IN THE COURT OF APPEALS OF THE STATE OF NEVADA

HERITAGE MORTUARY, INC., A NEVADA CORPORATION,
Appellant,
vs.
ANGELA BOWDEN; AND LA SHUNDER REED, INDIVIDUALLY,
Respondents.

No. 86224-COA

ORDER OF AFFIRMANCE

Heritage Mortuary, Inc. (Heritage) appeals from a final judgment following a bench trial in a tort action. Eighth Judicial District Court, Clark County; Jasmin D. Lilly-Spells, Judge.

Lee Andrew Reed (Lee) met Angela Bowden in 2014 in Arkansas, and they quickly fell in love and married shortly after.[1] Bowden moved to Las Vegas with her children so they could live with Lee, and the couple only grew closer. Bowden would also develop deep and loving relationships with Lee's family, especially his sister La Shunder Reed. Lee, however, fell ill from cancer and passed away on June 29, 2017.

That day, Reed called Heritage to collect and care for the body. Heritage collected the body on June 29, received a hospice report listing the date of death as June 29, and input Lee's date of death as June 29 in its internal system. Reed went to Heritage the next day to ask it to ship Lee's body to California so he could be buried with his family. But when Reed filled out the Heritage intake sheet that would allow Heritage to obtain

[1]We recount the facts only as necessary for our disposition and we refer to the respondents by their last names or as respondents collectively).

death certificates (an original and certified copies) and a transit and burial permit from the Department of Vital Statistics, she incorrectly listed the date of death as June 30. Of note, the intake sheet where Reed listed the incorrect date of death included a warning that the signer "assum[ed] all responsibility, financial or otherwise" for any errors on the form and the necessary corrections afterward.

Heritage failed to check its records or confirm with Reed that the date was correct and sent the information from the intake sheet, with the incorrect date, to the Nevada Department of Vital Statistics. After learning of the cost of shipping Lee's body to California, Reed changed her mind and called the director of Heritage, Tyrone Seals, to ask if he would arrange a showing for Lee's family and friends and then cremate the body in Las Vegas. Seals agreed and told Reed to return to Heritage to sign an affidavit of correction to receive a new burial transit permit to cremate Lee in Las Vegas. Seals also emailed Reed an estimated cost for the services—which contained the correct date of death. Reed agreed to the price and asked Seals if she could pay on July 14, and he accepted her offer.

The parties disagreed about the timing of the viewing. Reed later testified it was scheduled for 4:00 p.m. on July 14, the date she was supposed to pay Heritage. In addition, Angela Bowden posted on Facebook that the viewing would start on July 14 at 4:00 p.m. However, Seals testified that the viewing was set for 5:30 p.m.[2] Due to the confusion concerning the viewing start time, when the family arrived, Lee's body was not prepared. As a result, Seals directed an employee to quickly prepare the body for viewing. The viewing happened about an hour and a half later.

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[2]Heritage argued in its closing arguments that it was not even scheduled for July 14, and instead, July 14 was only the date that Reed was required to pay.

While Lee's body was being prepared, Reed paid Heritage over $4,000 as the amount the parties previously agreed upon for the viewing and cremation. Three days later, Reed and Bowden went to Heritage and Reed signed the affidavit of correction, which had been filled out by a Heritage employee, Donavan Mickens, so Heritage could obtain a change to the original transit and burial permit and cremate the body in Las Vegas. The affidavit of correction also incorrectly stated that the date of Lee's death was June 30, 2017, which Bowden, Reed, and Mickens failed to correct.

A dispute arose concerning the fee for the affidavit of correction, and Heritage refused to submit the affidavit of correction to the Department of Vital Statistics for an entire month. Heritage contended that Reed failed to pay the affidavit-of-correction fee and that neither she nor Bowden answered when it called requesting payment. Reed and Bowden countered that they called Heritage multiple times about the status of the death certificates and cremation, and they later testified they never received a response from Heritage.

Heritage did not send the affidavit of correction to the Department of Vital Statistics until August 18, but it was returned on September 1 because Reed had signed where Bowden, as the next of kin, was required to sign. Heritage resent the affidavit and subsequently received Lee's death certificates and the cremation permit—both listing the incorrect date of death. Bowden pointed out the incorrect date on the death certificates to Seals and Mickens, and Bowden had to submit another affidavit of correction, through Heritage, to correct the date of death. While the change request was pending, Heritage sent Lee's body to the crematorium, and when Bowden picked up the remains, the date of death on the container holding Lee's ashes listed June 30. Bowden did not receive

the corrected death certificates until November 17, almost five months after Lee passed away.

Bowden and Reed initiated a civil action against Heritage, alleging they were entitled to monetary damages based on breach of contract, negligence, negligent infliction of emotional distress, and negligent hiring, retention, and supervision. They also claimed they were entitled to damages based on pain and suffering from Heritage's negligent handling of Lee's remains. The two parties engaged in standard discovery, but Bowden did not disclose her Facebook post announcing the date and time of the viewing. The district court subsequently presided over a five-day bench trial. During the trial, the court admitted into evidence Bowden's Facebook post over Heritage's objection. The district court admitted the post because both sides had already examined Bowden about the content of the post in the direct and cross examinations, and the post provided corroborating evidence of when the viewing was scheduled to take place.

Also during trial, Bowden and Reed did not present expert witness testimony to support their claim for damages based on pain and suffering. However, they both testified about their pain and suffering from the delayed viewing, the delayed cremation, and the delay in receiving Lee's death certificates. They both testified that they were unable to properly grieve and receive closure after Lee's death.

After the bench trial, the district court found that Heritage was negligent, as it breached its duty of care to Bowden and Reed by failing to handle Lee's body diligently and professionally, and that breach was the proximate and actual cause of their pain and suffering. The court found that Heritage's lack of a system to double-check information provided by a grieving loved one, combined with the multiple sources of Lee's correct date of death and their delay sending the first affidavit of correction, was a

significant contributing factor to the delay of the viewing and the death certificates.

The district court also found that Heritage had negligently supervised its employees, who contributed to the breach because they failed to double-check the date on the affidavit of correction with the one found in Heritage's internal system. Lastly, the court found Bowden and Reed were comparatively negligent and 15 percent at fault for listing the wrong date on Heritage's intake form because it had an explicit warning that the signer would be responsible for incorrect information. The court accordingly ruled in favor of Bowden and Reed and awarded them damages in the amount of $90,000 to be split evenly between the two of them. The district court then reduced the award to $76,500 after their percentage of comparative fault was deducted from the initial award. This appeal followed.

First, Heritage argues that the district court abused its discretion by admitting the undisclosed Facebook post. Heritage contends that admission of the Facebook post amounted to trial by ambush and that the post should have been excluded because it was not disclosed during discovery. Bowden and Reed respond that the district court did not abuse its discretion because both parties had examined the witness about the content of the post before it was admitted as evidence. They further argue that, even if the Facebook post was erroneously admitted, it was harmless because it was cumulative of additional evidence presented during trial.

"[T]he trial court is vested with broad discretion in determining the admissibility of evidence." *Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 492, 117 P.3d 219, 226 (2005) (alteration in original) (quoting *State, ex rel. Dep't of Highways v. Nev. Aggregates & Asphalt Co.*, 92 Nev. 370, 376, 551 P.2d 1095, 1098 (1976)). This court reviews a district court's decision to admit evidence for an abuse of discretion. *Blige v. Terry*, 139

Nev., Adv. Op. 60, 540 P.3d 421, 429 (2023). This court will not interfere with the district court's exercise of its discretion absent a showing of palpable abuse. *Sheehan*, 121 Nev. at 492, 117 P.3d at 226.

NRCP 16.1(a)(1)(A) requires a party to provide a copy of every document or exhibit that it expects to use at trial or offer as evidence in any manner. If a party fails to do so, then one remedy could be the exclusion of the piece of evidence. NRCP 37(c)(1). However, a violation of rule 16.1 does not automatically result in the exclusion of the undisclosed evidence. *Id.* The party may still admit the evidence if "the failure [to disclose] was substantially justified or is harmless." *Id.* Further, due to the district court's wide discretion, a court relying on undisclosed evidence to support its ruling does not abuse its discretion so long as its decision was justified or harmless. *See Brame v. Bank of N.Y. Mellon*, No. 77186, 2020 WL 407140, at *2 (Nev. Jan. 23, 2020) (Order of Affirmance).

Here, Heritage has not shown that the district court abused its discretion or that there was any palpable abuse. We initially note that the content of the Facebook post was revealed in Bowden's direct exanimation, and Heritage failed to raise an objection or submit a motion to strike. *See* NRS 47.040(1) (stating error may not be predicated upon the admission of evidence unless a substantial right is affected and a timely objection or motion to strike was made). Further, the district court justified the admission of the actual Facebook post because both parties examined Bowden about the content of the post, there was ample and independent testimony about the viewing, and the court stated that the post could be used as impeachment evidence. This court will not disturb a district court's findings of fact unless they are clearly erroneous or not supported by substantial evidence, and here, the findings are supported by substantial evidence. *See Sheehan,* 121 Nev. at 486, 117 P.3d at 223. Those findings

then informed the district court's decision to admit the Facebook post, which conforms with the court's "broad discretion in determining the admissibility of evidence," *see id.* at 492, 117 P.3d at 226 (quoting *Nev. Aggregates & Asphalt*, 92 Nev. at 376, 551 P.2d at 1098), and it gives a justification for why the post was admitted, *see Brame*, No. 77186, 2020 WL 407140, at *2.

In addition, Heritage's only support for its argument that the district court abused its discretion by admitting the post is that the situation amounted to a trial by ambush because the Facebook post fell within NRCP 16.1(a)(1)(A)'s mandatory disclosure requirement. But beyond a conclusory citation to that rule, Heritage provides no argument why the admission was not permissible or how the court abused its discretion. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority). Thus, Heritage has not met its burden to show an abuse of discretion when the district court admitted Bowden's Facebook post.

Moreover, even assuming error, Heritage would still have to show that the error was prejudicial. *See Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) ("To establish that an error is prejudicial, the movant must show that the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached."); NRCP 37(c)(1) (stating that undisclosed evidence may be allowed if the failure to disclose was substantially justified or is harmless); *see also* NRS 47.040(1).

Here, the district court listened to the parties' testimony and determined that Reed was more credible about the topic of the viewing. The Facebook post was an additional finding the court used for its conclusion,

but the court admitted it, in part, because of the "ad nauseam" testimony about the viewing that already occurred. Further, the court stated in its ruling that the post would probably not change the outcome if it were admitted. Thus, the district court found that the Facebook post was cumulative of additional evidence admitted at trial and it implied it would have made the same finding if the post had not been admitted. *See Backer v. Gowen*, 73 Nev. 34, 50, 307 P.2d 765, 773 (1957) (stating that the erroneous admission of evidence was harmless when the challenged pieces of evidence were "a minor part of the total evidence submitted, were largely cumulative," and were not prejudicial).

Thus, Heritage has not shown how the Facebook post, if it was not used as evidence, would have changed the result of the proceeding. Nor has it argued how the post was not cumulative of additional evidence presented at trial. Thus, Heritage has not met its burden to show that the error was prejudicial. And, even if we concluded admitting the post was error, the error was harmless.

Second, Heritage argues that Bowden and Reed failed to meet their burden to demonstrate which portions of the delay in the receiving of the death certificates and the delay in the viewing were caused by defendants. It argues that the warning on the intake form that a customer would be responsible for any error on the intake form absolved them of any fault. Heritage further contends that Bowden and Reed did not show how Heritage was the cause of the delay, and therefore, the damages awarded by the district court were entirely speculative. Bowden and Reed counter there was sufficient evidence for the district court to find that Heritage was responsible for the delay and that the finding was not an abuse of discretion.

"This court will not disturb a district court's findings of fact unless they are clearly erroneous or not supported by substantial evidence."

Dynamic Transit Co. v. Trans Pac. Ventures, Inc., 128 Nev. 755, 761, 291 P.3d 114, 118 (2012). "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion." *Id.* (internal quotation marks omitted). And "credibility determinations and the weighing of evidence are left to the trier of fact." *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 365-66, 212 P.3d 1068, 1080 (2009). However, a district court's conclusions of law are reviewed de novo. *County of Clark v. Sun State Props., Ltd.*, 119 Nev. 329, 334, 72 P.3d 954, 957 (2003).

Here, the district court relied on Seals's testimony that the five-month delay vastly exceeded the two-to-three weeks it normally takes to receive death certificates and cremate a body, and it found that the delay was a breach of Heritage's duty to the family. The district court then found that "[t]he delay in cremating the body is not solely attributable to the [respondents]." Specifically, the court found that Heritage held the first affidavit for a month before sending it to the Department of Vital Statistics, that Heritage failed to communicate with the family, that Heritage failed to respond to the family's communications, that Heritage failed to have the family prepare all the necessary documents and collect all the necessary fees on the date of the viewing, and that Heritage did not have a system to double-check the information provided by the grieving loved ones when they filled out the form. However, the district court also found that Bowden and Reed were partially responsible because of the disclaimer on the intake form and found them 15 percent at fault.

The district court found that Heritage was partly responsible for the delay. And from those findings, the court concluded that Heritage had breached its duty to the respondents. The court's findings are supported by substantial evidence in the record, *see Dynamic Transit*, 128 Nev. at 761, 291 P.3d at 118, and this court will not second guess a district

court's resolution of factual issues involving conflicting evidence or reconsider its credibility findings, *see Grosjean*, 125 Nev. at 365-66, 212 P.3d at 1080. Heritage makes no cogent argument and cites no relevant authority that the exculpatory language in the intake form absolves it of all responsibility. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38. Therefore, we discern no abuse of discretion from the district court, nor do we find that it applied the law incorrectly. Thus, we conclude that Heritage is not entitled to relief based on this argument.

Lastly, Heritage argues that respondents were required to present expert testimony to differentiate the pain and suffering they felt from the death of Lee versus the pain and suffering they felt from Heritage's negligence. But Heritage provides no support for this argument except a vague rule quote from the 1993 edition of *Weinstein's Federal Evidence* that in no way references this case, these damages, or this law.[3] Oppositely, the Nevada Supreme Court does not require expert testimony to recover damages for the desecration of a loved one's remains. *See Boorman v. Nev. Mem'l Cremation Soc'y, Inc.*, 126 Nev. 301, 308, 236 P.3d 4, 8 (2010) ("We need not question the trustworthiness of an individual's emotional anguish in cases involving desecration of a loved one's remains." And "ultimately, the determination of whether a close family member should be able to recover any damages . . . is a question for the trier of fact."); *see also State,*

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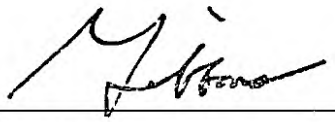
[3]The quote being "the average juror will have no basis for evaluating certain kinds of evidence without the assistance of expert testimony." But, looking at the newest edition of *Weinstein's Federal Evidence*, that quote has no bearing on Heritage's argument. *See* 4 Mark S. Brodin et al., *Weinstein's Federal Evidence*, 702.03[1] (2nd ed. 2024) (providing no specific explanations or examples when expert testimony was required and stating only that "[a]s it was under the common law, expert testimony is admissible under [Federal Rule of Civil Procedure 702] if it concerns matters beyond the understanding of the average person").

Univ. & Cmty. Coll. Sys. v. Sutton, 120 Nev. 972, 990, 103 P.3d 8, 20 (2004) (stating expert testimony is unnecessary to prove past emotional distress). Heritage does not distinguish *Boorman* or argue that it is inapplicable in any other way, so we need not further consider this issue. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38. Accordingly, we

ORDER the judgment of the district court AFFIRMED.[4]



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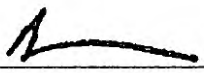

_____, J.
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Westbrook

cc: Hon. Jasmin D. Lilly-Spells, District Judge
James A. Kohl, Settlement Judge
The Law Office of Dan M. Winder, P.C.
Bertoldo Baker Carter Smith & Cullen
Eighth District Court Clerk

[4]Insofar as Heritage has raised arguments that are not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.