

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROBERT TELLES, ADMINISTRATOR  
OF THE ESTATE OF MICHAEL OWEN  
BRANNAN,  
Appellant,  
vs.  
DONALD CORNELIUS, SPECIAL  
ADMINISTRATOR OF THE ESTATE  
OF DIANA FREDERICK,  
Respondent.

No. 80355-COA

FILED

MAR 17 2021

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER REVERSING IN PART,  
VACATING IN PART, AND REMANDING*

Robert Telles, administrator of the Estate of Michael Brannan, appeals from a district court post-remand order modifying a divorce decree. Eighth Judicial District Court, Family Court Division, Clark County; Charles J. Hoskin, Judge.

Michael Brannan and Diana Frederick were married in 1995 and divorced in 2017.<sup>1</sup> Following a trial in August 2017, the district court issued a divorce decree in which it distributed various marital assets between the parties, including a pest-control business, two residential properties, three vehicles, and a motorcycle. The district court also ordered Michael to pay alimony and Diana's attorney fees. Michael appealed.<sup>2</sup>

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

<sup>2</sup>Both Michael and Diana died during the pendency of the first appeal. The administrators of their respective estates are the named parties to this appeal.

On the first appeal, this court affirmed in part, reversed in part, vacated in part, and remanded.<sup>3</sup> More specifically, this court reversed the district court's valuation of the business because there was not substantial evidence in the record to support the district court's conclusion that the business was worth \$180,000. Additionally, the district court did not explain how it derived this value. This court vacated on the issues of whether the district court had unequally distributed the community assets and whether the award for attorney fees were appropriate because these issues were premised on the business valuation and became premature in light of the reversal on the business valuation. Lastly, this court affirmed the district court's finding that the business need not be joined as a party to the lawsuit because there was substantial evidence in the record to confirm that Michael and Diana were the sole owners of the business.

The district court issued new findings after remand that was based on the existing record at the time of trial. The court did not hold additional evidentiary proceedings nor did it permit the parties to submit additional evidence for review, although no party requested a hearing or to submit additional evidence. In its order after remand, the district court found that the business was now worth \$250,000. The court based this valuation on Diana's trial testimony. The court then reaffirmed its previous community property distributions, including awarding Diana attorney

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<sup>3</sup>*Telles v. Cornelius*, Docket Nos. 74695-COA, 74815-COA (Order Affirming in Part, Reversing in Part, Vacating in Part, and Remanding, Ct. App., Aug. 8, 2019).

fees,<sup>4</sup> as well as ordering Michael to pay an equalization payment to Diana. Michael's Estate appeals.

On appeal, Michael's Estate argues that the district court abused its discretion when it: (1) considered only the existing evidence in the record when it issued its order after remand despite the appellate court having reversed the previous order on the basis that there had not been substantial evidence in the record to support the business valuation; (2) prohibited additional proceedings to present evidence prior to entering its order after remand; (3) failed to consider newly available information as to the value of the business;<sup>5</sup> (4) failed to provide adequate findings to support

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<sup>4</sup>The attorney fees in the previous order (\$2,955) are not the same amount the district court ordered in its order after remand (\$2,995). We assume this discrepancy is a typographical error, and no party has raised this issue.

<sup>5</sup>Generally, the law of the case doctrine provides that the law or ruling from a first appeal must be followed by all lower courts in all subsequent proceedings, including the same court that issued the ruling. *Hsu v. Cty. of Clark*, 123 Nev. 625, 629-30, 173 P.3d 724, 728 (2007). It appears that Michael's Estate attempts to assert a law-of-the-case-doctrine argument, though he does not specifically name the doctrine, by asserting that the district court did not adhere to the appellate court's order by not conducting further evidentiary proceedings after remand, thus violating this court's order. While this court did remand the case to the district court for further proceedings with regard to the business valuation, this court specifically stated that "we must reverse the district court's decision and remand for further findings or proceedings." There was no mandatory language that required the district court to conduct further proceedings, Michael's Estate cites no legal authority requiring a district court to conduct additional proceedings on remand, nor did he raise this argument below. For this reason, we need not address these arguments on appeal. See *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (explaining that issues not argued below are "deemed to have been waived and will not be considered on appeal"); *Edwards v. Emperor's Garden Rest.*, 122 Nev.

the unequal division of community property and debt; and (5) reaffirmed its prior award for attorney fees without stating a valid legal basis for fees.

The first three issues that Michael's Estate raises on appeal turn on whether the district court improperly valued the business at \$250,000. We address this issue first.

We review a district court's decision in a divorce decree for an abuse of discretion. *Devries v. Gallio*, 128 Nev. 706, 709, 290 P.3d 260, 263 (2012). We will affirm those decisions that are supported by substantial evidence in the record. *Id.* "Substantial evidence is that which a sensible person may accept as adequate to sustain a judgment." *Id.* (quoting *Williams v. Williams*, 120 Nev. 559, 566, 97 P.3d 1124, 1129 (2004)). Generally, property owners may opine as to the value of their business. *See State, Dep't of Highways v. Wells Cargo, Inc.*, 82 Nev. 82, 85-86, 411 P.2d 120, 121-22 (1966); *see also City of Elko v. Zillich*, 100 Nev. 366, 371, 683 P.2d 5, 8 (1984). However, the trial testimony of one of the parties to a divorce action, standing alone or otherwise not corroborated, does not necessarily establish substantial evidence to prove the value of a community-owned business. *See Wilford v. Wilford*, 101 Nev. 212, 215, 699 P.2d 105, 107-08 (1985). That is, a party's bare opinions about a business's value are not, in isolation, substantial evidence. *See, e.g., id.* Such opinions require corroboration through some other "factual basis." *See id.* at 215, 699 P.2d at 108. District courts must make specific findings to support their

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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). Nevertheless, we are remanding for further proceedings as explained herein.



conclusions. *Robison v. Robison*, 100 Nev. 668, 673, 691 P.2d 451, 455 (1984).

In *Wilford*, the appellant argued that the district court erred when it valued the community-owned business. 101 Nev. at 213, 699 P.2d at 106. During trial, the respondent was questioned about the accuracy of a company financial statement. *Id.* at 215, 699 P.2d at 107. The respondent was not sure if the statement was accurate, and he testified that the company's accounts payable exceeded its accounts receivable. *Id.* at 215, 699 P.2d at 107-08. The respondent provided no other evidence to support his assertion that the business had no value, yet the district court concluded that the community interest in the business was zero. *Id.* The Nevada Supreme Court reversed the district court's decision, concluding that in this situation, uncorroborated testimony, by itself, did not meet the evidentiary threshold to constitute substantial evidence upon which the district court could conclude that the business had no value. *See id.* at 215, 699 P.2d at 108.

From our review of the record, it is clear that the parties presented conflicting testimony as to the value of the business. Michael first inferred before trial, in a voicemail he left with Diana, that the business was worth a third of a million dollars.<sup>6</sup> Michael testified at trial the business was worth \$0 since he had discontinued it because he was 75 years old, had suffered an injury, could no longer work, and there were no employees to perform the work. Diana opined during trial that the business

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<sup>6</sup>During trial, the voicemail left by Michael was misconstrued. Diana stated that Michael said the business was worth a quarter of a million dollars. However, the voicemail transcript reports he said the business was worth a third of a million dollars (\$333,333.33).

was worth \$250,000 because it earned roughly \$90,000 in revenue in the year immediately preceding November 2016, which was when she quit working at the business. She did not explain how the prior gross revenue alone was determinative of the business's current value. She did, however, testify that when she quit, the business had roughly 300 customers, each of whom paid approximately \$25 per month.<sup>7</sup> However, neither party provided evidence to support their assertions. It might be inferred that Diana based her valuation of the business on the voicemail she received from Michael, but she does not attribute her opinion to this in her testimony, and the district court made no such finding.

While Diana was permitted to opine as to the value of the business, this case is similar to *Wilford* and the result should be the same. A district court cannot use unsupported testimony to assign an arbitrary value to a community business.<sup>8</sup> The district court based its business

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<sup>7</sup>300 customers at \$25 per month equals \$90,000 per year in revenue, though there was testimony the business had expenses, so the net earnings were less.

<sup>8</sup>Diana's Estate asserts that a court does not abuse its discretion so long as the court's valuation of the property falls within a range of possible values that is supported by competent evidence. It is inferred from her argument that she believes that because the district court determined she was competent to testify as to the value of the business due to her being part-owner, that her testimony was therefore sufficient to satisfy the substantial evidence threshold. However, according to Black's Law Dictionary, "competent evidence" refers to the admissibility of evidence and not necessarily the weight it should be given in court. *See Evidence – admissible evidence, Black's Law Dictionary* (11th ed. 2019). Conversely, "substantial evidence" is defined as "evidence that a reasonable mind could accept as adequate to support a conclusion." *Evidence – substantial evidence, Black's Law Dictionary* (11th ed. 2019). Thus, the credibility of her testimony does not equate to being substantial evidence when Diana

valuation on only Diana's unsupported testimony as to the business's value. The district court generally cited to the concept of business goodwill but did not make any finding or statement that the business was valued at \$250,000 because of goodwill, nor did any party testify or present evidence about the business's goodwill value. *See Malmquist v. Malmquist*, 106 Nev. 231, 250-51, 792 P.2d 371, 385 (1990). Diana's testimony appears to be arbitrary as to the assigned valuation number and therefore does not amount to substantial evidence. There is no other evidence in the record to support the district court's finding that the business is worth \$250,000.<sup>9</sup> Therefore,

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could have offered any dollar number as her opinion. Typically, in divorce cases, expert opinions are given as to business valuations, and here, the record is completely devoid of an opinion as to "good will." *See generally* NRS 50.025 (stating witnesses are required to have personal knowledge of the matter to which they testify unless they are expert witnesses). *Compare* NRS 50.265 (stating a lay witness cannot offer opinion testimony unless the opinion is based on the perception of the witness and helpful to a clear understanding of the testimony or a determination of a fact in issue), *with* NRS 50.275 (stating an expert witness may give an opinion if specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue).

<sup>9</sup>While the district court commented on Michael's lack of credibility and his failure to provide information, the court simply found that the business was generating income and had value, and the business could be reestablished after the divorce. Michael claimed the business was worth \$0 while Diana opined it was worth \$250,000, and the court apparently used Diana's opinion in part due to its frustration with Michael walking away from the business despite a pretrial direction not to do so. While the district court's frustration with Michael is understandable, without a finding that he violated NRCP 37 or another applicable rule and was sanctioned accordingly, the use of an arbitrary number as to valuation cannot be sustained. Finally, we note that there was no evidence to support the conclusion that the business could again be made a going concern, and Michael died before the district court made the findings in its 2019 order.



we reverse on this finding due to a lack of substantial evidence, and remand to the district court to conduct further proceedings to determine the value of the community business at the time of divorce.<sup>10</sup>

We next consider whether the district court abused its discretion when dividing the community property and if it was required to set forth compelling reasons for an unequal division. NRS 125.150(1)(b) states that the court must make as close to as possible an equal distribution of the community property at divorce. However, the court is permitted to make an unequal distribution of community property if it sets forth a compelling reason in writing for making such a distribution. *Id.*

Michael's Estate argues that the district court unequally distributed the community property without setting forth reasons for doing so in writing pursuant to NRS 125.150(1)(b). However, because we do not know the value of the business as explained above, we cannot determine whether the distribution was equal or unequal such that the district court should have set forth compelling reasons for it in writing. Accordingly, we vacate this portion of the district court's decision and the district court must address this issue on remand, including the need for an equalization payment.

Lastly, we consider whether the district court properly reinstated attorney fees and costs under NRS 18.010(2). This court reviews

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<sup>10</sup>The district court stated that it could only consider the evidence that had been presented during trial and whether evidence is substantial is up to the parties. However, upon remand, the district court, conceding there was little evidence in the record about the business's value, could have re-opened discovery and instructed the parties to provide the necessary evidence in light of our 2019 order remanding "for further findings or proceedings."




the district court's decision regarding attorney fees for an abuse of discretion. *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 80, 319 P.3d 606, 615 (2014).

Given our disposition reversing and remanding the district court's decree for further proceedings, we again necessarily vacate the post-decree award of fees and costs. See *W. Techs., Inc. v. All-Am. Golf Ctr., Inc.*, 122 Nev. 869, 876, 139 P.3d 858, 862 (2006) (vacating an award of fees and costs without reaching a decision on their merits). Accordingly, we vacate the award of fees and costs but note a later award may be warranted if supported by appropriate findings. See NRS 18.010(2)(b). Based on the foregoing, we

ORDER the judgment of the district court REVERSED IN PART, VACATED IN PART, AND REMAND this matter to the district court with instructions that it shall conduct further proceedings to ascertain the value of the business and issue new findings consistent with this order.

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

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

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

cc: Hon. Charles J. Hoskin, District Judge, Family Court Division  
McFarling Law Group  
Radford J. Smith, Chartered  
Eighth District Court Clerk