

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

HDAV OUTDOOR, LLC,  
Appellant,  
vs.  
RED SQUARE HOLDINGS, LLC,  
Respondent.

No. 77183-COA

**FILED**

DEC 18 2019

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

HDAV Outdoor, LLC appeals from a final judgment entered following a bench trial in a breach of contract action. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

In December 2013, Red Square Holdings, LLC (Red Square) and HDAV Outdoor, LLC (HDAV Outdoor) entered into a contract whereby HDAV Outdoor, in exchange for \$86,480, agreed to customize an Isuzu Diesel Eco Max box truck with LED light displays that would allow Red Square to use the box truck for mobile advertising.<sup>1</sup> The contract provided that HDAV Outdoor would complete the customization no later than eight weeks after Red Square delivered the box truck to HDAV Outdoor. Red Square delivered the truck to HDAV Outdoor on January 7, 2014; therefore, HDAV Outdoor should have completed the customization by March 4, 2014. However, Red Square did not receive the customized truck from HDAV Outdoor to use for advertising until July 15, 2014.

As a result, Red Square filed suit against HDAV Outdoor alleging, amongst other claims, breach of contract, and requesting various damages, including lost-profit damages. The case proceeded to a one-day bench trial, during which the district court awarded Red Square \$60,000 for

<sup>1</sup>We do not recount the facts except as necessary to our disposition.

its lost profits, which it later reduced to \$45,000 after a subsequent hearing on HDAV Outdoor's motion for reconsideration.<sup>2</sup>

The sole issue presented on appeal is whether the district court abused its discretion by awarding Red Square \$45,000 in lost profits. HDAV contends that the lost-profit damages should be reversed for lack of evidence and inconsistencies in the court's findings. However, the only objection HDAV's counsel made at trial was that Red Square's liaison, Mohamood Razack, lacked the requisite foundation to testify in support of these damages.<sup>3</sup> We, therefore, decline to address any of HDAV's other arguments on appeal.<sup>4</sup>

During trial, Razack testified that, in his "liaison" position, he sought vendors on Red Square's behalf as a "salesperson," and assisted in establishing Red Square's price schedule for advertisement contracts with

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<sup>2</sup>We note that the district court's amended judgment filed on September 11, 2018, confirms that the amount of lost profits was for \$45,000, thereby correcting its prior order.

<sup>3</sup>Red Square's counsel asked Razack how much money Red Square had lost per month when it either didn't have the truck at all or when the truck was not operational. HDAV Outdoor's counsel then objected for lack of foundation, which the district court overruled.

<sup>4</sup>HDAV Outdoor specifically argues that the district court erred by allowing Razack to testify regarding Red Square's lost profits in the amount of \$12,000 per month because Razack's testimony was speculative, contrary to the best evidence rule, and Razack lacked personal knowledge. Red Square argues that HDAV Outdoor did not preserve any of these arguments for appeal because HDAV Outdoor failed to specifically object on each of these grounds at trial. We agree, and decline to address them except to the extent necessary to address HDAV Outdoor's foundation objection. "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." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

vendors. Razack further testified that Red Square had four types of advertising contracts at various rates.<sup>5</sup>

Under these pricing conditions, Razack testified that he had negotiated advertising contracts with various vendors, ranging from large-scale vendors to local businesses. Razack stated that, because HDAV Outdoor had not completed the customization on the truck by March 4, 2014, Red Square suffered lost profits from the advertising contracts it was not able to execute. More specifically, Razack stated that he conservatively estimated Red Square lost \$12,000 per month in profits. We recognize that Razack did not clearly explain how he calculated this estimate, nevertheless, he testified that he was “reasonably certain” that Red Square suffered these lost profits based on HDAV’s “untimely and defective work.” The district court ultimately awarded \$10,000 per month for the period of time that HDAV Outdoor delayed completing the customized truck.

Specifically, the district court awarded Red Square consequential damages in the amount of \$45,000 in lost profits for the several month delay in completing the customized truck, which resulted in lost advertising opportunities and reduced profits to Red Square. The district court in making its decision recognized that Red Square failed to provide any evidence of its operating costs or written advertising

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<sup>5</sup>Based on Razack’s testimony, the four contract categories were (1) \$30,000 annual agreements (\$2,500/month); (2) \$3,000 per month agreements; (3) \$800 for a five-day agreement; and (4) daily contracts, though he did not state the pricing for the daily contracts. Razack also testified that Red Square sold advertisements that would display in 8-second blocks on each side of the truck, including the left and right sides of the truck, as well as the rear of the truck. With regard to the pricing for the truck’s rear screen, Razack testified that it had a different rate than the side screens, but he did not provide the rate.



agreements in order to evaluate its lost-profit damages. Nevertheless, we affirm the judgment of the district court.

We review a district court's factual findings for an abuse of discretion and will not disturb them unless they are clearly erroneous or not supported by substantial evidence. *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009). "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." *Witemaine v. Aniskovich*, 124 Nev. 302, 308, 183 P.3d 137, 141 (2008).

Damages resulting from a breach of contract must be "reasonably foreseeable at the time of the contract." *Daniel, Mann, Johnson & Mendenhall v. Hilton Hotels Corp.*, 98 Nev. 113, 115-16, 642 P.2d 1086, 1087 (1982). "The party seeking damages has the burden of proving both the fact of damages and the amount thereof." *Mort Wallin of Lake Tahoe, Inc. v. Commercial Cabinet Co.*, 105 Nev. 855, 857, 784 P.2d 954, 955 (1989). "[L]ost profits are generally an appropriate measure of damages so long as the evidence provides a basis for determining, with reasonable certainty, what the profits would have been had the contract not been breached." *Eaton v. J.H., Inc.*, 94 Nev. 446, 450, 581 P.2d 14, 17 (1978). Though "damages need not be proven with mathematical exactitude, . . . the mere fact that some uncertainty exists as to the actual amount of damages sustained will not preclude recovery." *Frantz v. Johnson*, 116 Nev. 455, 469, 999 P.2d 351, 360 (2000).

Nevada has adopted the Restatement (Second) of Contracts § 347 (1981) as the proper method for determining lost profits. *Road & Highway Builders, LLC v. N. Nev. Rebar, Inc.*, 128 Nev. 384, 392, 284 P.3d 377, 382 (2012). In *Road & Highway Builders*, the Nevada Supreme Court affirmed that compensatory damages in breach of contract cases may include an award of lost profits or expectancy damages, after taking into account

costs or other losses avoided by not having to perform. *Id.* Although “the amount of . . . saving (must be) deducted from the damages that otherwise would be recoverable. . . . This rule is applicable only if the evidence indicates that plaintiff would actually save expense by the discharge of his performance; any fixed expenditures . . . are not to be taken into account.” *Eaton*, 94 Nev. at 451, 581 P.2d at 17 (internal quotation marks omitted). Further, a trial court is entitled to consider past profits “for determining such future profits with reasonable certainty.” *Id.* at 450, 581 P.2d at 17.

Alternatively, a court may award “standby” or “delay” damages for lost profits resulting from an inability to timely use equipment as long as the delay is attributable to the breaching party and caused the non-breaching party’s lost opportunity to be extended. *See, e.g., Colo. Env’ts, Inc. v. Valley Grading Corp.*, 105 Nev. 464, 471, 779 P.2d 80, 84 (1989) (“These losses, when foreseeable, are a natural consequence of the [breaching party’s] delay, and, thus, are compensable.”).

Finally, the modern trend permits lay witness testimony in support of a company’s lost profits if the witness’s position in the company was such that he or she possessed personal knowledge of the company’s business. *See, e.g., Servicios Comerciales Lamosa, S.A. de C.V. v. De La Rosa*, 328 F. Supp. 3d 598, 618-19 (N.D. Tex. 2018) (permitting lay witness officer to testify on lost profits); *see also Gramanz v. T-Shirts and Souvenirs, Inc.*, 111 Nev. 478, 485, 894 P.2d 342, 347 (1995) (permitting the corporation’s shareholder and manager of corporate retail to testify regarding lost profits as long as his testimony was supported by substantial evidence and arose to more than mere speculation); *Rhine v. Miller*, 94 Nev. 647, 650, 853 P.2d 458, 460 (1978) (“In order to establish an adequate basis for determining the quantum of lost profits, appellant need only provide the

best evidence available to him under the facts and circumstances of the case.” (internal citations omitted)).

Here, in addition to objecting to Razack’s testimony, HDAV Outdoor challenges the accuracy of a number of factual findings made by the district court in awarding lost profits. For example, HDAV Outdoor notes in its opening brief that the district court found, on the one hand, that “[n]o evidence of operating costs were provided nor were any written agreements or confirmations of advertising services provided,” but on the other hand awarded \$45,000 in lost profits. However, HDAV Outdoor provided an incomplete record on appeal by failing to submit and properly label any of the nontestimonial evidence submitted at trial. Therefore, it is unclear from a review of the record what nontestimonial evidence the district court considered, and which evidence HDAV Outdoor disputes.

We take this opportunity to remind parties that appellants are responsible for producing an adequate appellate record, and when an “appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court’s decision.” *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007). When appealing a bench trial finding, the appellant must submit a trial record, which “consists of the papers and exhibits filed in the district court, the transcript of the proceedings, if any, the district court minutes, and the docket entries made by the district court.” NRAP 10(a). Further, “Copies of relevant and necessary exhibits shall be clearly identified, and shall be included in the appendix as far as practicable.” NRAP 30(d).<sup>6</sup>

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<sup>6</sup>HDAV Outdoor did submit what appears to be some of the trial exhibits in Volume 3 of the appendix. However, the documents are neither



Beyond the problems with the record on appeal, HDAV Outdoor's challenge to the award of lost profit fails. The district court's finding that Red Square produced no evidence of costs to offset from its lost future profits is consistent with an award of delay damages, which do not require the court to consider such an offset. *See Eaton*, 94 Nev. at 451, 581 P.2d at 17. Obviously, Red Square was not incurring any costs specifically related to operating the truck because it did not have the truck to operate.<sup>7</sup> To the extent that HDAV Outdoor challenges the actual period of time in which the district court awarded lost profits for its delay in delivering the truck (approximately four and one-half months), it has failed to identify evidence in the record to support its position or to properly cite to that evidence by page number in its briefing. Further, Red Square specifically notified HDAV Outdoor that it intended to commence advertising with the

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separated nor marked in any way that would allow us to identify where each document begins and ends; what trial exhibit each document might correspond to; whether the documents are complete or only partial; or even whether we have all of the trial exhibits or just some of them. Indeed, it is not even clear whether the appellate record contains a complete copy of the written contract that is the subject of the litigation. Volume 3 contains a document that appears to roughly match the contract as described at trial, but it is unlabeled and unnumbered. Further, the appellate record does not contain properly sequenced page numbers or exhibit numbers. Accordingly, the arguments contained in HDAV Outdoor's briefing are unsupported by citations to the record as required by NRAP 28(e)(1).

<sup>7</sup>We recognize that the district court was careful only to award lost profits for the time frame during which Red Square was not in possession of the truck, and declined to award lost profits for any period after the truck was delivered but continued to have operational issues. Lost profits awarded after delivery of the truck would have required the district court to have further considered operating expenses and the financial benefits in not having to fulfill a given contract in order to determine profitability. *See Restatement (Second) Contracts* § 347.


truck, and thus it was reasonably foreseeable that any delay in delivering the truck would adversely affect Red Square's profitability.

Finally, we conclude that the district court's mathematical calculation of Red Square's lost profits for the delay was not clearly erroneous. The district court did not abuse its discretion in determining that Razack could testify as a lay witness as to Red Square's lost monthly profits when he stated that he was familiar with Red Square's business and was "reasonably certain" that Red Square suffered lost profits in the amount of \$12,000 a month. The district court eventually awarded lost profits in the amount of \$10,000 a month. Although it is unclear from the record why the district court reduced the monthly amount, we presume that any missing portions of the record support the district court's award. *Cuzze*, 123 Nev. at 603, 172 P.3d at 135. At the very least, by failing to provide a coherent record, HDAV Outdoor has failed to demonstrate that the district court's award constituted an abuse of its discretion. Further, the district court may adjust past profits where appropriate in determining lost profits. Thus, we conclude that the district court's award of lost-profit damages in the amount of \$45,000, or \$10,000 per month for four and one-half months, was not an abuse of discretion.

Accordingly, we

AFFIRM the judgment of the district court.

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

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla



cc: Hon. Elizabeth Goff Gonzalez, District Judge  
Wiley Petersen  
Ideal Business Partners  
Cooper & Elliott  
Eighth District Court Clerk