financial hardship concern is present here and thus, whether *Sargent* was an appropriate basis on which to award fees.

The district court also erred in the manner in which it calculated the total amount of fees. "This court reviews the district court's award of attorney fees for an abuse of discretion." *Rivero v. Rivero*, 125 Nev. 410, 440, 216 P.3d 213, 234 (2009). The trial court has discretion to determine the reasonable amount of attorney fees, but "in exercising that discretion, the court must evaluate the factors set forth in *Brunzell*." *Miller*, 121 Nev. at 623, 119 P.3d at 730. Additionally, in family law cases, as here, the district court "must also consider the disparity in income of the parties when awarding fees." *Id.* (citing *Wright*, 114 Nev. at 1370, 970 P.2d at 1073). Accordingly, "parties seeking attorney fees in family law cases must support their fee request with affidavits or other evidence that meets the factors in *Brunzell* and *Wright*." *Id.* at 623-64, 119 P.3d at 730.

First, the district court did not analyze or make findings relevant to the factors set forth in *Brunzell*. Under *Brunzell*, the district

court *must* consider each of the following factors in determining the reasonableness of attorney fees:

(1) the qualities of the advocate: his ability, his training, education experience, professional standing, and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the reasonability imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; (4) the result: whether the attorney was successful and what benefits were derived.

85 Nev. at 349, 455 P.2d at 33. Although the parties addressed some of the *Brunzell* factors in their briefs and at the hearing, the record does not show the court considered or evaluated each of the *Brunzell* factors in determining whether \$71,740.82, which reflected the outstanding balance of attorney fees and costs, was a reasonable amount of fees.

The court made no oral findings at the hearing with respect to the *Brunzell* factors, nor in its written order, which consists only of three short paragraphs. The court also did not review Rene's counsel's billing records before making the award. And further, the award of fees clearly includes an award of costs. In her motion, Rene argued the amount of attorney fees *and costs* still owed totaled \$71,740.82, and the court awarded \$71,740.82 only as *fees*. Thus, the court added the amount of costs into its award of fees without considering the issue of costs or making any findings as to whether the costs had been necessarily incurred. *See* NRS 18.110.

Second, the record does not show the court considered the disparity of income of the parties under *Wright*. Although the district court recognized Rene was, is, and always has been unemployed, it stated

“[it] did not know what [Dean’s] net worth is today or what it could be tomorrow.” Moreover, the parties failed to attach an affidavit of financial condition as required by EDCR 5.32 to their motions. Although they filed financial disclosure forms on December 5, 2013, as previously mentioned, it is unclear whether the pre-divorce financial forms adequately illustrate the financial condition of the parties post-divorce. The court relied entirely on counsels’ description of the parties’ financial conditions, as explained in the parties’ briefs and at the hearing. But arguments of counsel are not evidence. *See Nev. Ass’n Servs., Inc.*, 130 Nev. at ___, 338 P.3d at 1255.

Accordingly, even if the court possessed jurisdiction, we would have to conclude the court abused its discretion in awarding Rene fees, and reverse and remand the judgment to the district court to consider whether *Sargeant* was an appropriate basis on which to award fees, whether Rene’s requested fees are reasonable under the *Brunzell* factors, and under *Wright*. *See Beattie v. Thomas*, 99 Nev. 579, 589, 668 P.2d 268, 274 (1983) (holding that it is an abuse of discretion to award the full amount of attorney fees requested without making findings based on evidence that the attorney fees are reasonable and justified).

Whether the district court abused its discretion in awarding costs

Dean next argues the district court abused its discretion in awarding Rene costs because Rene did not file a verified memorandum of costs within 5 days of entry of the decree, as required by NRS 18.110(1); and moreover, that the affidavit Rene filed with her motion for attorney fees and costs did not satisfy NRS 18.110(1)’s requirement for a verified memorandum of costs.

As an initial matter, we note the district court's order did not specify an award of costs. Rene's motion requested \$71,740.82 in attorney fees and costs, but the district court's order awarded the entire amount as fees. We address each of Dean's contentions, however, because it is apparent the court did award costs.

As to Dean's first contention, NRS 18.110(1) provides that a memorandum of costs must be filed by the prevailing party within 5 days after the entry of judgment or within "such further time as the court or judge may grant." The plain language of the rule permits the district court to consider a motion for costs after the expiration of the 5-day period. *See Eberle v. State ex rel. Redfield Trust*, 108 Nev. 587, 590, 836 P.2d 67, 69 (1992) (holding the requirement in NRS 18.110 that a memorandum of costs must be filed by the prevailing party within 5 days after entry of judgment is not jurisdictional because the section also allows for filing of a memorandum within such further time as the court or judge may grant). In *Eberle*, the Nevada Supreme Court found that the district court had impliedly granted a party additional time to move for costs when it considered and granted the party's motion for costs. 108 Nev. at 590, 836 P.2d at 69. And moreover, it held the district court did not abuse its discretion in granting the extension, explaining such "exercise of discretion to reach the merits of the motion will not be disturbed on appeal." 108 Nev. at 590, 836 P.2d at 69. Accordingly, we conclude the district court did not abuse its discretion in considering Rene's motion for costs, which she filed 17 days after the deadline imposed by NRS 18.110(1).

As to Dean's second contention, we conclude the award of costs was an abuse of discretion. NRS 18.110(1) requires a party who claims costs to file "a memorandum of the items of the costs in the action or


proceeding . . . stating that to the best of his or her knowledge and belief the items are correct, and that the costs have been necessarily incurred in the action or proceeding." Here, Rene's affidavit did not separate costs from fees, or specify any items of cost. Rather, the affidavit summarily claimed Rene owed \$71,740.82 in attorney fees and costs. Therefore, because the district court did not receive any evidence enabling it to determine the claimed costs were reasonable and necessary, the district court abused its discretion to the extent its award included costs. See *Gibellini v. Klindt*, 110 Nev. 1201, 1206, 885 P.2d 540, 543 (1994) ("Without evidence to determine whether a cost was reasonable and necessary, a district court may not award costs.").

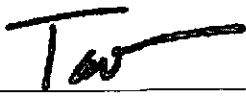
We therefore conclude the district court abused its discretion in awarding attorney fees because it did not evaluate each of the *Brunzell* factors, or consider the disparity in income of the parties under *Wright*. Further, although we conclude the district court did not abuse its discretion in considering Rene's untimely motion for costs, we conclude the district court abused its discretion in awarding costs, to the extent costs were included in the district court's award of fees, because it did not receive any evidence enabling it to determine whether the claimed costs were reasonable and necessarily incurred.

Accordingly, because we decline to address the issue of whether NRCP 54(d)(2)(B) is jurisdictional at this time, we reverse the district court's order awarding attorney fees and remand the matter to the district court to consider whether it granted the parties an extension to file a motion for fees, and if satisfied the motion was timely, whether *Sargeant* is an appropriate basis on which to award fees, and if so, whether the requested fees are reasonable under the *Brunzell* factors and

under *Wright*, and whether the claimed costs were reasonable and necessarily incurred.

Accordingly, we ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Cynthia Dianne Steel, District Judge, Family Court Division
Lansford W. Levitt, Settlement Judge
Nehme-Tomalka & Associates
Black & LoBello
Eighth District Court Clerk