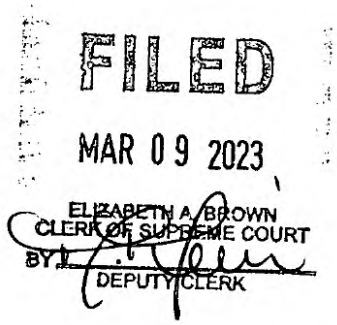
IN THE SUPREME COURT OF THE STATE OF NEVADA

TON VINH LEE, AN INDIVIDUAL,
Appellant/Cross-Respondent,
vs.
INGRID PATIN, AN INDIVIDUAL,
Respondent/Cross-Appellant,
and
PATIN LAW GROUP, PLLC, A NEVADA PROFESSIONAL, PLLC,
Respondent.

No. 83213



ORDER OF REVERSAL

This is an appeal and cross-appeal from post-judgment orders granting attorney fees and costs in a tort action. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Appellant Ton Vinh Lee (Lee) sued respondents Ingrid Patin and Patin Law Group (collectively Patin or Patin defendants) for defamation. After losing their anti-SLAPP motion to dismiss, the Patin defendants sent Lee nearly identical offers of judgment. The offers of judgment stated:

> Pursuant to Rule 68 of the N.R.C.P., Defendant, [PATIN], hereby offers to allow judgment to be taken in her favor, only, and against Plaintiff, TON VINH LEE, in the above-entitled matter in the total amount of ONE THOUSAND AND NO/100THS DOLLARS ($1,000.00), inclusive of all accrued interest, costs, and attorney fees, any other sums that could be claimed by Defendant, [PATIN], against Plaintiff, TON VINH LEE, in the above-captioned action.
>
> Pursuant to Rule 68 of the N.R.C.P., this offer shall be open for a period of ten (10) days from the date of service of this Offer. In the event this Offer of Judgment is accepted by Plaintiff,

> TON VINH LEE, Defendant, [PATIN], will elect to pay the amount offered here within a reasonable time and obtain a dismissal of the claim as provided by N.R.C.P. 68(d), rather than to allow judgment to be entered against Defendant [PATIN].
>
> This Offer of Judgment is made solely for the purposes intended by N.R.C.P. 68 and is not to be construed as an admission in any form, shape or manner that Defendant, [PATIN], is liable for any of the allegations made by Plaintiff in the Complaint. Nor is it an admission that Plaintiff is entitled to any relief, including, but not limited to, an award of damages, attorney's fees, costs or interest and is nullified by any such award.

As is evident on a plain text reading, the offers of judgment are internally contradictory. The first paragraph says that if Lee pays Patin $1000 and agrees to accept judgment in Patin's favor against Lee, that will conclude the case without Lee risking further exposure for Patin's interest, costs, and attorney fees. The second paragraph says that, if Lee accepts the offer, Patin will pay Lee and seek dismissal, to avoid judgment in Lee's favor against Patin.

Lee allowed the offers to expire without accepting them. After further motion practice and an unsuccessful appeal of the district court's order denying their anti-SLAPP motion to dismiss, the Patin defendants filed a motion for summary judgment, which the district court granted. Patin thereafter filed a motion for attorney's fees under NRCP 68(f).[1]

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[1]The Nevada Rules of Civil Procedure were amended effective March 1, 2019. See *In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 0522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, December 31, 2018) ("[T]his amendment to the [NRCP] shall be effective prospectively on March 1, 2019, as to all pending cases and

Applying the factors in *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983), the district court granted Patin's motion for attorney's fees in part, finding that Lee's rejection of Patin's offers of judgment was unreasonable because "[t]he purpose of the fee shifting provision of NRCP 68 is to encourage settlement, and Defendants offered Plaintiff an early opportunity to take judgment against them." This appeal and cross-appeal followed.

NRCP 68 is designed to encourage settlement by placing the risk of loss on the non-accepting offeree. *Bergmann v. Boyce*, 109 Nev. 670, 677-78, 856 P.2d 560, 565 (1993), *superseded by statute on other grounds as recognized in In re DISH Network Derivative Litig.*, 133 Nev. 438, 451 n.6, 401 P.3d 1081, 1093 n.6 (2017). However, "while the purpose of NRCP 68 is to encourage settlement, it is not to force plaintiffs unfairly to forego legitimate claims." *Beattie*, 99 Nev. at 588, 668 P.2d at 274. Therefore, courts must balance several factors in determining attorney fee penalties under NRCP 68, including whether the offeree's rejection of the offer was reasonable. *Id.* While the award of attorney fees "is generally entrusted to the sound discretion of the district court," we review questions of law, such as the offer's compliance with the requirements of NRCP 68, de novo. *In re Estate of Miller*, 125 Nev. 550, 552-53, 216 P.3d 239, 241 (2009). And, "[a]s a threshold matter," the court must determine whether the "offers of judgment were valid." *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 81, 319 P.3d 606, 616 (2014).

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cases initiated after that date."). Patin made the offers of judgment pursuant to NRCP 68 on January 26, 2017, and we apply the rule in effect at that time. *See* NRCP 68(f) (1998).

NRCP 68 imposes mandatory penalties against a party who rejects and fails to better a valid offer of judgment. *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 419, 132 P.3d 1022, 1028 (2006). The penalties include fee-shifting provisions, which are in derogation of common law. *See Quinlan v. Camden USA, Inc.*, 126 Nev. 311, 314, 236 P.3d 613, 615 (2010). For these reasons, Nevada strictly interprets NRCP 68. *Id.*; *see also Albios*, 122 Nev. at 431, 132 P.3d at 1036. An "offeree must know what is being offered in order to be responsible for refusing the offer." *Arkla Energy Res. v. Roye Realty & Dev., Inc.*, 9 F.3d 855, 867 (10th Cir. 1993). Thus, NRCP 68 requires an offer to be for an unconditional, definite amount "so that the parties can be unequivocally aware of what the defendant is willing to pay for his peace." *Stockton Kenworth v. Mentzer Detroit Diesel*, 101 Nev. 400, 404, 705 P.2d 145, 148 (1985); *see also* 12 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3002 (3d ed. 2022) ("[T]he offer must specify a definite sum for which judgment may be entered, which plaintiff can either accept or reject. It must be unconditional . . . .").

Here, the offers of judgment contain contradictory language on whether, if accepted, Lee would have to pay Patin and accept judgment in Patin's favor against Lee on his defamation complaint, or whether Patin would pay Lee the offered amount with dismissal of the complaint to follow. Lee did not raise this contradiction before the district court; however, we reach this issue *sua sponte* to prevent plain error. *See Bradley v. Romeo*, 102 Nev. 103, 105, 716 P.2d 227, 228 (1986); *see also Edwards Indus., Inc. v. DTE/BTE, Inc.*, 112 Nev. 1025, 1035, 923 P.2d 569, 575 (1996) (holding that an invalid offer of judgment could not provide a proper basis for attorney fees and costs). To ensure the parties addressed the contradiction,

we ordered oral argument and instructed that, "Counsel should be prepared to address the offers of judgment underlying this appeal, . . . whether the [offers] are ambiguous, and, if so, to discuss their proper interpretation. The argument will focus on these issues."

In advance of argument, Patin filed a supplemental brief. In the brief, Patin urges this court to construe the offers of judgment according to contract law principles, which look to the parties' conduct to discern intent in cases involving ambiguous contracts. But the applicability of those principles is altered by Rule 68's automatic operation because, unlike garden-variety contract offers, a Rule 68 offer has a binding effect and triggers penalties when refused. 12 Wright & Miller, *Federal Practice and Procedure* § 3002 (3d ed. 2022). While clarification of an ambiguous offer before acceptance can lead to a valid settlement agreement on the clarified terms, *see, e.g.*, *Fleischer v. August*, 103 Nev. 242, 246, 737 P.2d 518, 521 (1987) (determining that a phone conversation between the parties regarding an offer clarified any ambiguity), a court's consideration of extrinsic evidence in cases where the offeree rejects or allows the offer to expire without accepting it unfairly puts the offeree, at the time the offer is being considered, "in the position of guessing what a court will later hold the offer means." *Allen v. City of Grovetown*, 681 Fed. Appx. 841, 845 (11th Cir. 2017) (quoting *Util. Automation 2000, Inc v. Choctawhatchee Elec. Coop., Inc.*, 298 F.3d 1238, 1244 (11th Cir. 2002)). Therefore, we decline to allow post-expiration extrinsic evidence to clarify a rejected offer of judgment because principles of contract interpretation do not apply to the rejected offer and thus the court must base its analysis on the offer's language.

The dissent urges us to ignore this issue because the contradiction in the offers of judgment was not argued before the district court or in Lee's appellate briefs. While we agree that the principle of party presentation correctly establishes the court's role as neutral arbiter of issues as presented by the parties, "[t]he party presentation principle is supple, not ironclad. There are no doubt circumstances in which a modest initiating role for a court is appropriate." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (citing, *e.g.*, *Day v. McDonough*, 547 U.S. 198, 202 (2006)).

One such circumstance arises when a party presents an interpretive question that requires the court to apply a statute or interpret contract provisions—both questions of law reviewed de novo—but neither party presents arguments necessary to resolve the interpretive question. *See Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 41 n.2 (2015) (Thomas, J., concurring in the judgment in part and dissenting in part) ("Parties cannot waive the correct interpretation of the law simply by failing to invoke it."); *Certain Underwriters at Lloyd's of London v. KG Admin. Serv.*, 855 Fed.Appx. 260, 268 n.7 (6th Cir. 2021) (applying the court's interpretation of an insurance contract term over parties' competing interpretations as necessary to uphold principles of contract interpretation). Having been asked to enforce (and, on cross-appeal, to augment) a NRCP 68(f) penalty, this court was unable to avoid reviewing the offers of judgment to determine whether the offers were valid under NRCP 68. And on de novo review, we found the assumption that the offers of judgment were valid under NRCP 68 to be unreasonable. Therefore, it was necessary to address this issue before enforcing penalties based on the offers of judgment.

Since the offers of judgment failed to provide a definitive statement of the amount offered and on what terms, we find that the offers are invalid as a matter of law and reverse on that basis.[2] Furthermore, the contradictory language in the offers prevents the reviewing court from conducting a proper *Beattie* analysis and makes it difficult to assess Lee's understanding at the time the offer was made. Our cases require that we construe this contradictory language against the drafter of the offer, in this case, Patin. *See McCrary v. Bianco*, 122 Nev. 102, 109-110 & n.16, 131 P.3d 573, 577-78 & n.16 (2006) (construing the offer against the drafter). So construed, the offer required Lee to pay Patin and accept judgment in her favor and against him on his defamation complaint. Thus, the district court's *Beattie* analysis was incorrect insofar as it found that the offers provided Lee an early opportunity to take judgment against Patin such that it was unreasonable for Lee not to have accepted them. For these reasons, we

ORDER the district court's award of attorney fees REVERSED.[3]

Pickering, J.
Pickering

Gibbons, Sr.J.
Gibbons

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[2]We do not address whether Patin is nevertheless entitled to attorney fees under NRS 18.010(2)(b), as the district court did not reach that question below, although the district court's finding of good faith would appear to preclude an award under that statute.

[3]The Honorable Mark Gibbons, Senior Justice, participated in the decision of this matter under a general order of assignment.

CADISH, J., dissenting:

I cannot agree with the court's *sua sponte* reversal based on an issue never raised by any party nor addressed by the district court, and I therefore dissent. The majority reverses an award of attorney fees under Rule 68 of the Nevada Rules of Civil Procedure based on an offer of judgment, holding that the offer is contradictory and thus invalid, that it must be construed against the drafter, that under such a construction the offer was for Lee, the plaintiff below, to pay Patin, the defendant below, and thus the district court's analysis of one of the *Beattie* factors was incorrect because the offer did not present an opportunity for Lee to take judgment against Patin as the court below found. However, none of these arguments were raised by appellant Lee in district court, nor were such issues considered by the district court, nor were any of these issues raised by Lee in his briefing to this court. The word "ambiguous" (or any form thereof) appears nowhere in Lee's briefing in this court, nor is there any discussion of the internal contradiction on which the majority relies, and the record demonstrates that he was never confused about the intent of the offer as to who would pay money or have a judgment against them if it were accepted.

As we recently reiterated, "[I]n both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decisions and assign to courts the role of neutral arbiter of matters the parties present." *State v. Eighth Judicial Dist. Court (Doane)*, 138 Nev., Adv. Op. 90, 521 P.3d 1215, ____ (2022) (quoting *Greenlaw v. U.S.*, 554 U.S. 237, 243 (2008)). In accordance with this principle, this court has routinely declined to consider issues not raised below because they are deemed waived, *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983

(1981) (holding that this court deems waived and will not consider an argument that the appellant did not "urge[] in the trial court," for which proposition this case has been cited in 449 cases); declined to consider issues not raised in appellant's opening brief, even when raised in the reply brief, *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 & n.3, 252 P.3d 668, 672 & n.3 (2011) (noting that an appellant waives arguments that are not presented in their opening brief, for which proposition this case has been cited in 231 cases); and even declined to address issues raised when they are not cogently argued with citations to pertinent authority, *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 & n.38, 130 P.3d 1280, 1288 & n.38 (2006) (noting we "need not consider" appellant's arguments unless they meet their responsibility to "cogently argue" and "present relevant authority" regarding the issues raised, for which proposition this case has been cited in 112 cases). In this case, the issue relied on by the majority was not raised below, in the opening brief, or in the reply brief, and thus was never cogently argued nor supported with relevant authority.

We have occasionally granted relief for plain error where the issue was argued on appeal but not raised below, in limited circumstances where an "error is so unmistakable that it reveals itself by a casual inspection of the record," *Williams v. Zellhoefer*, 89 Nev. 579, 580, 517 P.2d 789, 789 (1973), and "where it has been demonstrated that the failure to grant relief will result in a manifest injustice or a miscarriage of justice." *In re J.D.N.*, 128 Nev. 462, 469, 283 P.3d 842, 847 (2012) (quoting 5 Am. Jur. 2d *Appellate Review* § 720 (2007)). On only exceedingly rare occasions, this court has raised an issue *sua sponte* to prevent plain error, and then in narrow circumstances including where "a statute which is clearly controlling was not applied by the trial court," *Bradley v. Romeo*, 102 Nev.

103, 105, 716 P.2d 227, 228 (1986), or in preventing injustice from an order awarding parties the full value of their stock by requiring them to return the stock in question, *Western Indus., Inc. v. General Ins. Co.*, 91 Nev. 222, 229-30, 533 P.2d 473, 478 (1975). In my view, none of these circumstances apply to this case about an award of attorney fees based on an offer of judgment where the parties addressed, and the district court analyzed, the issue under the applicable rule governing offers of judgment and factors applicable to such an award under Nevada law, and the majority has not adequately explained why this case presents such an unusual circumstance.[1] The alleged ambiguity of the offer of judgment in this case is not an issue involving manifest injustice such as would warrant our disregard of the well-recognized principle of party presentation; this is a civil case where all parties have been represented by counsel throughout the case, and there has been no disregard of controlling law as to issues raised. Indeed, if our court is going to start raising issues such as this that were never raised by the parties at any stage of the case, it is hard to imagine that there are any issues we will not wade into on our own accord.

Turning to the issues actually raised by the parties on appeal, Lee has failed to show the district court abused its discretion in awarding attorney fees incurred by attorneys Kerry Doyle and Christian Morris below, having appropriately considered the *Beattie* factors and *Brunzell* factors in doing so. *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983); *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d

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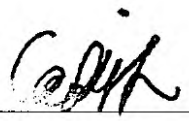
[1]The record and briefing by the parties make clear that Lee understood the offers to be offers to pay him the amount offered, not the reverse, which is also Patin's understanding. Thus, there is certainly no injustice in continuing to interpret the offers as the parties have, rather than raising an ambiguity that no party was confused by.

31, 33 (1969). Lee relies on the 2019 version of NRCP 68 in arguing that his pre-offer attorney fees must be subtracted from the amount of the offers to compare them with the judgment ultimately obtained and determine whether he obtained a more favorable judgment. However, as the majority acknowledges, this court applies the rule in effect at the time of the offers—here that was in 2017. Under that version of the rule, even assuming the offers precluded a separate award of fees and costs incurred by Lee, only pre-offer costs—not fees—were considered "together with" the amount of the offer in this comparison. NRCP 68(g) (1998) ("Where a defendant made an offer in a set amount which precluded a separate award of costs, the court must compare the amount of the offer together with the offeree's pre-offer taxable costs with the principal amount of the judgment."). Yet Lee has presented no evidence here or below regarding his pre-offer taxable costs. Moreover, even under the revised rule, pre-offer fees are only to be considered "if attorney fees are permitted by law or contract." NRCP 68(g) (2019) ("If a party made an offer in a set amount that precluded a separate award of costs, expenses, interest, and if attorney fees are permitted by law or contract, attorney fees, the court must compare the amount of the offer, together with the offeree's pre-offer taxable costs, expenses, interest, *and if attorney fees are permitted by law or contract,* attorney fees, with the principal amount of the judgment") (emphasis added). Lee makes no argument and provides no authority that his fees were permitted by law or contract, and no legal basis for such fees appears in the record. Accordingly, this argument necessarily fails. Contrary to Lee's contention, the district court properly evaluated the *Beattie* factors, and did not abuse its discretion in finding an award of fees as to Doyle and Morris appropriate here.

Finally, as to the cross-appeal, the district court abused its discretion in failing to award fees incurred by Patin's appellate counsel, Micah Echols, during a prior unsuccessful appeal in this case. The court correctly concluded that Lee did not beat the offer, analyzed the *Beattie* factors which it found warranted an award of fees, analyzed the *Brunzell* factors as to Echols' fees and found that they had been reasonably incurred, yet declined to award them because his prior appeal to this court was unsuccessful. This was incorrect as a matter of law, given that the result obtained at the end of the case was entirely in Patin's favor and choosing to appeal on an unsettled issue was not unreasonable here, and I would reverse the district court's conclusion as to this part of its decision only.

Thus, I dissent from the majority's reversal on Lee's appeal, I would affirm the district court's decision as to Lee's appeal, and I would reverse the district court's refusal to award fees incurred by Echols on the cross-appeal.



_____, J.
Cadish

cc: Hon. Gloria Sturman, District Judge
Resnick & Louis, P.C./Las Vegas
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Christian Morris Trial Attorneys
Doyle Law Group
Eighth District Court Clerk