IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RICHARD A. SHANKS, ESQ., AN INDIVIDUAL; AND THE LAW OFFICE OF RICHARD SHANKS, A TEXAS COMPANY,
Appellants,
vs.
FIRST 100, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Respondent.

No. 72802

ORDER OF REVERSAL AND REMAND

Appellants Richard Shanks and his law office appeal from an order granting First 100's motion for partial summary judgment in a tort action.[1] Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Richard Shanks and his law office ("Shanks") received a $50,000 wire transfer to his lawyer trust account from First 100, LLC.[2] First 100 claims that the $50,000 was a "'good faith' deposit" while First 100 and Shanks' client, Rick Allan,[3] negotiated a proposed loan. Shanks counters that the $50,000 was payment for a different loan First 100 owed to Allan and that he appropriately distributed the funds to his client upon receipt.

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[1]All remaining claims in Shanks' complaint were dismissed pursuant to the parties' stipulation.

[2]We do not recount the facts except those necessary to our disposition.

[3]Allan is referred to by the parties as Richard Griffey and his name is also spelled as "Allen." Because he was named as Rick Allan in the complaint caption, we will refer to him as Allan throughout.

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When First 100 sought the return of the $50,000 and Shanks did not comply, it filed a complaint against Shanks and his law office alleging several causes of action. First 100 then moved for partial summary judgment as to its claims for conversion and unjust enrichment. Shanks opposed the motion with a May 14, 2014, letter ("May 14 letter") that purportedly showed that representatives from First 100 intended to pay Allan $50,000 for a prior loan from Allan. Shanks also attached his affidavit with statements about the letter, when he received it, and how he relied on it. The district court granted First 100's motion, concluding, in part, that Shanks failed to authenticate the May 14 letter.

Shanks filed a motion for reconsideration based partially on "recently discovered" emails that included several exchanges between a representative of First 100, Shanks, and Allan regarding the $50,000, which he contended supported his argument that the payment was for a prior loan because First 100 representatives referred to the $50,000 as a loan in some of those emails. The district court denied the motion.

Shanks thereafter filed a motion to set aside the order granting partial summary judgment on grounds of fraud, which the court denied. This appeal followed.

The district court erred in granting First 100's motion for partial summary judgment

Standard of review

"We review a district court's order granting partial summary judgment de novo." *McCrosky v. Carson Tahoe Reg'l Med. Ctr.*, 133 Nev. ___, ___, 408 P.3d 149, 152 (2017). "Summary judgment is proper if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. We view all evidence in a light most favorable to the nonmoving party." *Id.* (internal citation omitted).

While Shanks failed to authenticate the May 14 letter in his affidavit opposing First 100's motion for summary judgment, evidence in Shanks' later motions reveal a genuine factual dispute

NRS 52.015 requires that evidence be authenticated "by evidence or other showing sufficient to support a finding that the matter in question is what its proponent claims." "Every authentication . . . is rebuttable by evidence or other showing sufficient to support a contrary finding." NRS 52.015(3). Generally, an individual with personal knowledge of the document at issue must be able to testify about the circumstances of the document to authenticate it. *Compare Mishler v. McNally*, 102 Nev. 625, 628, 730 P.2d 432, 435 (1986) (determining that a memo was not authenticated per NRS 52.015 and inadmissible because it was an unsigned copy with no date of receipt and the custodian of records could not say when the hospital received it), *and Kalmes v. Gerrish*, 7 Nev. 31, 34 (1871) (concluding it was error to admit an agreement "without proof of its execution by the subscribing witness" because the law requires proof of execution of a document and the circumstances of execution), *and Sanders v. Sears-Page*, 131 Nev. 500, 516, 354 P.3d 201, 211 (Ct. App. 2015) (concluding that a medical record was not authenticated where the testifying doctor "did not author the document, was not the custodian of the record, and testified the document looked like a typical medical record"), *with Johnson v. Egtedar*, 112 Nev. 428, 436-37, 915 P.2d 271, 276 (1996) (concluding that medical slides were authenticated per NRS 52.015 because a doctor testified that the slides were recuts from originals, "there was no significant difference between the recuts" and originals, each slide was labeled with the patient's name and patient number, the information in the slides matched information in the patient's pathology report, and in his opinion the slides were the patient's).

Generally, a person with personal knowledge must be able to testify about the circumstances surrounding the execution of a document. *See Kalmes*, 7 Nev. at 34. Here, Shanks stated in his affidavit that he was not present when the parties discussed the $50,000. He did not state that he witnessed the parties draft the letter or that he witnessed any party sign it; he only swore as to how he received the letter from his client. Thus, we conclude that Shanks did not provide sufficient facts to show he had personal knowledge to authenticate the letter and the district court did not err in granting partial summary judgment given the evidence then available. We now turn to whether the district court abused its discretion in denying Shanks' subsequent motions. If so, then this court determines whether the district court ultimately erred in granting First 100's motion for partial summary judgment.

The district court abused its discretion by denying Shanks' motion for reconsideration

Shanks' motion is reviewable on appeal

On appeal, Shanks asserts that this court may consider arguments made in his motion for reconsideration. First 100 contends that the court is limited to the information available at the summary judgment stage and should not consider Shanks' "rogue" documents. We agree that Shanks' arguments in his motion for reconsideration may be considered.

An order denying a motion for reconsideration itself is not appealable, but when such an order is properly part of the record on appeal, this court considers the arguments made in the motion in "deciding an appeal from the final judgment." *Arnold v. Kip*, 123 Nev. 410, 417, 168 P.3d 1050, 1054 (2017). When an order denying a motion for reconsideration is entered before a notice of appeal from the final judgment is filed, "the reconsideration motion and order are properly part of the record on appeal."

Id. at 416-17, 168 P.3d at 1054. "[I]f the reconsideration order and motion are properly part of the record on appeal from the final judgment, and if the district court elected to entertain the motion on its merits, then we may consider the arguments asserted in the reconsideration motion in deciding an appeal from the final judgment." *Id.* at 417, 168 P.3d at 1054.

Additionally, evidence supporting a motion for reconsideration properly part of the record on appeal may be considered on appellate review. *See AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589-90, 245 P.3d 1190, 1197-98 (2010).[4] In *AA Primo Builders,* the court reversed an order of dismissal, in part, based on evidence the appellant submitted in its motion to amend or alter the judgment. *Id.* at 589-90, 245 P.3d at 1197-98. *AA Primo Builders* first addressed and then eliminated the prior distinction between an NRCP 59(e) motion and a motion to reconsider. *Id.* at 584, 245 P.3d at 1194 ("Although the distinction between motions to reconsider and motions to alter or amend may have once afforded flexibility, today it serves no purpose except to put an appellant who misjudges which category a post-judgment motion falls into at risk."). The court held that so long as a motion for reconsideration met the stated requirements, "there is no reason to deny it NRCP 59(e) status, with tolling effect under NRAP 4(a)(4)(C)." *Id.* at 585, 245 P.3d at 1195. When reviewing the NRCP 59(e) motion, the court compared the matter to the motion for reconsideration in *Arnold* to determine that the NRCP 59(e) motion was also reviewable for an abuse of discretion. *Id.* at 589, 245 P.3d at 1197. It concluded that "AA Primo

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[4]We note that evidence must still be properly before the court. *See Russ v. General Motors Corp.*, 111 Nev. 1431, 1435, 906 P.2d 718, 720 (1995) ("[A] trial court may not consider hearsay or other inadmissible evidence when considering summary judgment.").

properly presented its reinstated charter to the district court by way of a timely NRCP 59(e) motion to alter or amend the judgment of dismissal." *Id.*

Here, while the district court denied Shanks' motion in a minute order, it stated that it did so "[f]ollowing review of the papers and pleadings on file herein." We conclude the district court considered the merits of Shanks' motion for reconsideration. Additionally, because the order denying the motion was filed before Shanks filed his notice of appeal from the final judgment, the motion and order, along with the evidence appended to the motion,[5] are properly part of the record on appeal and, accordingly, we may consider Shanks' arguments and evidence from his motion for reconsideration.

Standard of review

An order denying a motion for reconsideration "is reviewable for abuse of discretion." *See id.* at 589, 245 P.3d at 1197. "While review for abuse of discretion is ordinarily deferential, deference is not owed to legal error." *Id.*; *see also Rish v. Simao*, 132 Nev. ___, ___, 368 P.3d 1203, 1209 (2016) (concluding the district court abused its discretion when it prevented the appellant "from presenting or eliciting any evidence and testimony regarding the nature and circumstances of the accident" underlying his

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[5]First 100 argues that because Shanks did not include this evidence until his reply brief to his motion for reconsideration, it did not have a fair chance to respond. The rules of the Eighth Judicial District Court allow the moving party to file a reply memorandum of points and authorities and provides for deadlines to file one. EDCR 2.20(h). Unlike the Nevada Rules of Appellate Procedure, the district court rules do not limit the reply to "any new matter set forth in the opposing brief." *See* NRAP 28(c). Thus, this court may consider the arguments raised in all of the pleadings submitted for Shanks' motion for reconsideration, as well as the "new" evidence of the emails. *See Arnold*, 123 Nev. at 416-17, 168 P.3d at 1054; *AA Primo Builders*, 126 Nev. at 589-90, 245 P.3d at 1197-98.

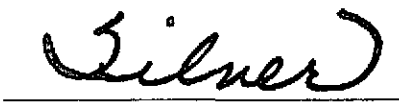
claims, a legal error). "A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous." *Masonry & Tile Contractors Ass'n of S. Nev. v. Jolley, Urga & Wirth Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997).

The emails submitted by Shanks with his motion demonstrate a genuine factual dispute about the purpose of the $50,000

In his reply to his motion for reconsideration, Shanks attached an exchange of emails purportedly between himself, First 100's Vice President of Finance Matthew Farkas, and Allan. These emails appear to create a genuine dispute of material fact because Farkas referenced a $50,000 loan to Allan, and some of the emails include as an attachment the May 14 letter bearing signatures from First 100 representatives. Addressing the district court's earlier ruling that Shanks did not authenticate the May 14 letter, Shanks attached a declaration stating he had personal knowledge of receiving these emails and the emails are dated. *Cf. Mishler*, 102 Nev. at 628, 730 P.2d at 435 (stating that a memo was not authenticated because it was not dated and the records custodian could not testify about when the hospital received it). Therefore, we conclude that the district court abused its discretion by denying the motion for reconsideration without properly considering the new emails and the genuine factual disputes they present. *See generally Fritz v. Washoe County*, 132 Nev. ___, ___, 376 P.3d 794, 798 (2016) (reversing an order granting summary judgment because it only included a summary of basic facts and "ignored certain evidence provided by the parties").

Accordingly, we[6]

ORDER the judgment of the district court REVERSED and REMAND for proceedings consistent with this order.[7]



_____, C.J.
Silver

_____, J.
Gibbons

cc: Chief Judge Elizabeth Gonzalez, Eighth Judicial District
Eighth Judicial District Court, Dept. 10
Thomas J. Tanksley, Settlement Judge
Andersen & Broyles, LLP
Maier Gutierrez & Associates
Eighth District Court Clerk

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[6]Given our disposition, we need not address Shanks' remaining claims.

[7]The Honorable Jerome T. Tao voluntarily recused himself from participation in the decision of this matter.