IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MELISSA RIVERA, A/K/A MELISSA RODRIGUEZ, AN INDIVIDUAL, Appellant, vs. ASHLEY BIRK, AN INDIVIDUAL, Respondent.	No. 87072-COA
MELISSA RIVERA, A/K/A MELISSA RODRIGUEZ, AN INDIVIDUAL, Appellant, vs. ASHLEY BIRK, AN INDIVIDUAL, Respondent.	No. 87462-COA

ORDER AFFIRMING IN PART, VACATING IN PART, AND REMANDING

In these consolidated appeals, Melissa Rivera, a/k/a Melissa Rodriguez (Rivera) appeals from a judgment on a jury verdict and a post-judgment order granting attorney fees and costs in a personal injury action. Eighth Judicial District Court, Clark County; Danielle K. Pieper, Judge.

In 2018, respondent Ashley Birk was stopped at a red light in Las Vegas when Rivera rear-ended her at high speed. Birk was injured and obtained chiropractic treatment, underwent an MRI, and received epidural injections to deal with neck and back pain. She filed a complaint against Rivera in June 2020, at which point she had accumulated significant medical expenses. The parties subsequently engaged in a lengthy discovery process.

In October 2021, Birk submitted to an independent medical evaluation (IME) with Dr. Reynold Rimoldi, who would later testify as

Rivera's expert at trial. Although Dr. Rimoldi reviewed only the written report of Birk's 2018 MRI—and not the MRI images themselves—he opined that the 2018 MRI was comparable if not identical to Birk's 2016 MRI, which was taken after a separate, unrelated car accident that Birk was involved in. The 2016 MRI revealed only minor disc protrusions. Based on his analysis, he concluded that only six to twelve weeks of chiropractic treatment was necessary to treat Birk's injuries from the 2018 accident and that any further treatment, including surgery, was medically unnecessary. However, Birk underwent spinal surgery that consisted of a discectomy and artificial disc replacement with Dr. Mark Kabins in April 2022. Dr. Rimoldi authored supplemental reports both after reviewing Dr. Kabins's comprehensive medical record review and after Birk's surgery, each time stating that his opinions remained unchanged.

Birk deposed Rivera, and she stated that she did not know how fast she was going or how close she was following Birk at the time of the accident. She also stated that she did not believe any other cars or drivers contributed to the accident. However, Rivera never deposed Birk or investigated Birk's social media posts during the discovery period.

In February 2023, eight months after the close of discovery, Rivera disclosed a social media report prepared by her investigator containing Birk's social media posts that allegedly cast doubt on Birk's claimed injuries. Birk moved to strike the report as untimely and argued that NRCP 37(c) required its exclusion because it would be unfairly prejudicial if admitted. The district court granted the motion, adopting Birk's arguments as its rationale.[1]

[1]One the eve of trial, Rivera submitted a brief urging the district court to admit the social media report for the same reasons she had argued when

Trial began in May 2023, approximately one year after the close of discovery. Birk gave her opening statement which included a discussion on liability, only for Rivera to concede liability in her opening statement, telling the jury that the only disputes were whether all of Birk's medical treatment was medically necessary and whether her injuries were caused by the accident. Rivera was the first witness to testify. Rivera largely reiterated her deposition testimony admitting that the crash was her fault. She also testified that she was unaware that it had, up to that point, been her legal position to contest liability.

Dr. Kabins testified that annular fissures, or tears, at the C4-5 and C5-6 levels of Birk's spine were present on the 2018 MRI but not the 2016 MRI. He also testified to a reasonable degree of medical probability that Birk's injuries and spine treatments were caused by the 2018 car accident and that Birk would have remained asymptomatic but for the 2018 accident. During cross-examination, Rivera offered six of the 2018 MRI films, and the court admitted them into evidence. These six of the approximately forty slides on the 2018 MRI were the subject of Dr. Kabins's testimony in which he explained although MRIs are a useful tool for showing a patient's injuries, they do not enable one to make conclusions about what caused their injuries.

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opposing Birk's motion to strike. Birk responded that this was an improperly styled and untimely motion for reconsideration. Rivera did not offer the report as evidence during trial. The court never ruled on Rivera's brief, effectively denying whatever motion was presented. *See Bd. of Gallery of Hist., Inc. v. Datecs Corp.*, 116 Nev. 286, 289, 994 P.2d 1149, 1150 (2000) (concluding that a district court's failure to rule on a motion constituted a denial of the motion).

Before Dr. Rimoldi testified, the parties held a conference with the district court to determine whether Dr. Rimoldi could testify about the 2018 MRI films. Rivera argued Dr. Rimoldi should be able to testify about all the slides from the 2018 MRI, but that at a minimum, Dr. Rimoldi should be able to testify about the six slides from the 2018 MRI that Dr. Kabins had referenced during his testimony. Birk argued that Dr. Rimoldi should not be permitted to testify about any of the slides, as they were not properly authenticated and Dr. Rimoldi should not be allowed to form medical opinions about images he would be viewing for the first time.

After the lengthy bench conference, the district court ruled that Dr. Rimoldi could not testify about any of the 2018 MRI films because Rivera admitted that Dr. Rimoldi had never seen them. The court also apparently ruled that the films were improperly authenticated even though six of the approximately forty films had been admitted during Rivera's cross-examination of Dr. Kabins, because Rivera did not indicate with enough specificity which of the forty films she was seeking to admit.[2] When Rivera informed the court that Birk did not object to authenticity within 14 days after pre-trial disclosures and thus waived any objection to authenticity, the court stated that even if the 2018 MRI films "somehow got through [NRCP] 16.1," the court was still the gatekeeper of what constituted admissible evidence. When asked by the court how she was going to use the 2018 MRI films, Rivera merely stated that they were relevant and properly authenticated evidence of Birk's injuries.

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[2]We note that Rivera requested to admit a CD of multiple 2018 MRI images. It is unclear how a lay jury would be able to interpret multiple images of an MRI or whether the technology was provided to access the images on the CD.

Dr. Rimoldi ultimately testified about the conclusions he had drawn from the 2016 MRI and the written report from the 2018 MRI, which mirrored his conclusions from the IME. According to Dr. Rimoldi, there was no objective evidence that the 2018 accident caused Birk's injuries, except for mild tissue sprains and strains. Nor was there any objective evidence that Birk needed anything more than six to twelve weeks of chiropractic treatment following the accident. He further testified that, upon reviewing the reports before and after the 2018 accident, it was clear that the two MRIs were "similar, if not identical." He did agree, however, that Birk's 2016 accident was not the cause of her injuries following her 2018 accident, though he did not offer any testimony as to an alternative explanation for Birk's need for surgery after the 2018 accident.

Following Dr. Rimoldi's testimony, Birk moved for a directed verdict pursuant to NRCP 50, asking the district court for the entirety of her past and future treatment and medical billing. She argued that Rivera was unable to undermine Birk's own expert's testimony, provide an alternate theory of causation, or contradict Birk's testimony with competent expert testimony of her own. The district court orally denied this motion.

Dr. Bruce Hirschfeld was called as a witness on behalf of Birk to testify about her past medical expenses. However, before Dr. Hirschfeld took the stand, Rivera moved to require Birk to admit every single one of her medical bills into evidence because the best evidence rule, codified at NRS 52.235, required the admission of original copies to prove their content. Birk responded that Rivera never objected to the admissibility of Dr. Hirschfeld's reports and summaries within the relevant pretrial period pursuant to NRCP 16.1(a)(3)(B). Birk also countered that the best evidence rule did not apply, as the billing amounts were not in dispute. The district court agreed with Birk, stating that while the original bills were

theoretically admissible, their admission was unnecessary, and they would not take the place of Dr. Hirschfeld's testimony which summarized Birk's medical expenses.

During Dr. Hirschfeld's testimony, Birk moved to admit a chart prepared by Dr. Hirschfeld listing her past medical expenses. Rivera objected under the best evidence rule and was overruled. Dr. Hirschfeld then explained the entries of Birk's medical bills on the chart and testified that her past medical expenses totaled $331,466.79. He also testified that the treatment was necessary and the costs of Birk's treatment were reasonable and consistent with those typically charged in the relevant medical community.

Birk eventually testified, and Rivera questioned her about her social life, including her birthday party, wedding, and the trips she had taken. Some of these events were displayed in Birk's social media posts that had been excluded from evidence. At one point, Rivera asked Birk if she remembered telling friends, "I'm sore, mostly in my neck and lower back, but most important, I'm alive from those serious injuries." This quote was taken almost verbatim from one of Birk's Facebook posts, but Birk's counsel did not lodge any objection.

During closing arguments, Birk asked the jury to award approximately $16 million in special and general damages. Rivera argued for $48,000 based upon certain medical expenses and past pain and suffering. Ultimately, the jury returned a verdict totaling approximately $2.3 million. Following trial and on Birk's motion, the district court

awarded her $1,173,152.63 in attorney fees[3] and approximately $77,000 in costs. In its order awarding attorney fees, the court concluded that Birk was entitled to fees pursuant to NRS 18.010(2)(b) and considered the appropriate factors under *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).[4] These consolidated appeals followed.

The social media report

Rivera argues that we should reverse and remand for a new trial because the district court improperly excluded the social media report, even though it was disclosed eight months after the close of discovery but several months prior to trial. She further argues that the report was highly relevant to her defense, not unduly prejudicial to Birk, and there was substantial justification for the late disclosure to prevent exclusion under NRCP 37(c). Birk responds that the late disclosure not only prejudiced her but that exclusion pursuant to NRCP 37(c) was proper because no substantial justification existed for the late disclosure eight months after the discovery deadline.

A district court's decision regarding discovery sanctions is generally reviewed for an abuse of discretion. *Foster v. Dingwall*, 126 Nev. 56, 65, 227 P.3d 1042, 1048 (2010). A trial court abuses its discretion when

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[3]$1,173,152.63 is 40 percent of the judgment on the jury verdict entered on June 23, 2023, totaling $2,932,881.58, which includes the principal and pre-judgment interest.

[4]The district court specifically found that Rivera failed "to properly defend the merits of this case with actual, foundational evidence," did not "address its liability," "did not present an alternative theory as to causation," and did not bring forth a defense "with credibility." However, as noted above, the district court had previously denied Birk's motion for a directed verdict pursuant to NRCP 50, acknowledging that Rivera maintained a defense sufficient to be go to the jury.

it makes a decision that is not supported by substantial evidence, which is evidence that a reasonable mind might accept as adequate to support a conclusion. *Willard v. Berry-Hinckley Indus.*, 139 Nev., Adv. Op. 52, 539 P.3d 250, 255 (2023). Additionally, a district court's decision to admit or exclude late-disclosed evidence is also reviewed for abuse of discretion. *Capanna v. Orth*, 134 Nev. 888, 894, 432 P.3d 726, 733-34 (2018).

Rivera offers three arguments why the late disclosure of the social media report was substantially justified. All of them are unpersuasive.

First, she argues that Birk was not compliant with NRCP 16.1(a)(1)(A)(ii) because she did not include her social media posts in her initial disclosures. NRCP 16.1(a)(1)(A)(ii) only requires a party to disclose "all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use *to support* its claims or defenses." (Emphasis added.)[5] Because Rivera does not demonstrate that Birk intended to use the social media posts in support of her claims, she fails to establish that NRCP 16.1(a)(1)(A)(ii) required Birk to divulge the social media posts. Thus, because NRCP 16.1(a)(1)(A)(ii) did not require Birk to disclose her social media posts, we conclude Rivera's first argument fails.

Second, Rivera argues that the delay in disclosure of the social media report was substantially justified because Birk did not adequately respond to her written request for production of "[c]opies of all writings regarding the accident at issue in this matter, whether generated prior to

[5]Rivera's opening brief inaccurately states that NRCP 16.1(a)(1)(A)(ii) requires parties to disclose "all documents or information *related to* any claims or defenses raised in this lawsuit." (Emphasis added.)

or subsequent to the incident, including but not limited to, letters, notes, memoranda, electronic communications, or any other form of written document." While social media posts may fall within the category of "electronic communications," it was incumbent upon Rivera to clarify her request or bring a motion to compel on her request for production when Birk failed to respond.[6] *See* EDCR 2.34(d) (requiring parties to engage in a good-faith effort to resolve discovery disputes). If those measures failed, then Rivera could have timely engaged in self-help discovery, such as hiring an investigator and obtaining a report within the appropriate time period, not after discovery had closed. Further, late-disclosed social media reports have not been well-received, where, as here, the information is publicly available. *Cf. Skropeta v. State*, No. 69812, 2017 WL 6597164 at *3 (Nev. Dec. 22, 2017) (Order of Affirmance) (affirming the district court's denial of defendant's motion for a new trial because no discovery violation had occurred when the State did not disclose the victim's Facebook posts which were publicly accessible and freely reviewable).

At the hearing on Birk's motion to exclude the social media report, Rivera did not explain why she waited until after the close of

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[6]Notably, out of the hundreds, if not thousands, of posts, pictures, and comments in Rivera's social media report, only a select few were actually responsive to Rivera's discovery request, which sought electronic communications "regarding the accident." The bulk of the report contains social media content showing Birk's level of activity following the accident that Rivera may have wished to use for impeachment purposes. Pretrial impeachment evidence is required to be promptly disclosed by the party intending to use it. NRCP 16.1(a)(3)(A). Birk, however, was not intending to use it, thus she was not required to disclose the evidence as impeachment evidence, and Rivera has not shown justification for her own failure to timely discover and disclose such evidence documented in the investigator's report.

discovery to retain an investigator to review Birk's social media and prepare the untimely-disclosed report. Because Rivera failed to provide a valid reason to excuse her untimely disclosure of this publicly available information, she fails to demonstrate how the untimely disclosure was substantially justified or harmless under NRCP 37(c) such that exclusion of the evidence as a sanction should not have been imposed.

Further, Rivera has not shown that the very untimely disclosure was harmless when Birk argued it was prejudicial because discovery had closed and she would not have been able to depose Rivera's investigator and, if necessary, hire her own social media investigator to discount the social media posts or otherwise explain them. *See Dey, L.P. v. Ivax Pharms., Inc.*, 233 F.R.D. 567, 571 (C.D. Cal. 2005) (explaining surprise to a party and lack of ability to cure the surprise militate against a finding of harmlessness with respect to late-disclosed discovery in the context of FRCP 37). We thus conclude that the district court acted within its discretion in excluding Rivera's social media report pursuant to NRCP 37(c) as the late disclosure was not substantially justified or harmless.[7]

Third, Rivera argues that Birk was not prejudiced by the late disclosure because she disclosed the social media report within weeks of its completion. However, Rivera points to no rule, case, or statute that allows for a party to use untimely disclosures when they are disclosed for the first

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[7]We note, however, that Rivera was permitted to cross-examine Birk about certain of her social media postings at trial. Thus, even though the investigator's report was excluded, the jury was still able to learn about certain information that Birk had posted, and Rivera has failed to demonstrate how the exclusion of the social media report affected her substantial rights. *Cf.* NRCP 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.").

time after the close of discovery, even when disclosed as soon as the party receives them, where prejudice is reasonably asserted in response. Her third argument thus fails, and we need not consider it further. *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).

Rivera also challenges the substance of the district court's order granting Birk's motion to strike the social media report. The order states that it granted the motion for "the reasons outlined in Plaintiff's Motion and Reply." Rivera claims this does not constitute substantial evidence and thus the district court abused its discretion in granting the motion. We disagree.

The order, although merely citing to the arguments made in Birk's motion and reply and incorporating them by reference as its rationale, was supported by substantial evidence because those briefs and their attachments were thorough and a reasonable judge could reach the same conclusion under the circumstances. *See, e.g., Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014); *see also Devries v. Gallio*, 128 Nev. 706, 710-11, 290 P.3d 360, 263 (2012) (holding that a district court order that did not explain its reasoning could still be upheld "so long as the reasons for the [order] are readily apparent elsewhere in the record and are sufficiently clear to permit meaningful appellate review" (internal quotation marks omitted)). Accordingly, the district court did not abuse its discretion, and we thus reject Rivera's request for a new trial on the basis that the social media report was excluded.

The 2018 MRI images

Rivera also argues for a new trial because the district court erred in excluding some of the images from the 2018 MRI and testimony related to them. Rivera contends that the images were properly

authenticated, they were relevant to causation of Birk's injuries, and their exclusion prejudiced her. Birk counters that exclusion was proper because the images were not properly authenticated and their exclusion did not prejudice Rivera because Rivera had already cross-examined Dr. Kabins about the 2018 MRI images and Dr. Rimoldi had neither reviewed these images prior to trial nor rendered any opinions related to them.

A district court's decision to admit or exclude evidence is reviewed for an abuse of discretion and will not be disturbed "absent a showing of palpable abuse." *LVMPD v. Yeghiazarian*, 129 Nev. 760, 764-65, 312 P.3d 503, 507 (2013) (internal quotation marks omitted). The authentication of a document requires "evidence or other showing sufficient to support a finding that the matter in question is what its proponent claims." NRS 52.015(1). When an expert seeking to authenticate a document lacks personal knowledge as to how, when, and in what manner the document was made, the expert's testimony as to the document's authenticity is insufficient to authenticate the document. *Sanders v. Sears-Page*, 131 Nev. 500, 515, 354 P.3d 201, 211 (Ct. App. 2015) (citing *Frias v. Valle*, 101 Nev. 219, 221-22, 698 P.2d 875, 877 (1985)). The admissibility of a medical record at trial when the medical expert witness had not previously reviewed the record or formed a medical opinion about it prior to trial is generally problematic. *See Sanders*, 131 Nev. at 516-19, 354 P.3d at 212-14 (holding that the defense medical expert was not a proper witness to authenticate the plaintiff's medical record because the expert did not author the document, was not the custodian of the record, and had only testified that the document looked like a typical medical record). However, when a party has properly made a pretrial disclosure of the evidence it intends to offer at trial, the opposing party must lodge any objections to its

admissibility, including authentication, within 14 days after the disclosure is made, otherwise the objection is waived. NRCP 16.1(a)(3)(B)(ii)(b).

Here, neither Dr. Rimoldi, nor anyone from his office, had personal knowledge regarding the creation of the 2018 MRI films. However, Birk did not object specifically to this evidence within 14 days of its pretrial disclosure.[8] Thus, she forfeited any objection to their authenticity, and it may have been error for the district court to exclude the films on these grounds. However, NRCP 16.1 specifically reserves a party's right to object to the admission of evidence pursuant to NRS 48.025 (relevancy) and NRS 48.035 (prejudice, confusion or waste of time). So even though the 2018 MRI films may have been authenticated, Birk preserved her right to object to their admission at the time of trial.

Moreover, a party seeking to preserve the error of improperly excluded evidence must generally make an offer of proof at the time of trial and before the close of evidence or the error may be deemed forfeited on appeal. NRS 47.040(1)(b); *S. Pac. Transp. Co. v. Fitzgerald*, 94 Nev. 245, 246, 579 P.2d 1251, 1251 (1978). Offers of proof are designed to disclose to the court and opposing party the nature of the evidence being offered and preserve the record for appellate review. *Las Vegas Convention & Visitors Auth. v. Miller*, 124 Nev. 669, 688, 191 P.3d 1138, 1150-51 (2008). An offer of proof must be specific and definite, so as not to force the court to engage

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[8]Birk argues that she did properly object to the 2018 MRI films' authenticity, claiming that they were not produced in the joint pre-trial disclosure binder and that she objected to all evidence that was not in the joint binder. However, based on the parties' NRCP 16.1 disclosures, the films were identified early on in the litigation and based on the record it does not appear that any party objected to authenticity within 14 days as required. Nevertheless, we need not further address this issue considering our disposition.

in speculation and conjecture about the substance of the proffered evidence. *Id.* at 688-89, 191 P.3d at 1151. The failure to make an offer of proof can leave an appellate court unable to review the excluded evidence. *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 74 n.2, 319 P.3d 606, 611 n.2 (2014).

When the district court asked Rivera what she was going to use the 2018 MRI films for, she simply replied that it was relevant evidence and she wanted the jury to see it. When asked a second time, Rivera replied that it was properly authenticated evidence of the plaintiff's injuries without specifically explaining how she intended to use the evidence. These responses fell well short of the specificity required under NRS 47.040(1)(b) to inform the court of the substance of the proffered evidence. Such general statements did not enable the court to discern the substance of the 2018 MRI films or what Dr. Rimoldi was going to say about them, leaving the court speculating. Because Rivera did not make an adequate offer of proof, Rivera failed to preserve her argument that the district court erred by excluding the 2018 MRI films. Further, the jury was able to see the films that were subject to Dr. Kabins's testimony as they were in evidence, and Dr. Rimoldi was able to render and state opinions without reviewing the films.[9] Accordingly, Rivera is not entitled to relief on these grounds.

Birk's past medical bills

Rivera argues that, if we do not reverse and remand on the above grounds, we should deduct $331,466.79 for past medical expenses

[9]We also agree that if Rivera intended Dr. Rimoldi to review the films and provide additional opinions, Rivera would likely have been required to supplement those opinions in advance of trial. *See* NRCP 26(e). Therefore, we cannot say the district court abused its discretion in prohibiting Dr. Rimoldi from giving expert opinions regarding the 2018 MRI films at trial, which had not been disclosed to Dr. Rimoldi in advance of trial.

from the jury verdict because the district court improperly allowed Birk to establish past medical expenses without admitting every single one of her medical bills. Birk responds that her past medical damages were competently proven because the requirement that damages be established by competent evidence does not require each individual medical bill to be admitted into evidence.

We review a district court's evidentiary rulings for abuse of discretion. *Yeghiazarian*, 129 Nev. at 764-65, 312 P.3d at 507. The best evidence rule, codified as NRS 52.235, requires production of the original document to prove the content of a writing. NRS 52.255 lists four exceptions to this rule, but neither party argues on appeal that any of them apply. Rather, the issue before us is whether the best evidence rule applies when an expert witness is summarizing records of which the contents are not disputed.

The supreme court has stated that the purpose of the best evidence rule is to require production of the original document where the actual contents of the document are at issue and sought to be proved. *Young v. Nev. Title Co.*, 103 Nev. 436, 440, 744 P.2d 902, 904 (1987). If the party seeking to invoke the best evidence rule cannot assure the court that a good faith dispute as to the content of the writing exists, the court's failure to apply the rule is likely harmless error, if error at all. 2 Robert P. Mosteller et al., *McCormick on Evidence* § 243.1 (8th ed. 2022); *see also* NRS 52.245 (duplicates are generally admissible); NRS 52.275 (summaries are generally admissible); *cf.* NRCP 61.

During their discussion of Birk's medical bills and the best evidence rule with the district court, Birk stated that the amount of her medical bills was not in dispute, and Rivera did not argue the point. Because there was not a dispute as to the amount of Birk's medical bills,

and since Rivera did not timely object to the admissibility of Dr. Hirschfeld's summaries as part of the pretrial disclosures, the district court's decision not to require the admission of all the bills does not constitute error.

However, even assuming error, it was harmless. *See Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) (explaining that, to establish an error is not harmless and reversal is warranted, "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"). Dr. Hirschfeld, who had been doing life care planning for almost 20 years, described the entries in his chart detailing Birk's medical expenses line by line while he was testifying. This qualifies as competent evidence supporting an award of damages. *See Mort Wallin of Lake Tahoe, Inc. v. Com. Cabinet Co.*, 105 Nev. 855, 857, 784 P.2d 954, 955 (1989) (stating that while the party seeking damages has the burden of proof, the amount need not be proven with mathematical exactitude, so long as there is an evidentiary basis for determining a reasonably accurate amount of damages); *see also* NRS 47.040 ("[E]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ."). Thus, the district court did not abuse its discretion by declining to require Birk to admit all her past medical bills, and Rivera is not entitled to relief based on this argument.

Attorney fees

Rivera also argues that the district court abused its discretion in awarding Birk $1.17 million in attorney fees under NRS 18.010(2)(b) because she brought forth credible defenses and that the district court failed to consider the large difference in the amount of damages Birk requested and what the jury awarded. Birk responds that the award of attorney fees was proper because Rivera maintained groundless defenses as to liability

and causation; thus, attorney fees were proper pursuant to NRS 18.010(2)(b). Birk does not address Rivera's argument that the district court should have considered the difference in damages sought versus damages awarded in its determination of the reasonableness of Rivera's defenses.

A district court may award attorney fees to a prevailing party when it finds that the opposing party's claim or defense was "maintained without reasonable ground or to harass the prevailing party." NRS 18.010(2)(b). This section is to be "liberally construe[d] . . . in favor of awarding attorney's fees in all appropriate situations." *Id.* "[A] claim is frivolous or groundless if there is no credible evidence to support it." *Roe v. Roe*, 139 Nev., Adv. Op. 21, 535 P.3d 274, 293 (Ct. App. 2023) (internal quotation marks omitted). "The decision to award attorney fees is within the sound discretion of the district court and will not be overturned absent a manifest abuse of discretion." *Kahn v. Morse & Mowbray*, 121 Nev. 464, 479, 117 P.3d 227, 238 (2005) (internal quotation marks omitted).

The district court found Birk was entitled to attorney fees and costs because Rivera did not bring forth a defense "with credibility" and failed "to properly defend the merits of this case with actual, foundational evidence." Specifically, it criticized Rivera for not conceding liability until her opening statement in the face of evidence to the contrary. In addition, although the court had previously denied Birk's motion for a directed verdict on causation, it found that Rivera "did not present an alternative theory as to causation." It also rejected Rivera's argument that a district court should consider the difference between damages requested and the jury award, stating that "[t]his is not a component of the NRS 18.010 analysis, nor is the Court permitted to take into account the amount of

damages sought by a party when considering attorney's fees pursuant to NRS 18.010(2)."

In making these findings, the district court made two errors as a matter of law requiring remand. First, a party defending an action for negligence is not required to present an alternative theory of causation. Rather, a defendant has at least three avenues to counter a plaintiff's causation theory: (1) undermine plaintiff's expert testimony via cross-examination, (2) provide an alternative theory of causation, or (3) contradict plaintiff's expert testimony with its own expert testimony. *Williams v. Eighth Jud. Dist. Ct.*, 127 Nev. 518, 530, 262 P.3d 360, 368 (2011). To the extent that the district court based its attorney fees award on Rivera's purported failure to provide an alternative theory of causation, this was error as a matter of law. Additionally, we note that an unsuccessful defense is not automatically unreasonable, frivolous, or vexatious, and a mere loss on the merits does not mean that the losing defense was unreasonable for the purpose of awarding attorney fees. *In re Execution of Search Warrants for: 12067 Oakland Hills, Las Vegas, Nev. 89141*, 134 Nev. 799, 807, 435 P.3d 672, 679 (Ct. App. 2018).

The district court also erred by finding that it could not consider the difference between the amount of damages Birk requested and the amount the jury awarded. NRS 18.010(2)(b) states that "without regard to the recovery sought," a court may award attorney fees to a party when the opposing party maintains a claim or defense without reasonable ground. The introductory language is not meant to imply that a court cannot consider the discrepancy between the amount of recovery sought and the amount awarded when determining the reasonableness of a claim or defense. *See Jones v. City of Billings*, 927 P.2d 9, 12 (Mont. 1996) (holding that a court may consider the discrepancy between the amount of recovery

sought and the amount of recovery awarded in determining whether a defense was frivolous or brought in bad faith). Rather, the phrase "without regard to the recovery sought" is merely meant to distinguish NRS 18.010(2)(b) from NRS 18.010(2)(a), which only applies if the prevailing party "has not recovered more than $20,000."

The district court failed to correctly apply the governing law in at least two ways, and we cannot say that it would have reached the same decision had it applied law correctly. We must therefore vacate the award and remand for further proceedings. *See In re Guardianship of B.A.A.R.*, 136 Nev. 494, 500, 474 P.3d 838, 844 (Ct. App. 2020) ("[B]ecause it is not clear that the district court would have reached the same conclusion . . . had it applied the correct [legal] standard . . . we must reverse the district court's decision and remand for further proceedings."); *see also Draskovich v. Draskovich*, 140 Nev., Adv. Op. 17, 545 P.3d 96, 101 (2024) (reversing in part, vacating in part as to the award of attorney fees, and remanding to the district court to necessarily re-analyze attorney fees when the district court had erroneously applied a presumption). On remand the district court is directed to make further findings regarding the reasonableness of Rivera's defenses and properly apply NRS 18.010(2)(b) before making a determination of whether to award attorney fees.[10]

[10]We note that Rivera presented challenges to the amount of attorney fees awarded and recognize that the district court will need to reevaluate the factors enumerated in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969) before issuing a new ruling if awarding attorney fees. We further note that under certain circumstances courts may apportion attorney fees between meritorious and unmeritorious defenses. *See Capanna v. Orth*, 134 Nev. 888, 895-96, 432 P.3d 726, 734-35 (2018). (affirming a district court's award of 80 percent of the fees requested in a

Accordingly, we

ORDER the judgment of the district court AFFIRMED as to Docket No. 87072-COA AND VACATE AND REMAND to the district court for proceedings consistent with this order as to Docket No. 87462-COA regarding the award of attorney fees.

_____, C.J.
Bulla

_____, J.
Gibbons

_____, J.
Westbrook

cc: Hon. Danielle K. Pieper, District Judge
John Walter Boyer, Settlement Judge
Messner Reeves LLP
Aaron Law Group, LLC
Bighorn Law/Las Vegas
Eighth District Court Clerk

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professional negligence case when the district court concluded that the defendant's liability defense was unreasonably maintained but that its defense as to damages was reasonably maintained). Finally, insofar as the parties have raised arguments that are not specifically addressed in this order, we have considered the same and conclude that they do not provide a basis for relief or need not be reached given the disposition of this appeal. *See Johnson v. Dir., Nev. Dep't of Prisons*, 105 Nev. 314, 315 n.1, 774 P.2d 1047, 1048 n.1 (1989) (declining to resolve an issue in light of the court's disposition).