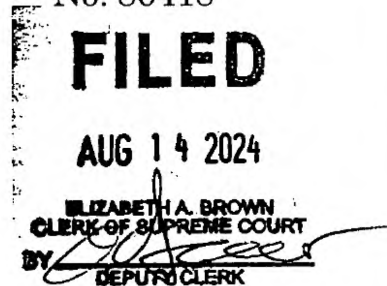
IN THE SUPREME COURT OF THE STATE OF NEVADA

RONY MANSOUR, Appellant, vs. TOWBIN MOTOR CARS, LLC, A DOMESTIC LIMITED-LIABILITY COMPANY; AND TOWBIN TOY STORE, LLC, A DOMESTIC LIMITED-LIABILITY COMPANY, Respondents.	No. 86418
RONY MANSOUR, Appellant, vs. TOWBIN MOTOR CARS, LLC, A DOMESTIC LIMITED-LIABILITY COMPANY; AND TOWBIN TOY STORE, LLC, A DOMESTIC LIMITED-LIABILITY COMPANY, Respondents.	No. 86915



ORDER AFFIRMING IN PART AND REVERSING IN PART (DOCKET NO. 86418), REVERSING (DOCKET NO. 86915), AND REMANDING

These are consolidated appeals from a district court order granting summary judgment in a contract action (Docket No. 86418) and from an order awarding attorney fees and costs (Docket No. 86915). Eighth Judicial District Court, Clark County; Nancy L. Allf, Judge.

Respondents Towbin Motor Cars, LLC, and Towbin Toy Store, LLC (collectively, Towbin) moved to dismiss appellant Rony Mansour's complaint. Alternatively, Towbin moved for summary judgment. The district court granted Towbin's motion in what appears to be a hybrid order dismissing some claims and granting summary judgment as to other claims. Appellant Rony Mansour appealed that order in Docket No. 86418. The district court then awarded Towbin roughly $140,000 in attorney fees on the

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ground that Rony maintained his claims without reasonable grounds. Rony appealed that order in Docket No. 86915. We address each order in turn.

Docket No. 86418

Rony preliminarily contends that the district court erred in treating Towbin's motion as a motion for summary judgment instead of as a motion to dismiss. Namely, Rony relies on NRCP 12(d), which provides:

> If, on a motion under Rule 12(b)(5) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

In this respect, Rony contends that he was "never afforded the opportunity to gather all necessary evidence to oppose a motion for summary judgment" and that, "[b]ecause this is a[ ] business/employment dispute between family members the credibility determinations of the jury are all the more important." Rony additionally contends that "[h]e was never provided a reasonable opportunity to present evidence to oppose the motion because discovery was never opened." But beyond these generalized statements, Rony does not coherently explain what *written* discoverable documentation that Towbin might have had to support the alleged *oral* promises the Towbin family made to him that form the bases for his claims. He also does not cogently argue that the alternative motion to dismiss or for summary judgment that Towbin filed did not afford adequate notice that summary judgment was potentially in play.

Rony's opening brief refers to his counsel's comments at the September 28, 2022, hearing and suggests that those comments amounted to a request to conduct discovery. But having reviewed the transcript of that hearing—and setting aside Rony's failure to properly request NRCP 56(d)

relief in his written opposition to the motion to dismiss or for summary judgment—we are not persuaded that the district court abused its discretion in resolving Towbin's motion before permitting discovery. *Cf. Aviation Ventures, Inc. v. Joan Morris, Inc.*, 121 Nev. 113, 118, 110 P.3d 59, 62 (2005) (reviewing a district court's refusal to allow discovery for an abuse of discretion); 5C Charles Alan Wright & Arthur Miller, Federal Practice & Procedure: Civil § 1371 (3d ed. Supp. 2024) ("[I]t is well-settled that it is within the district court's discretion whether to accept extra-pleading matter on a motion for judgment on the pleadings [or a motion to dismiss] and treat it as one for summary judgment . . . ."). In sum, and despite Rony's complaints in this respect, we perceive no reversible error in the district court's decision to treat Towbin's motion as a motion for summary judgment, and we review Rony's legal arguments de novo. *Cf. Wynn v. Associated Press*, 136 Nev. 611, 613, 475 P.3d 44, 47 (2020) ("When the district court considers matters outside the pleadings in resolving a motion to dismiss, it effectively treats the motion as one for summary judgment."); *id.* ("We review a district court's decision to grant summary judgment de novo.").

Rony next contends that the district court erred in granting summary judgment on his breach-of-contract claim. Namely, Rony contends that the district court ignored the oral agreements that Rony allegedly made with Towbin family members. But the district court correctly determined that the written Pay Plan superseded those previous oral agreements, particularly given that the Pay Plan expressly stated that Rony was an "at-will employee" and that Towbin could "terminate the employment relationship at any time, without reason." *See Ringle v. Bruton*, 120 Nev. 82, 91, 86 P.3d 1032, 1037 (2004) ("The parol evidence rule does not permit the admission of evidence that would change the contract

terms when the terms of a written agreement are clear, definite, and unambiguous."); *Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 281, 21 P.3d 16, 21 (2001) ("The parol evidence rule forbids the reception of evidence which would vary or contradict the contract, since all prior negotiations and agreements are deemed to have been merged therein." (internal quotation marks omitted)). Although Rony relies on various cases recognizing the concept of an implied contract of continuing employment, none of them involved a situation where there was a written contract that expressly contradicted any implied contract. And we decline to consider Rony's untimely argument that Towbin was not a party to the Pay Plan. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (recognizing that arguments not raised in district court generally need not be considered for the first time on appeal).

Rony next contends that the district court erred in granting summary judgment on the tortious-discharge claim. Specifically, Rony contends that the district court erred in finding that Rony's allegations in a separate divorce proceeding contradicted the allegations in the complaint as to why he was terminated. We are not persuaded. In the complaint, Rony alleged he was terminated for refusing to photoshop a sign. In the divorce case, Rony alleged he was terminated because his ex-wife Jesika wanted to "deprive Rony of the ability to earn an income . . . or receive any assets or spousal support." Rony contends that these allegations are not contradictory because his "divorce counterclaim does not state the reason for termination." We disagree. Accordingly, although the district court did not expressly state as much, Rony's allegations in the divorce proceeding constituted a judicial admission. *See Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co.*, 127 Nev. 331, 343, 255 P.3d 268, 276

(2011) ("Judicial admissions are defined as deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge.").

Alternatively, we note that the letter terminating Rony was written by Towbin's manager, Carolynn Towbin. There is no indication in the record that Carolynn knew of the alleged photoshopping incident, much less that Rony coherently requested discovery on this particular issue. That said, the termination letter lists several reasons for Rony's termination, including Rony yelling at Carolynn and disrespecting her in front of other employees. These are legitimate reasons for terminating Rony's employment that have nothing to do with the alleged photoshopping incident and which would otherwise render summary judgment appropriate on Rony's tortious-discharge claim. *Cf. Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) (recognizing that this court may affirm the district court on any ground supported by the record); *Allum v. Valley Bank of Nev.*, 114 Nev. 1313, 1319-20, 970 P.2d 1062, 1066 (1998) ("We hold that recovery for retaliatory discharge under state law may not be had upon a 'mixed motives' theory; thus, a plaintiff must demonstrate that his protected conduct was *the* proximate cause of his discharge.").

Rony next contends that the district court erred in granting summary judgment on his claim for breach of the covenant of good faith and fair dealing. This contention fails for the same reasons discussed above, i.e., the Pay Plan superseded any alleged oral agreements, and Rony was terminated for reasons other than the alleged photoshopping incident. *Cf. D'Angelo v. Gardner,* 107 Nev. 704, 717, 819 P.2d 206, 215 (1991) ("[M]ere breach of an employment contract does not of itself give rise to tort

damages . . . [. T]he kind of breach of duty that brings into play the bad faith tort arises only when there are special relationships between the tort-victim and the tort-feasor." (internal quotation marks omitted)).

Rony finally contends that the district court erred in granting summary judgment on his claim for "Breach of Profit Participation Agreement." To the extent Rony bases this claim on an allegation that he is entitled to sales commissions, the Pay Plan precludes this basis. *Ringle*, 120 Nev. at 91, 86 P.3d at 1037; *Kaldi*, 117 Nev. at 281, 21 P.3d at 21. But Rony also bases this claim on the allegation that "Carolynn Towbin and/or Jesika Towbin utilized business funds for personal use, thereby lowering the profits in the Defendant dealerships, which then lowered the 10% share that Plaintiff should have received." Because the Pay Plan entitles Rony to a 10% share of Towbin's net income, any improper use of Towbin funds would decrease Rony's commission. The district court granted summary judgment on this portion of Rony's fourth claim based on the statute of frauds even though the written Pay Plan expressly entitles Rony to a 10% share of Towbin's profits.[1] Rony's allegations in this regard, if established by evidence, could entitle Rony to relief. Accordingly, we reverse the district court's order insofar as it granted summary judgment on the portion of Rony's fourth claim alleging an improper use of Towbin funds.

Docket No. 86915

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[1]Towbin argues that Rony did not sufficiently allege in his operative complaint the existence of the Pay Plan's 10% provision. We disagree. Although the operative complaint does not expressly use the term "Pay Plan" in characterizing the written contract, paragraphs 44, 45, 48, and 49 of the complaint sufficiently alleged that Towbin breached the 10% provision.

The district court awarded Towbin roughly $140,000 in attorney fees on the ground that Rony maintained his claims without reasonable grounds under NRS 18.010(2)(b). But given our conclusion that a portion of Rony's fourth claim survives summary judgment at this stage, we necessarily reverse the attorney fee award. We leave for the parties and the district court on remand to evaluate whether a reduced attorney fee award may be appropriate. In this, we agree with the district court that the majority of Rony's claims were maintained without reasonable grounds, as they were plainly precluded by the parol evidence rule. *Cf. id.* (observing that an attorney fee award may be appropriate if a "claim" is maintained without reasonable grounds). Consistent with the foregoing, we

ORDER the judgments of the district court AFFIRMED IN PART AND REVERSED IN PART (DOCKET NO. 86418), REVERSED (DOCKET NO. 86915) AND REMAND this matter to the district court for proceedings consistent with this order.

_______________________, J.
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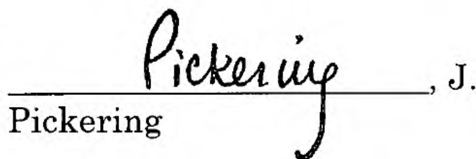

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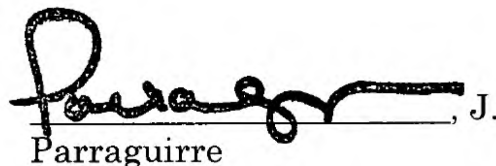

_______________________, J.
Parraguirre

cc: Chief Judge, Eighth Judicial District
Department 27, Eighth Judicial District
William C. Turner, Settlement Judge
Law Office of Daniel Marks
Bendavid Law
Eighth District Court Clerk