

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHARLES LAM, INDIVIDUALLY AND  
DERIVATIVELY ON BEHALF OF  
TRAN ENTERPRISES, LLC, A NEVADA  
LIMITED LIABILITY COMPANY, AND  
AS TRUSTEE OF THE NT  
REVOCABLE LIVING TRUST, DATED  
THE 15TH OF OCTOBER 2009,  
Appellant,  
vs.  
NHU TRAN FOUNDATION, INC., A  
NEVADA NON-PROFIT  
CORPORATION,  
Respondent.

No. 82032-COA

FILED

SEP 22 2021

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Charles Lam, individually and derivatively on behalf of Tran Enterprises, LLC, and as trustee of the NT Revocable Living Trust, appeals from a district court summary judgment order, and final monetary judgment. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

This appeal stems from the administration of the irrevocable NT Legacy Trust (Legacy Trust) as it relates to the sale of real property.<sup>1</sup> Nhu Tran, the settlor, owned various properties through her business Nhu Tran Enterprises, LLC (Tran Enterprises). Lam—Tran's son—managed Tran Enterprises and helped Tran acquire those properties.

In 2009, Tran transferred ownership of Tran Enterprises and its assets, including the properties, to the Legacy Trust. The trust documents made a \$2,000,000 general bequest to Lam and several smaller bequests to

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<sup>1</sup>We recount the facts only as necessary for our disposition.

other beneficiaries. Tran devised the remainder of the trust corpus to the Nhu Tran Foundation, Inc. (the Foundation),<sup>2</sup> which Tran incorporated to care for orphans in Vietnam. Tran also appointed her attorney, P. Sterling Kerr, as successor trustee of the Legacy Trust.

Tran died in 2017. As the appointed trustee of the Legacy Trust, Kerr terminated Lam as manager of Tran Enterprises and requested financial information that Kerr claimed he needed to properly administer the trust assets. Lam refused these requests and commenced the underlying suit, challenging Kerr's actions as trustee and seeking to temporarily restrain Kerr from selling the trust assets. Kerr, the trust, and Tran Enterprises (collectively, when possible, defendants) then brought a third-party complaint against Lam.

The third-party complaint alleged that Lam intentionally interfered with the land sale contract between Big Teton, LLC and Tran Enterprises (the Big Teton agreement), which Lam signed as agent for Tran Enterprises while he was still manager of the LLC. Under the terms of the Big Teton agreement, Big Teton would buy Tran's real property, sell it to a third party, and split the net profits with Tran Enterprises. However, when Big Teton informed Lam of the sale, Lam ignored all requests that he collect Tran Enterprises' portion of the sale proceeds. It was not until after his mother's death that Lam responded to Big Teton and accepted Big Teton's cashier's checks for the sale of the property, which Lam had demanded be made payable to him personally. When Kerr discovered these events, he notified Big Teton that Tran Enterprises was the rightful owner of the sale proceeds. However, Big Teton's manager declined to issue checks to Tran

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<sup>2</sup>The Foundation is named as respondent on appeal because it is the successor in interest to Tran Enterprises and the Legacy Trust.

Enterprises because he was concerned Lam would sue Big Teton. Defendants then served Lam with the third-party complaint alleging the aforementioned facts, but he never answered it.

Tran Enterprises brought a second third-party complaint alleging that Lam intentionally interfered with land sale contracts between Edward Homes, Inc. and Tran Enterprises (the Edward Homes agreements). Tran Enterprises and Edward Homes had contracted for the sale of several parcels. Following commencement of his lawsuit, Lam sought and obtained a restraining order preventing Tran Enterprises from transferring those parcels to Edward Homes. Edward Homes then sued Tran Enterprises, seeking specific performance of the Edward Homes agreements. Tran Enterprises answered and brought the second third-party complaint against Lam for his interference. Lam answered this third-party complaint, asserting equitable estoppel as his only defense. The district court ratified, and the parties completed, the sale of the parcels. Notably, the Edward Homes agreement contained a provision binding Tran Enterprises to pay Edward Homes' attorney fees in connection with this matter. As such, the second third-party complaint also requested Lam indemnify Tran Enterprises for fees and costs owed to Edward Homes.

The district court consolidated the Big Teton and Edward Homes matters. Ultimately, the probate commissioner determined that Lam did not have standing to challenge Kerr's actions as trustee and the district court ordered Lam to turn over the relevant financial information to Kerr.

Defendants then moved for summary judgment against Lam, asserting that there was no genuine issue of material fact as to Lam's intentional interference with the Big Teton and Edward Homes agreements. Defendants requested that the court award them all attorney fees and costs and that Lam indemnify Tran Enterprises for attorney fees and costs it owed

in connection with the Edward Homes matter. Lam confined his opposition to arguments challenging the attorney fees requests based on NRS 18.010(2)(b) and NRCP 11(b). Crucially, Lam did not contest his liability for intentional interference or indemnification in his opposition to summary judgment.

The district court granted summary judgment in part and denied it in part as to Lam, finding no genuine dispute of material fact as to the Big Teton tortious interference claim and ordering Lam to pay Tran Enterprises' attorney fees in defending the action as a compensatory damages. The district court also found that Lam indisputably had an obligation to indemnify Tran Enterprises for the attorney fees it incurred in the Edward Homes matter and thus ordered Lam to pay Tran Enterprises' attorney fees associated with defending against Edward Homes' specific performance claim. The district court further ordered Lam to reimburse Tran Enterprises for Edward Homes' attorney fees. The court characterized each of these fee awards as compensatory damages, not sanctions under NRS 18.010(2)(b) or NRCP 11(b). The district court declined to award costs or punitive damages in either matter. Following entry of final judgment, Lam appealed the order granting summary judgment and the final judgment awarding damages.<sup>3</sup>

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<sup>3</sup>Six months later, the district court approved a settlement agreement between Kerr, Kerr's law office, and Kerr's law partner (collectively, the Kerr-related parties), and the Foundation. Pursuant to the settlement terms, the Kerr-related parties agreed to refund a portion of their commission for selling Tran's real estate, the parties agreed to wind up the trust and Tran Enterprises, the parties agreed to release and indemnify each other for all claims between them, and the Foundation agreed to establish an indemnity fund to pay for the defense of all parties. Lam was not a party to this settlement agreement. Further, following entry of final judgment, all remaining claims in the Big Teton and Edward Homes matters appear to



On appeal, Lam argues that: (1) the district court erred in finding him liable for intentional interference with the Big Teton agreement; and (2) the district court erred in finding him liable for indemnification of attorney fees in connection with the Edward Homes matter.<sup>4</sup> The Foundation argues that Lam waived these arguments by failing to present them to the district court below. We agree with the Foundation.

Lam argues that the district court erred in finding him liable for intentional interference with the Big Teton agreement for several reasons. First, Lam asserts that he lacked the prerequisite intent to commit an intentional interference with the Big Teton agreement because he had a “legitimate motive” for his conduct.<sup>5</sup> Second, Lam claims that once he

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have been resolved or voluntarily dismissed and no party raises any issue in this regard.

<sup>4</sup>Lam frames these issues in terms of damages, but none of the arguments in his opening or reply briefs specifically controvert the award of attorney fees as compensatory damages. Therefore, Lam has waived any challenge to the awards of attorney fees. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014) (providing that appellant must “plainly and prominently” raise an argument in his opening or reply brief to preserve it for review); *see also Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161, n.3, 252 P.3d 668, 672 n.3 (2011) (noting that issues not raised in the opening or reply brief are waived).

<sup>5</sup>Lam focuses his legitimate motive argument on the settlement agreement. He questions why the Kerr-related parties agreed to refund their commissions in connection with the Edward Homes agreements. He deems it unfair that he must pay Tran’s attorney fees while the Kerr-related parties were not sanctioned for this “disgorge[ment].” Lam goes on to argue that the Big Teton properties were sold below market value and that he believed Kerr was not acting to fulfill the purpose of the trust. According to Lam, all of these facts together give him a “legitimate motive” for withholding the cashiers’ checks, negating what he asserts is the requisite intent for an intentional interference claim.

returned the cashier's checks, the Big Teton agreement was complete and any subsequent motions he filed or actions he took cannot be considered interferences with Tran Enterprises and Big Teton's contractual relationship. Third, Lam argues that he cannot be liable for tortious interference with the Big Teton agreement because he himself signed it.

Next, Lam asserts that the district court erred in finding him liable for indemnity in connection with the Edward Homes matter because he had a "legitimate motive" for attempting to enjoin the sale of the Edward Homes properties.

We review orders granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Regardless, as the Nevada Supreme Court explained in *Old Aztec Mine, Inc. v. Brown*, "[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." 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (emphasis added); *see also Schuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434, 436, 245 P.3d 542, 544 (2010).

In this case, none of Lam's arguments were presented to the district court. Therefore, we need not consider them.<sup>6</sup> *See Old Aztec*, 97 Nev.

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<sup>6</sup>Additionally, Lam makes no citation to the record in the argument section of his opening brief in violation of NRAP 28(a)(10)(A). And two of Lam's arguments are non-cogent or supported by relevant legal authority: (1) Lam cites no authority to support his argument that he should not be held liable for interferences with the Big Teton agreement that occurred after he returned the cashier's checks; (2) Lam cites no authority to support his argument that his alleged "legitimate motive" should excuse his obligation to indemnify Kerr in relation to the Edward Homes matter. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38

at 52, 623 P.2d at 983; *see also* NRAP 1(c)<sup>7</sup>; *cf.* NRCP 1.<sup>8</sup> Lam, however, urges us to exercise our discretion and address his arguments even though he failed to raise them below. He gives several reasons.

First, Lam argues that we have discretion to consider arguments raised for the first time on appeal under “exceptional circumstances.” Lam asserts that this court should consider his arguments regarding the settlement agreement because the district court did not approve the settlement until after the district court entered summary judgment. As such, Lam was unaware of the settlement terms at the time he filed his opposition, giving rise, he argues, to exceptional circumstances.<sup>9</sup>

Second, Lam argues that *Old Aztec* is not absolute and that this court can consider “additional authority to support an argument incompletely or imperfectly presented in district court.” Last, he argues that considering his appellate arguments is necessary to prevent manifest injustice. Lam asserts that “from the beginning” he believed that Kerr was using trust funds for Kerr’s personal benefit rather than to fulfill the trust

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(2006) (declining to consider claims not cogently argued and not supported by relevant authority).

<sup>7</sup>“These rules shall be liberally construed to secure the proper and *efficient* administration of the business and affairs of the courts . . . .” NRAP 1(c) (emphasis added).

<sup>8</sup>“These rules . . . should be construed, administered, and employed by the court and the parties to secure the just, *speedy*, and *inexpensive* determination of every action and proceeding.” NRCP 1 (emphasis added).

<sup>9</sup>This argument is unpersuasive. The settlement agreement was approved by the court on January 27, 2020, months after the district court granted summary judgment against Lam. Therefore, the settlement agreement was unlikely to have motivated his interference with the Big Teton agreement.

purpose. According to Lam, it would therefore be unjust not to consider his new arguments on appeal, “particularly” those regarding the settlement agreement.

Lam made no mention of exceptional circumstances, incomplete or imperfect arguments, or manifest injustice in his opening brief to this court or in the proceedings below. He presents these arguments only in his reply brief. As a result, the Foundation had no opportunity to respond, and it would be unfair for us to consider these arguments here. *See Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 671 n.7, 262 P.3d 705, 715 n.7 (2011); *Weaver v. State, Dep’t of Motor Vehicles*, 121 Nev. 494, 502, 117 P.3d 193, 198-99 (2005).

In any event, Lam has not demonstrated circumstances warranting an exception to the *Old Aztec* rule. In support of his exceptional circumstances argument, Lam cites only *United States v. Smith*, 905 F.2d 1296, 1302 (9th Cir. 1990), *superseded by statute on other grounds, as recognized in United States v. Flores*, 93 F.3d 587, 592 (9th Cir. 1996). But the court in *Smith* specifically noted that there are no exceptional circumstances to consider a newly-raised argument where, as here, the argument could have been made below. *Id.* Thus, *Smith* underscores why Lam’s arguments should not be considered for the first time on appeal.

In support of his manifest injustice argument, Lam cites *Hormel v. Helvering*, 312 U.S. 552, 557 (1941), *United States v. Brunner*, 726 F.3d 299, 303 (2d Cir. 2013), and *Kline v. Johns-Manville*, 745 F.2d 1217, 1220 (9th Cir. 1984). The circumstances warranting an exception in *Hormel* and *Brunner* involved a change in the law made after the district courts issued their decisions, an argument that presented only a question of law, or both. *Hormel*, 312 U.S. at 557; *Brunner*, 726 F.3d at 303. These are not Lam’s circumstances. Further, *Kline* does not assist Lam because the court in that



case rejected a manifest injustice claim by an appellant who failed to give any reason why he did not raise the issue below. 905 F.2d at 1302. Therefore, we are not persuaded by Lam’s claims regarding exceptional circumstances and manifest injustice.

Lam cites *Archon v. Eighth Judicial District Court* in support of his assertion that we should consider arguments that he incompletely or imperfectly raised below. 133 Nev. 816, 822, 407 P.3d 702, 708 (2017). But none of Lam’s arguments were incompletely or imperfectly presented below—they were not presented at all. Further, the court in *Archon* ultimately decided not to consider the argument at issue, which differed from any made to the district court, in part because it was unfair to the opposing party. *Id.* As such, *Archon* does not save Lam’s arguments from the *Old Aztec* rule either.

In the alternative, Lam argues that *Old Aztec* should not apply in the first place, contending that he in fact contested liability below as to both issues. Regarding the Big Teton matter, Lam first argues that he contested liability by “fil[ing] papers opposing the motion to deposit funds.” Lam’s citation to the record does not support this argument.<sup>10</sup> He next argues that he “objected to the funds going to P. Sterling Kerr, who he believed would not use those funds to benefit the Foundation.” Lam provides no citation to the record for this contention. Third, Lam argues that he contested liability by refusing to return the checks up to the point that the district court issued an order to show cause why he should not be held in contempt. Lam cites to no place in the record where he ever claimed that

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<sup>10</sup>The line he cites to reads, “a concise statement setting forth each fact material to the disposition of the motion which the.”

refusing to return the checks was his way of contesting liability for intentional interference.<sup>11</sup> Last, Lam adds that in the October 2018 order granting summary judgment against Big Teton, the court ordered each party to bear its own attorney fees and costs, and that the district court found that Kerr had not shown that Lam acted with malice or oppression sufficient to be awarded punitive damages at the summary judgment stage.<sup>12</sup>

Regarding the Edward Homes matter, Lam similarly argues that he contested his liability when he “filed papers to attempt to stop the sale of parcels, which were being sold below their value.” Lam again argues that he “objected to the funds going to P. Sterling Kerr, who he believed would not use those funds to benefit the Foundation.” Again, Lam included no citation to the record. Last, Lam indicated that Kerr had not demonstrated Lam’s bad faith and that the district court did not award punitive damages.

None of these arguments is sufficient. Lam was required to specifically present his arguments to the district court in a properly supported opposition to the motion for summary judgment. *See* NRCP 56. It is not enough that he generally contested his liability, in passing, in other filings. *See Dermody v. City of Reno*, 113 Nev. 207, 210-11, 931 P.2d 1354, 1357 (1997) (denying consideration of new arguments raised on appeal where

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<sup>11</sup>Lam instead cites to the order granting summary judgment against Big Teton as support. The lines he cites to simply read, “On or about August 1, 2018, consistent with this Court’s Order to Show Cause Why Charles Lam Should Not be Held in Contempt of Court, Charles Lam returned to Big Teton the six (6) Cashier’s Checks provided by Big Teton and made payable to Charles Lam.”


<sup>12</sup>This finding on the issue of punitive damages, which damage claim was deferred, was not part of the district court’s reasoning for granting summary judgment on the claim for tortious interference with the Big Teton agreement.


appellant contested liability below, but on a different theory); *Powers v. Powers*, 105 Nev. 514, 516, 779 P.2d 91, 92 (1989) (same).

Lam has cited to no place in the record where he ever argued that (1) he had a legitimate motive for intentionally interfering with the Big Teton agreement; (2) he should not be liable for interferences that preceded him returning the Big Teton cashier's checks; (3) he cannot be liable for intentional interference as a party to the Big Teton agreement; or (4) he should not be required to indemnify Tran Enterprises in connection with the Edward Homes matter because he had a legitimate motive for barring the sale. Indeed, these are "potentially game-changing issues, not mere refinements of points already in play," and reversing summary judgment would be tantamount to allowing Lam "to reinvent his case on new grounds." See *Schuck*, 126 Nev. at 437-38, 245 P.3d at 545. Accordingly, because we are not persuaded to consider these arguments raised for the first time on appeal, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. Mark R. Denton, District Judge  
Neil J. Beller, Ltd.  
Lee Kiefer & Park, LLP  
Eighth District Court Clerk