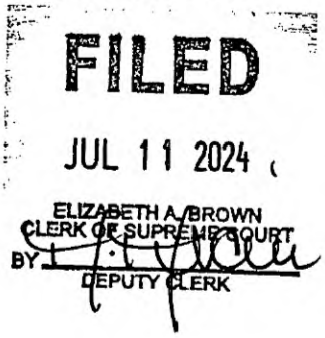
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

VRES, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND THOMAS CHRISTENSEN, AN INDIVIDUAL,
Appellants,
vs.
CLASSIC LANDSCAPES, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Respondent.

No. 85343-COA



ORDER OF AFFIRMANCE

VRES, LLC, and Thomas Christensen (collectively appellants or VRES) appeal from three district court orders denying summary judgment, an order denying attorney fees and costs, and a final judgment following a bench trial in a contractual dispute. Eighth Judicial District Court, Clark County; Bita Yeager, Judge.

Classic Landscapes, LLC (Classic), is a landscape maintenance company that has been doing business in Clark County since 2004.[1] VRES is the owner of an office building, a warehouse, and yard space located at 3620 and 3660 West Quail Avenue in Las Vegas, which is near the intersection of S. Valley View and Russell Road (collectively, the leased premises or premises). VRES acquired the leased premises in January 2011 when Classic was a tenant under a lease (the original lease) that was set to expire in 2016. Before the lease lapsed, VRES and Classic entered into a new lease that was set to expire in August 2019 (the 2016 lease). From 2011

[1]We do not recount the facts except as necessary to our disposition.

until August 2017, VRES accepted without complaint, penalty, or declaration of default, Classic's constant and consistent late rent payments.

In August 2017, VRES sent Classic a letter stating that VRES was exercising its right to terminate the lease and to retroactively collect late fees and attorney fees for the previous 11 months. Classic refused to pay the late fees but began to make timely payments and did so until the lease expired. Classic vacated the premises in August 2019.

In December 2018, VRES filed suit against Classic seeking declaratory relief, including that the lease was terminated, that Classic must vacate the premises immediately if the termination was valid; determination of the validity and enforceability of the lease terms; attorney fees and costs; and special damages for past and future late fees, unpaid rent, unpaid utilities, and unpaid taxes. Classic filed an answer and counterclaims for declaratory relief and breach of the implied covenant of good faith and fair dealing against VRES. Classic also filed third-party claims against Thomas and Eric Christensen for intentional interference with contractual relations and abuse of process.[2]

VRES filed three motions for summary judgment during the course of litigation. In July 2019, before the district court ruled on VRES's first motion for summary judgment, Classic voluntarily dismissed Thomas Christensen without prejudice. The district court denied the first motion after finding that there were genuine disputes of material fact. VRES filed a renewed motion for partial summary judgment in January 2020. The

[2]Thomas Christensen is one of VRES's managers. VRES maintains that Eric Christensen has never been involved with VRES. Classic voluntarily dismissed Eric Christensen before he was served in this case.

district court denied the motion, once again finding that there were material facts in dispute.

In December 2020, with the close of discovery approaching, VRES filed its final motion for summary judgment. In opposition, Classic argued that VRES's motion was moot because it had vacated the premises in August 2019. Importantly, Classic explicitly argued that VRES and Classic had established a "course of conduct" regarding the payment and acceptance of late rent payments over the entire term of Classic's occupancy of the premises and, therefore, as a matter of Nevada law, VRES could not terminate Classic's lease without first providing notice that it would henceforth demand strict compliance with the terms of the 2016 lease.[3] VRES replied that Classic did not support its course of conduct argument with admissible evidence and, even if a course of conduct had been established, it applied only from 2016 onward, rather than from 2008 when Classic took possession of the premises under the original lease. Accordingly, VRES argued that accepting late payments over a period of one year did not establish a course of conduct defense. The district court denied VRES's third motion, finding that there was a genuine dispute of material fact as to the parties' course of conduct during Classic's occupancy of the premises.

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[3]VRES contends that the district court rewrote the lease and created the course of conduct defense. In fact, Classic stated facts in support of this defense in its affidavit in opposition to the first motion for summary judgment and explicitly argued it in opposition to the third summary judgment motion. Therefore, we conclude VRES's argument is without merit.

In March 2021, the district court conducted a pretrial hearing regarding exhibits and made tentative rulings.[4] A two-day trial began shortly thereafter. During a break at trial, the district court admonished VRES's representative who was on the witness stand not to have any communication with counsel until she completed her testimony.[5]

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[4]The district court conceded that it had been mistaken when it stated that exhibits were being admitted during the pretrial evidentiary hearing. This mistake, VRES argues, led it to "reasonably expect[ ]" that the stipulated exhibits were in evidence before trial began and, therefore, it was prejudiced when the district court, at the beginning of trial, clarified that no exhibits were actually in evidence, and that counsel would need to move for the admission of proposed exhibits during trial. This purportedly surprised VRES and caused it to fail to move for the admission of certain exhibits because it went into trial believing that the stipulated exhibits were already admitted. Nevertheless, at the end of the bench trial, before the court took the parties' motions for directed verdict under advisement, it once again reminded them that the stipulated exhibits were not all moved into evidence, and asked the parties whether they would like them all to be admitted. Classic requested that only the stipulated exhibits used during trial be admitted. VRES did not object. Because VRES failed to object to Classic's request, and failed to make its own request to admit all the stipulated exhibits, VRES waived this issue 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"). Moreover, not only does VRES fail to point to specific exhibits that should have been admitted (or excluded), VRES also has not shown that the verdict would have been different in the absence of the district court's error. Therefore, the district court's error in declaring exhibits admitted before trial was harmless and does not warrant reversal. *See McClendon v. Collins*, 132 Nev. 327, 333, 372 P.3d 492, 495-96 (2016) (providing that reversal is warranted only where an error affects a party's substantial rights such that "a different result might reasonably have been reached" but for the error (internal quotation marks omitted)); *see also* NRS 47.040.

[5]The district court admonished counsel not to talk to his witness based on its interpretation of *Coyote Springs Investment, LLC v. Eighth*

Following a two-day bench trial in March 2021, both parties moved for a directed verdict. The district court entered judgment in Classic's favor, finding that the parties had engaged in an established course of conduct for six years, in which Classic made late rent payments that VRES accepted without protest; therefore, VRES was required to notify Classic of its intent to demand strict compliance with the late-fees and default provisions of the lease before seeking to invoke these provisions. Thus, Classic did not breach the lease and VRES was not entitled to late fees and other costs it was seeking. After VRES had rested its case-in-chief, and the district court had ruled in favor of Classic, VRES contended that the district court should not have admonished its counsel not to talk to his witness and requested another opportunity to redirect its witness.[6] Classic objected and the court denied VRES's request to conduct redirect. The

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Judicial District Court, 131 Nev. 140, 347 P.3d 267 (2015). We note, however, that the holding of *Coyote Springs* appears to be limited to breaks taken during depositions and not those that occur during trial. And appellants have not provided any legal authority to support the extension of the holding of *Coyote Springs* to the trial setting.

[6]VRES argued that the district court misinterpreted *Coyote Springs*, and therefore erroneously admonished counsel not to speak to his witness. In *Coyote Springs*, the supreme court held that attorneys may confer with witnesses during a break not requested by counsel in discovery depositions. 131 Nev. at 149, 347 P.3d at 273. Nevertheless, VRES waived its ability to object to the district court's misinterpretation of *Coyote Springs* by failing to raise an objection when it became aware of the court's error. *See Venetian Casino Resort, LLC v. Eighth Jud. Dist. Ct.*, 118 Nev. 124, 130, 41 P.3d 327, 331 (2002) ("[I]f a party has constructive or actual knowledge of potentially disqualifying circumstances, but fails to object within a reasonable amount of time, the objection is waived."). Further, VRES has not demonstrated that the result of the trial would have been different had the district court not issued this admonishment. *See McClendon*, 132 Nev. at 333, 372 P.3d at 495-96.

district court later denied VRES's and Thomas Christensen's requests for attorney fees, and awarded fees and costs to Classic based on a rejected offer of judgment.[7] This appeal followed.

We now consider appellants' arguments that the district court erred in denying VRES's motions for summary judgment and that the district court's finding that the parties established a mutual course of conduct was not supported by substantial evidence.

The district court properly ruled that VRES was not entitled to summary judgment

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[7]VRES asserts that it prevailed on all claims in its complaint for declaratory relief at trial and, therefore, as the prevailing party, was entitled to attorney fees and costs. VRES also contends that, under the 2016 lease, VRES was entitled to attorney fees and costs incurred in enforcing the lease's late-fees and default provisions. Thomas Christensen argues that he was entitled to fees and costs because Classic voluntarily dismissed its third-party claim against him. VRES does not cogently argue how it "prevailed on all claims in its complaint regarding the 2016 lease and its terms." Instead, VRES's conclusory argument is that "[s]ummary [j]udgment should have been granted, making trial unnecessary; and, when the case did proceed to trial, the [district court] disregarded the evidence and erred on the questions of law." This argument need not be addressed given the disposition of this appeal. Additionally, VRES does not cogently argue how it prevailed on any of its claims or Classic's counterclaims when they were voluntarily dismissed following a directed verdict in Classic's favor; therefore, this court need not consider it. *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). Finally, VRES's argument that it was entitled to attorney fees and costs incurred to enforce the terms of the lease fails because the district court found that Classic never defaulted and made timely payments after VRES notified Classic it would begin to demand strict compliance with the lease's late-payment provisions.

VRES argues that the district court disregarded the law, the lease, and the undisputed facts when it denied its three motions for summary judgment. Accordingly, VRES contends that this case should not have gone to trial. Classic responds that that the district court correctly found that there were material facts in dispute, and that this court should apply *Ortiz v. Jordan*, 562 U.S. 180 (2011), which held that a party may not appeal an order denying summary judgment after a full trial on the merits.[8]

"Although a district court's order denying summary judgment is not independently appealable, 'where a party properly raises the issue on appeal from the final judgment, this court will review the decision de novo.'" *Mardian v. Greenberg Fam. Tr.*, 131 Nev. 730, 733, 359 P.3d 109, 111 (2015) (quoting *Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010)); *see also Pub. Emps.' Benefits Program v. LVMPD*, 124 Nev. 138, 146, 179 P.3d 542, 548 (2008) (stating that "a district court order resolving a request for declaratory relief" is reviewed de novo). Summary judgment is proper only if, when considering the evidence "in a light most favorable to the nonmoving party," no genuine dispute of material fact exists, and the moving party is entitled to a judgment as a matter of law. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). A genuine dispute of material fact exists if, based on the evidence presented, a reasonable jury could return a verdict in favor of the nonmoving party. *Butler v. Bayer*, 123 Nev. 450, 457-58, 168 P.3d 1055, 1061 (2007). Moreover, all of the

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[8]"May a party . . . appeal an order denying summary judgment after a full trial on the merits? Our answer is no. The order retains its interlocutory character as simply a step along the route to final judgment. Once the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary-judgment motion." *Ortiz*, 562 U.S. at 183-84 (footnote and citation omitted).

nonmovant's statements must be accepted as true, all reasonable inferences that can be drawn from the evidence must be admitted, and neither the trial court nor this court may decide issues of credibility based upon the evidence submitted in the motion or the opposition. *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 713-14, 57 P.3d. 82, 87 (2002).

As an initial matter, we note that the United States Supreme Court's decision in *Ortiz*, 562 U.S. 180, is persuasive and could be applied to this case. The Nevada Supreme Court did not disavow *Ortiz* when it held that this court reviews orders denying summary judgment when "a party properly raises the issue on appeal from the final judgment." *Mardian*, 131 Nev. at 733, 359 P.3d at 111 (internal quotation marks omitted). However, this issue was not discussed in *Mardian* nor in the Nevada case that *Mardian* cites (*Cromer*, 126 Nev. at 109, 225 P.3d at 790, which precedes *Ortiz* by one year). Rather, it was only a general statement of law at the beginning of the discussion in both *Mardian* and *Cromer*.

Further, while VRES properly challenges the district court's rulings on its motions for summary judgment on appeal from the final judgment, it did not preemptively address *Ortiz* nor respond to Classic's argument that *Ortiz* controls such that the denials of summary judgment should not be considered in light of the trial on the merits. *See Colton v. Murphy*, 71 Nev. 71, 72, 279 P.2d 1036, 1036 (1955) (concluding that when respondents' argument was not addressed in appellants' opening brief, and appellants declined to address the argument in a reply brief, "such lack of challenge . . . constitutes a clear concession by appellants that there is merit in respondents' position"). While Classic makes a compelling argument that *Ortiz* is correct in that "[o]nce the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the

summary-judgment motion," 562 U.S. at 184, we choose to address the summary judgment orders on the merits.

VRES's first motion for summary judgment was insufficient and denial was appropriate

VRES argues that the district court erred in denying its first motion for summary judgment because its motion involved issues of contractual construction, which presented only questions of law, and Classic failed to show there were disputed material facts. VRES also contends that the district court erred by granting Classic's request for more time to conduct discovery before the court ruled on VRES's motion. Classic points out that VRES's motion was defective because the affidavit attached thereto was prepared by VRES's counsel who was attesting to facts for which she had no personal knowledge, and therefore must have been disregarded. Classic also argues that because VRES filed this motion merely three weeks after Classic filed its answer and counterclaims in January 2019, no discovery had been conducted, and it filed an affidavit from Classic's co-owner, Jay Stauss, showing material facts in dispute.

NRCP 56(b) allows a party to "file a motion for summary judgment at any time until 30 days after the close of all discovery." "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." NRCP 56(c)(4). Moreover,

> [i]f a nonmovant *shows by affidavit or declaration* that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order.

NRCP 56(d) (emphasis added).

Here, the affidavit VRES submitted to support its motion for summary judgment was prepared by VRES's counsel. VRES does not dispute that its counsel lacked the personal knowledge required to properly support VRES's motion for summary judgment. In contrast, Classic filed an affidavit alleging disputes of material fact. Therefore, we conclude that VRES's motion was insufficient and the district court correctly denied it.

The district court correctly denied VRES's second motion for summary judgment because there were material facts in dispute

VRES's renewed motion for summary judgment reiterated its arguments from its first motion but attached a proper supporting affidavit from Thomas Christensen.[9] In opposition, Classic argued that the August 2017 letter was ineffective to terminate the lease under unlawful detainer statutes because it did not contain any of the NRS 40.253(3) requirements and did not provide for a chance to cure within five days pursuant to NRS 40.2512. On appeal, both parties reiterate these arguments.

NRS 40.2512 outlines the procedures for regaining possession of real property from a tenant in unlawful detainer. In an unlawful detainer action, strict compliance with the statutory notice provision is a jurisdictional prerequisite. *Roberts v. Second Jud. Dist. Ct.*, 43 Nev. 332, 340, 185 P. 1067, 1069 (1920). "When a lessor seeks termination under a lease provision, the notice requirements for an unlawful detainer action are inapplicable." *Davidsohn v. Doyle*, 108 Nev. 145, 151, 825 P.2d 1227, 1230

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[9]While Classic did not attach affidavits to its opposition to VRES's second or third motions, NRCP 56(c)(3) allows the district court to "consider other materials in the record." Notably, in his original affidavit, Jay Stauss implicitly made a course of conduct argument when he stated, "Classic believes that because VRES was accepting its payments made on or before the 15th of each month for nearly one year, VRES owed Classic notice that moving forward VRES wanted strict compliance with the payment date."

(1992). "We . . . hold that a lessor who seeks termination under a lease provision is not obligated to meet the notice requirements of NRS 40.2516."[10] *Id.* at 150, 825 P.2d at 1230; *see also Int'l Indus., Inc. v. United Mortg. Co.*, 96 Nev. 150, 154-55, 606 P.2d 163, 165-66 (1980) (upholding the termination of a lease pursuant to its terms where the lessee failed to cure within 30 days of the lessor's notice to cure).

Here, VRES did not institute an unlawful detainer action; rather, it sought a declaratory judgment terminating the lease pursuant to a provision of the lease. Therefore, we conclude that the district court improperly considered NRS Chapter 40 statutes when it ruled that whether VRES was attempting to evict Classic and whether Classic believed it was being evicted were material facts in dispute.

Nevertheless, both affidavits—Christensen's and Stauss's—demonstrated that there were material facts in dispute: whether VRES provided any notice of default to Classic prior to VRES's August 2017 letter, and whether this letter provided Classic with an opportunity to cure the default before termination would occur. Although VRES argued that providing notice of default and an opportunity to cure was not required under section 16(b)(1) of the 2016 lease, the plain language of the lease provides that 16(b)(1) activates only upon the occurrence of a default under section 16(a). Thus, section 16(b)(1) cannot prevent the application of 16(a)(2), which dictates that a default occurs after the ten-day cure period:

> [16](a). Defaults. Each of the following events shall be deemed an event of default by Tenant:

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[10]The supreme court also noted that "under NRS 40.252, a contractual provision which attempts to shorten the notice period required in NRS 40.2516 is void." *Davidsohn*, 108 Nev. at 151 n.5, 825 P.2d at 1230 n.5.

> 1. *Failure to pay any installment of minimum rent*, electrical reimbursement, additional rent or other amount or charge due hereunder within five (5) days of date due; [or]
>
> 2. Tenant remaining in default or failing to perform any of the other covenants or obligations of Tenant hereunder *after the expiration of ten (10) days following notice of such violation* or failure, provided however, Tenant shall not be in default if it commences to *cure* such default within such ten (10) day period and diligently pursues the same to completion . . . .

(Emphases added.) Section 16(b)(1) of the lease provided, in relevant part:

> [16](b) Remedies on Default. Upon occurrence of any event of default, Landlord may, at Landlord's option, in addition to any other remedy or right given hereunder or by law:
>
> 1. Give notice to Tenant that this Lease shall terminate upon the date specified in the notice, which date shall not be earlier than the date of giving of such notice . . . .

Put simply, 16(a)(1) provides that a default occurs if rent is not paid by the fifth day of the month. Then, 16(a)(2) provides that a tenant remaining in default has ten days to cure that default following the requisite notice. Thus, 16(a)(2) plainly requires a notice of default and an opportunity to cure.

In his affidavit, Christensen claimed that "VRES requested timely payment orally during the fall of 2016 and early 2017, with no response from Classic," that "VRES has never waived late fees," and that "VRES terminated the lease effective August 31, 2017." Classic, through Jay Stauss's affidavit, stated that VRES "never made a complaint to Classic regarding the timeliness of the rent payments" before the August 2017 letter and that the letter "was the first time, either orally or in writing, that

VRES had stated opposition to being paid on or before the 15th of each month."

VRES argues that the August 2017 letter provided Classic 20 days to cure: the letter was noticed on August 10 and stated that the lease would be terminated on August 31, 2017. However, the letter is, at minimum, ambiguous as to whether VRES was providing a meaningful opportunity for Classic to cure the default. The August 2017 letter ends with the following statements:

> *Your lease is hereby terminated* on August 31, 2017. In addition to the minimum rent due of $7,600.00 you owe an additional $15,504.00 in late fees, attorney fees, utilities and interest. *Please contact our office immediately in order to remedy this situation.*

(Emphases added.) Upon receiving the letter, Jay Stauss called VRES's attorney, who reiterated that VRES was exercising its right to terminate the lease because Classic had not been paying on the first of each month. VRES, however, stated that it was willing to negotiate a new lease to "tighten[ ] up" the lease's language. Therefore, it appears that VRES's argument that it allowed Classic 20 days to cure the default stems from its willingness to negotiate a new lease, which is not a true curing opportunity to cure the defaulted lease, but rather an offer to negotiate a new one with materially different terms. Nevertheless, this created a question of fact precluding summary judgment.

Further, Classic disputed Thomas Christensen's assertion that VRES provided verbal notices of late rent to Classic. Therefore, this was another disputed material fact. Although the district court erroneously looked to unlawful detainer statutes in ruling that summary judgment was inappropriate, the court correctly found that there were material facts in

dispute. Because "[t]his court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason," we conclude that the district court correctly denied VRES's second motion for summary judgment. *Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010).

The district court properly found that there was a genuine dispute of material fact as to the parties' course of conduct during Classic's occupancy of the premises

While citing to deposition transcripts in its third motion for summary judgment, VRES argued that because Classic was "habitually late" in the payment of rent and unpaid late fees, VRES's August 2017 letter terminated the lease and Classic's tenancy at the premises. Classic responded by arguing that VRES's claim of Classic's habitually late payments was evidence that VRES and Classic had established a course of conduct for the late payment and acceptance of rent, without incurring late fees and, therefore, Nevada law required VRES to provide a written notice that it would demand strict compliance of the terms of the lease before seeking to do so.

When a party enters into a contract and reduces it to writing, it must abide by its terms as plainly stated therein. *Chiquita Mining Co. v. Fairbanks, Morse & Co.*, 60 Nev. 142, 153, 104 P.2d 191, 196 (1940). Moreover, "non-waiver clause[s], which allows a landlord to accept rent without waiving late penalties or interest, [are] generally enforceable." *Consumers Distrib. Co. v. Hermann*, 107 Nev. 387, 394, 812 P.2d 1274, 1278 (1991) (citing Restatement (Second) of Property § 12.1 cmt. c (Am. L. Inst. 1977)). "However, parties may not sit on their rights forever, and such clauses retain their force and effect for only a reasonable amount of time. It is unconscionable for a lessor to assert this provision after it has

continually refrained from collecting the penalty for a long period of time." *Id.* at 394, 812 P.2d at 1278-79.

The Nevada Supreme Court recognized this equitable principle, often called "course of conduct" or "course of dealing," in *Nevada National Bank v. Huff*, 94 Nev. 506, 582 P.2d 364 (1978). In *Huff*, the supreme court held that

> an established course of dealing under which the debtor (lessee) makes continual late payments and the secured party (lessor) accepts them does not result in a waiver of the secured[ ] party's right to rely upon a clause in the agreement authorizing him to declare a default and repossess the chattel.

Id. at 512-13, 582 P.2d at 369. While the supreme court acknowledged that "no outright waiver of a secured party's right to rely upon [a default] clause occurs through a course of dealing involving the acceptance of late payments," the court held that

> a secured party who has not insisted upon strict compliance in the past, who has accepted late payments as a matter of course, *must*, before he may validly rely upon such a clause to declare a default and effect repossession, *give notice* to the debtor (lessee) that strict compliance with the terms of the contract will be demanded henceforth if repossession is to be avoided.

Id. at 513, 582 P.2d at 369.

While *Huff* involved secured chattel, the supreme court in *Consumers* confirms that the same contractual theory applies to landlord-tenant cases. Accordingly, here, VRES similarly should have provided notice to Classic that it would strictly enforce the late rent provisions of the lease before assessing penalties in the future. Both the original lease and the 2016 lease provided that rent was due on the first day of each month and included late fee clauses that authorized VRES to assess late fees if

rent was not paid by the fifth day of the month. In its third motion for summary judgment, VRES conceded that Classic paid rent late every month since VRES took ownership of the leased premises in 2011, and that VRES accepted the late payments without ever demanding payment of late fees in writing until August 2017 when VRES attempted to terminate the lease and retroactively assess late fees for the previous 11 months. While VRES claimed that it orally notified Classic that it was in breach of the lease during the fall of 2016 and early 2017, Classic disputed this in Jay Stauss's affidavit in support of Classic's opposition to VRES's first motion for summary judgment.

Notably, VRES argues on appeal that "if this Court affirms the lower Court's finding [VRES] had to give written notice that the terms of the lease would be enforced as written, [VRES's] first notice of default on August 10, 2017 provides that notice" and that VRES provided numerous written notices thereafter. However, the August 2017 letter explicitly states that VRES was "hereby" terminating the lease at the end of the month, while requesting Classic to contact VRES to address this issue. At minimum, this creates a question of fact precluding summary judgment.

Further, whether VRES provided verbal notices before the August 2017 letter and whether the parties had established a course of conduct that deviated from the terms of the lease were also genuinely disputed material facts precluding summary judgment. *See Anes v. Crown P'ship, Inc.*, 113 Nev. 195, 199-200, 932 P.2d 1067, 1069-70 (1997) (holding that although a receiver had the power to modify or cancel a tenant's lease, the receiver's acceptance of rent, allowing the tenant to remain in possession and providing professional services outlined in the lease constituted "a substantial issue of material fact" as to whether the receiver

impliedly adopted the tenant's lease). Accordingly, we conclude that the district court correctly found that VRES was not entitled to summary judgment.

The district court's finding that the parties engaged in a mutual course of conduct was supported by substantial evidence

VRES argues that Classic did not present evidence during trial to support a defense of course of conduct.[11] Classic argues that it presented sufficient evidence demonstrating that the parties established a mutually accepted course of conduct of paying and accepting late rent payments thus deviating from the terms of the lease.

As discussed above, the supreme court has held that a party who has accepted late payments as a matter of course, and without insisting upon strict compliance with the terms of the contract in the past, must notify the debtor of its intent to demand strict compliance before seeking to invoke a clause to declare default and collect late fees. *Huff*, 94 Nev. at 513, 582 P.2d at 369; *Consumers*, 107 Nev. at 394, 812 P.2d at 1278-79. Where a tenant and a landlord established a course of conduct different than the written terms of the lease, it is a question of fact whether the parties "impliedly adopted" the course of conduct into the lease. *Anes*, 113 Nev. at 200, 932 P.2d at 1070.

Here, the district court sat as the trier of fact in a bench trial. VRES provided testimony that Classic was habitually—and "classically"—

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[11]VRES also argues that the district court should have disregarded any evidence of course of conduct because Classic waived this defense by not affirmatively pleading it. VRES, however, waived this argument on appeal because it did not raise it below. *See Old Aztec Mine*, 97 Nev. at 52, 623 P.2d at 983 (explaining that issues not argued below are "deemed to have been waived and will not be considered on appeal").

late in making rent payments during the period of the original lease and the 2016 lease, for a total of approximately six years.[12] VRES's representative also testified that VRES accepted Classic's late payments without imposing late fees, declaring default, or sending written notices requesting timely payments. The district court found that this demonstrated that VRES and Classic established a course of conduct where Classic consistently made late payments, VRES accepted them, and VRES never insisted on strict compliance of the late-fees and default provisions of the lease until August 2017. Although VRES testified that it provided multiple verbal notices that Classic was late, VRES's did not introduce evidence that it provided notice that it intended to terminate Classic's lease or assess late fees prior to sending the August 2017 letter that attempted to terminate the lease and retroactively assess late fees. The district court found that the August 2017 letter did not terminate the lease, but instead served as VRES's first notice to Classic that VRES intended to demand strict compliance in the future. VRES's representative testified that after August 2017, with the exception of the partially late September 2017 rent due to the annual three-percent increase, Classic timely paid rent until the expiration of the lease in August 2019.

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[12]VRES's representative who testified at trial began to manage the leased premises in 2014, therefore she could not testify from personal knowledge as to whether Classic made late payments between 2011 and 2014. However, VRES, at no point during the litigation of this case, disputed that Classic was habitually late during that time period. Indeed, in its third motion for summary judgment, VRES conceded that Classic paid rent late every month since VRES took ownership of the premises in 2011, and that VRES accepted the late payments without ever demanding payment of late fees in writing until August 2017.

We conclude that the district court's finding that Classic and VRES established a course of conduct different than the terms of the lease was supported by substantial evidence. Consequently, we agree with the district court that VRES could not terminate Classic's lease and assess late fees without first providing written notice that it would henceforth demand strict compliance with the terms of the 2016 lease.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.[13]

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Bita Yeager, District Judge
Dana J. Nitz, Settlement Judge
Christensen Law Offices, LLC
Marquis Aurbach Chtd.
Eighth District Court Clerk

[13]Insofar as the appellants have 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.