IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

PALAU NATIONAL COMMUNICATIONS CORPORATION,
Appellant,
v.
YMAL ULUDONG,
Appellee.

Cite as: 2016 Palau 13
Civil Appeal No. 15-013
Appeal from Civil Action No. 14-042

Decided: June 14, 2016

Counsel for Appellant .....Kevin N. Kirk
Counsel for Appellee .....Pro Se

BEFORE: KATHLEEN M. SALII, Associate Justice
LOURDES F. MATERNE, Associate Justice
HONORA E. REMENGESAU RUDIMCH, Associate Justice Pro Tem

Appeal from the Trial Division, the Honorable R. Ashby Pate, Associate Justice, presiding.

OPINION

PER CURIAM:[1]

[¶ 1] This appeal arises from the Trial Division's grant of summary judgment to Appellee Ymal Uludong in Uludong's suit for wrongful termination against his former employer, Appellant Palau National Communications Corporation ("PNCC"). We conclude that the Trial Division erred by granting summary judgment on a theory of liability not raised in Uludong's motion for summary judgment without providing reasonable notice to PNCC and that this error was not harmless. We vacate the judgment and the subsequent damages award and remand the case to the Trial Division for further proceedings.

[1] We determine that oral argument is unnecessary to resolve this matter. ROP R. App. P. 34(a).

BACKGROUND

[¶ 2] PNCC hired Uludong in 2011 as a facility maintenance manager. When hired, Uludong was given a copy of PNCC's Personnel Rules & Regulations (the "manual") and asked to review it. Section A of the manual stated that PNCC is a public corporation established under Title 15 of the Palau National Code ("the statute") and that, under the statute, the Board of Directors ("Board") has authority to establish policies for PNCC, and the General Manager ("GM") may terminate the services of PNCC employees in accordance with those policies.[2] Section L of the manual provided that PNCC employees were prohibited from engaging in a list of 27 "offenses" and that committing one of the listed offenses would constitute cause for discipline, including, if appropriate, termination of employment. Section B of the manual contained a provision regarding modifications to the manual, in which the Board "reserve[d] the right in its discretion to add to, delete from, or amend the contents of [the manual] at any time based on recommendations from management." Techitong Aff., Attach. 7 at 3.

[¶ 3] In September 2013, PNCC began a comprehensive restructuring of its workforce which became known within PNCC as the "Bona Fide Process." The restructuring included abolishing a number of positions—such as Uludong's facility maintenance manager position—and transitioning all existing management-level employees into newly created three-year contract positions. Uludong submitted applications for several management positions created under the Bona Fide Process but, instead, was offered a job as an installation services supervisor, a position for which he had not applied. At Uludong's request, PNCC officials gave Uludong several weeks to review the offer. However, after receiving another request for more time, the GM notified Uludong that the Board had decided that his prior position had been "effectively nullified on January 1, 2014 by the restructuring" and that, due to his failure to accept the position offered to him, his "employment with PNCC ha[d] ceased as of January 9, 2014." Complaint, Ex. 4 at 1. Uludong appealed

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[2] *See* 15 PNC § 314 ("The Board shall appoint a general manager of the P.N.C.C. . . . . The general manager . . . shall, in accordance with policies established by the Board, retain, direct and terminate the services of employees.").

the Board's decision internally and received a hearing, but the GM informed Uludong that the Board's decision would not be reversed.

[¶ 4] Uludong, proceeding pro se, filed suit in the Trial Division, raising nine claims for relief, three of which are relevant to this appeal. In Count IX,[3] Uludong alleged that PNCC's actions "were not in compliance with the [manual]," and that his "legal rights as an employee ha[d] been violated" because "the restructuring of PNCC . . . did not provide for termination of management employees who do not sign contracts . . . ." Complaint ¶¶ 104-07. In Count III,[4] Uludong asserted that, under PNCC's enabling statute, any termination of a PNCC employee must be in accordance with a policy promulgated by the Board and that the Board's policy regarding termination was contained exclusively within the manual. He alleged that he lost his employment by being terminated by the Board for a cause—either his refusal to accept a new contract offer or the abolition of his position—that was not among the list of 27 offenses in section L of the manual. Thus, Uludong alleged that the Board "exceeded its authority" and that his termination was "improper and/or illegal as it was not in accordance with any policy established by the Board." *Id.* ¶¶ 56, 59-60.

[¶ 5] In Count V,[5] Uludong alleged that PNCC, in meetings between management and employees, had promised to negotiate a new employment contract with him under the Bona Fide Process. Specifically, Uludong claimed that PNCC led him to believe that it would allow him sufficient time to review the new contract, that he would not lose his employment during negotiations, and that he would be able to bargain with PNCC regarding the new contract's terms. Uludong alleged that PNCC did not follow through with these promises and made them only to lull employees into accepting the Bona Fide Process without complaint. This deception, Uludong claimed, amounted to fraud and breach of a "verbal contract." *Id.* ¶¶ 75, 78.

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[3] Count IX was titled "Wrongful Termination." *See* Complaint ¶¶ 103-07.

[4] Count III was titled "Count III – Termination Violate Regulations – Section B: Application of Regulations and Section L. Disciplinary Actions, 2: Violations Justifying Disciplinary Actions." *See* Complaint ¶¶ 56-65.

[5] Count V was titled "Bad Faith – Breach of Contract – Fraud." *See* Complaint ¶¶ 72-82.

[¶ 6] Uludong moved for partial summary judgment on what he titled a wrongful termination claim, which appears to have been an amalgam of Counts III and IX of his complaint. He argued that, under section L of the manual, the GM could only dismiss him for one of the 27 listed offenses and that the reasons offered by the GM—the abolition of his former position and his refusal to accept a new position—were not on the list. He also argued that under the manual, which contained the only policies that had been promulgated by the Board, the GM alone, and not the Board, had the discretion to terminate his employment. These violations of PNCC policies, Uludong contended, substantiated his wrongful termination claim.

[¶ 7] In its opposition to Uludong's summary judgment motion, PNCC argued that Uludong lacked any legal support for his wrongful termination claim. It contended that the Board had the authority to adopt the Bona Fide Process pursuant to the statute, and, when it did so, the Board effectively changed its policies, allowing for the abolition of Uludong's former position. Although it insisted a factual dispute remained whether it had violated any policies contained in the manual, PNCC primarily argued that, by adopting the Bona Fide Process, the Board had annulled any policy contained in the manual on which Uludong could base a wrongful termination claim.

[¶ 8] Noting that Uludong's pro se "argument and reasoning [were] difficult to follow," PNCC also addressed several potential "implication[s]" arising from Uludong's summary judgment motion. Def.'s Mem. at 16 (June 26, 2015). Notably, in one sentence of its supporting memorandum, PNCC stated that "[a]ny argument that PNCC may have violated an implied contract of employment created by the [manual] has to take into consideration all of the provisions of the [manual]." According to PNCC, both the statute and the manual clearly permitted PNCC to make unilateral changes to the policies found within the manual. *Id.* at 18.

[¶ 9] Before assessing the merits of Uludong's motion for summary judgment, the Trial Division noted that, although "Uludong ha[d] sued PNCC for wrongful termination as well as breach of contract[,] . . . he ha[d] technically only moved for summary judgment on his wrongful termination claim" and not on his breach of contract claim. Decision at 8 n.2 (March 3, 2015). Despite Uludong's failure to move for summary judgment on his

breach of contract claim, the Trial Division determined that it would address the claim for two reasons. First, the Trial Division concluded that, under *Ngotel v. Duty Free Shoppers Palau, Ltd.*, 20 ROP 9 (2012), Uludong's breach of contract claim was inseparable from his wrongful termination claim. Second, the Trial Division determined that addressing the claim would be consistent with the accepted tradition of Palauan courts' employing a heightened duty of solicitude to pro se litigants.

[¶ 10] The Trial Division granted summary judgment to Uludong on his wrongful termination claim,[6] relying exclusively on a determination that there was no genuine dispute that PNCC had breached an implied-in-fact employment contract with Uludong. First, quoting *Ngotel*, the Trial Division noted that "'wrongful discharge claims sound primarily in contract.'" Decision at 8 (quoting *Ngotel*, 20 ROP at 18) (alteration omitted). Next, the Trial Division found that undisputed facts demonstrated that the manual constituted the terms of an implied-in-fact employment contract. Because PNCC did not dispute that the manual allowed for termination only for the 27 listed offenses or that Uludong had not lost his employment for any those offenses, the Trial Division determined that the only remaining issue was whether the manual had been modified so as to allow PNCC to terminate Uludong's employment.

[¶ 11] The Trial Division concluded that no evidence showed PNCC had modified the manual by the method specified for doing so in section B of the manual. Specifically, the Trial Division rejected PNCC's argument that the Board's adoption of the Bona Fide Process effectively amended the policies contained in the manual, reasoning that the manual could only be amended by the process set forth in section B. Because there was no genuine dispute that the manual, which formed the basis of the implied-in-fact contract, was never modified, Uludong's termination for reasons other than those listed as

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[6] The Trial Division also granted Uludong summary judgment on a related due process claim. The Trial Division concluded that PNCC violated Uludong's due process rights when it wrongfully terminated his employment by breaching an implied-in-fact contract based on the manual. Accordingly, we treat the due process claim as subsumed under the wrongful termination claim.

grounds for termination in the manual constituted a breach of contract and was thus a wrongful termination.

[¶ 12] After giving the parties two weeks' notice, the Trial Division *sua sponte* granted summary judgment to PNCC on the remaining claims for which Uludong had not moved for summary judgment, including his claims for bad faith and fraud contained in Count V of the complaint. After a subsequent hearing, the Trial Division awarded Uludong damages based on his successful wrongful termination claim. PNCC timely appealed.

[¶ 13] Because the parties did not address it in their initial appellate briefs, we ordered supplemental briefing on (1) whether Uludong, in his motion for summary judgment, raised a wrongful termination claim based on an implied-in-fact contract resulting from the manual, and (2) if Uludong did not raise it, whether the Trial Division's granting summary judgment on such a claim amounted to reversible error. The parties have since submitted their supplemental briefs, and the appeal is ripe for disposition.

STANDARD OF REVIEW

[¶ 14] "We review a lower court's grant of summary judgment de novo. Our review is plenary, considering both whether there is no genuine issue of material fact and whether substantive law was correctly applied." *Llecholch v. ROP*, 21 ROP 70, 71 (2014) (citation omitted). "Summary judgment is proper when . . . [there is] no genuine issue of material fact, and [the] moving party is entitled to judgment as a matter of law." *Id.* at 72. A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine "if the evidence is such that a reasonable [finder of fact] could return a verdict for the nonmoving party." *Id.* "In considering whether summary judgment is appropriate, all evidence and inferences are viewed in the light most favorable to the non-moving party." *Llecholch*, 21 ROP at 72.

DISCUSSION

[¶ 15] In their supplemental briefs, both parties state that Uludong moved for summary judgment on a wrongful termination claim based on an implied-in-fact contract theory. We are not convinced. The parties' agreement on the

issue appears to result from fundamental misconceptions regarding theories of liability in wrongful termination claims. Both parties appear to believe that, by raising a claim of wrongful termination based on violation of policies expressed in an employment manual or handbook, a plaintiff necessarily raises a claim for breach of an implied-in-fact contract. Their belief seems to be founded on the assumption that claims for wrongful termination and claims for breach of implied-in-fact contract somehow must be coterminous. As we explain below, this is an erroneously circumscribed view of the law of wrongful termination. A plaintiff may raise a colorable claim of wrongful termination relying on theories other than breach of contract (whether pursuant to an express contract or an implied-in-fact contract); for instance, he may raise a claim sounding in tort that relies on violation of public policy. Consequently, the fact that a plaintiff alleges violation of policies expressed in an employment manual or handbook does not conclusively demonstrate that he has also raised a claim for breach of an implied-in-fact contract.

[¶ 16] Although, where possible, we usually eschew deciding matters in contravention of the parties' agreement, we are not bound by the parties' agreement concerning the law or the legal characterization of the facts. *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 622 (1996) (plurality opinion) (explaining that courts "are not bound to decide a matter of . . . law based on a concession . . . as to the proper legal characterization of the facts"); *U.S. Nat'l Bank v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993) (stating that there is no "impropriety in refusing to accept what in effect [i]s a stipulation on a question of law."). Thus, we will not hesitate to disregard the parties' agreement regarding the characterization of facts where it is necessary to correct a misunderstanding of the law.

[¶ 17] We conclude that the Trial Division erred by granting Uludong summary judgment on a theory of liability that Uludong failed to raise in his motion for summary judgment, that the error was not harmless, and that reversal is warranted.

I. The Trial Division erred by granting summary judgment on a claim that the movant had not raised without giving notice to the non-movant.

[¶ 18] In *Melekeok Gov't Bank v. Adelbai*, 13 ROP 183 (2006), we noted that nothing in ROP R. Civ. P. 56 or our precedent prevents trial courts from entering summary judgment on an issue or claim *sua sponte*. *See* 13 ROP at 187 n.5 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986); 10A Charles Alan Wright, Arthur Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2720 (3d ed. 1998)). However, "[w]here a court enters summary judgment on a theory of liability not raised by the moving party, . . . the court must ensure that the nonmoving party has had an adequate opportunity to argue and present evidence on that issue." *Id.* at 187. In requiring a trial court to provide adequate notice of its intent to grant summary judgment on an issue not raised by the movant, *Adelbai* rested firmly on the widespread practice in U.S. jurisdictions. *See id.* (citing authorities). Indeed, following *Adelbai*, the Federal Rules of Civil Procedure were amended to formally incorporate the practice into the Rules. *See* Fed. R. Civ. P. 56(f); *id.* advisory committee's note to 2010 amendment (noting that Rule 56(f) codifies "procedures that have grown up in practice"). Further, because "summary judgment forecloses any future litigation" on the claim or issue decided, *Secharmidal v. Techemding Clan*, 6 ROP Intrm. 245, 251 (1997) (quoting *White v. Texas American Bank/Galleria*, 958 F.2d 80, 83-84 (5th Cir. 1992)), the notice requirement set forth in *Adelbai* should be strictly enforced, *Adelbai*, 13 ROP at 187.

[¶ 19] Here, we conclude that the Trial Division granted summary judgment to Uludong on a claim that Uludong did not raise in his summary judgment motion. The Trial Division construed Uludong's motion as seeking summary judgment on a wrongful termination claim based on an implied-in-fact contract. We conclude, however, that, although the motion presented a wrongful termination claim, and although both parties assert in their supplement briefs that it was based on an implied-in-fact contract, it was based on alleged statutory rights or public policy, not on an implied-in-fact contract.

[¶ 20] As a default rule, employment without a definite term is presumed to be at-will and may be terminated any time, with or without cause, by the

employer. *See Ngotel*, 20 ROP at 13-14 (collecting cases); *accord* 82 Am. Jur. 2d *Wrongful Discharge* §§ 1-3 (2013). However, "[a]n employer . . . may choose to contractually alter the general rule of at-will employment and restrict [its] freedom to discharge without cause," 82 Am. Jur. 2d *Wrongful Discharge* § 3, and we have held that "a former employee may sustain a breach-of-contract claim against their former employer by establishing a breach of an implied-in-fact contract." *Ngotel*, 20 ROP at 14. In a claim for breach of implied-in-fact contract, the employee bears the burden of "showing: (1) conduct by the employer constituting an offer of employment in abrogation of the at-will rule; (2) the employee accepted the offer by continuing her employment after learning of the offer-creating conduct; and (3) breach of the terms of the offer." *Id.* Provisions contained within an employee manual or handbook may form the basis of an implied-in-fact contract, and failure to abide by those provisions may constitute breach of the contract. *See id.* at 15-17; *see generally* 82 Am. Jur. 2d *Wrongful Discharge* §§ 20-27.

[¶ 21] Of course, breach of an implied-in-fact contract is just one of several bases for a wrongful termination claims that have been recognized in U.S. jurisdictions. *See generally* 82 Am. Jur. 2d *Wrongful Discharge* §§ 2-5, 52-84. Moreover, as previous cases illustrate, employee-plaintiffs in Palau have successfully prosecuted wrongful termination claims in the Trial Division on bases other than breach of contract. *See, e.g.*, *Becheserrak v. ROP*, 7 ROP Intrm. 111 (1998) (statutory basis); *Uchau v. Napoleon*, 19 ROP 1 (2011) (public policy and constitutional bases). Even in *Ngotel*, in which we recognized that "wrongful discharge claims sound primarily in contract," we took note that other courts have recognized wrongful termination claims sounding in tort as well. 20 ROP at 19. We need not determine which of the bases for wrongful termination that have been recognized in U.S. jurisdictions should be recognized in Palau, and we do not pass upon the other bases for wrongful termination claims that have been recognized in the Trial Division. It is sufficient for purposes of this appeal to note that colorable claims for wrongful termination may be asserted under multiple, distinct theories of liability and that breach of an implied-in-fact contract is only one of those theories.

[¶ 22] Another theory of liability for wrongful termination, recognized in some jurisdictions, arises from the so-called "public policy exception" to the at-will rule. *See Ngotel*, 20 ROP at 19; *see generally* 82 Am. Jur. 2d *Wrongful Discharge* §§ 52-63. Under this theory, an employer may be held liable for termination of employment that violates the jurisdiction's public policy. 82 Am. Jur. 2d *Wrongful Discharge* § 52; Restatement of Employment Law § 2.01 (2015); *see also, e.g.*, *Barela v. C.R. England & Sons, Inc.*, 197 F.3d 1313, 1315 (10th Cir. 1999); *Foley v. Interactive Data Corp.*, 765 P.2d 373, 376 (Cal. 1988) (en banc); *Smith v. Bates Technical Coll.*, 991 P.2d 1135, 1139 (Wash. 2000) (en banc). Employer liability is said to be premised on the principle that the right to discharge employees at will should be tempered by public policy, else the threat of discharge might be used to coerce employees to take actions against the public welfare. *See Foley*, 765 P.2d at 376. Thus, although there is variation among jurisdictions that recognize the theory, to be successful under this theory of liability, a former employee generally must show (1) the existence of a clear public policy, (2) the employer's violation of the policy by requiring the employee to engage in conduct that would violate the policy, and (3) termination caused by the employer's requirement that the employee violate the policy.[7] *See* 82 Am. Jur. 2d *Wrongful Discharge* § 52; Restatement of Employment Law, *supra*, § 5.01 *et seq.* (Chapter 5. The Tort of Wrongful Discharge in Violation of Public Policy); *see also, e.g.*, *Barela*, 197 F.3d at 1315. Where the theory is recognized, the existence of a public policy may be shown by reference to statute or regulation. *See* 82 Am. Jur. 2d *Wrongful Discharge* §§ 2-3, 60; Restatement of Employment Law, *supra*, § 5.03 (Wrongful Discharge in Violation of Public Policy: Sources of Public Policy); *see, e.g.*, *Buethe v. Britt Airlines*, 787 F.2d 1194, 1197 (7th Cir. 1986); *Balinger v. Del. River Port Auth.*, 800 A.2d 97, 108 (N.J. 2002).

[¶ 23] When compared, it is plain that a wrongful termination claim based on the public policy exception presents a different theory of liability than a wrongful termination claim based on breach of an implied-in-fact contract.

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[7] In this appeal, because the issue is not before us, we neither conclusively recognize the public policy exception nor define its elements. We list the basic elements generally used in U.S. jurisdictions here only to compare them to the elements of a wrongful discharge claim based on breach of an implied-in-fact contract, which we set forth in *Ngotel*.

Under the latter theory, the employee's termination is wrongful because it is in breach of an implicit promise by the employer to voluntarily restrict its rights, a promise made personally to the employee for his benefit and to induce his employment. In the former theory, however, the termination is wrongful because it violates a duty imposed on the employer, not by promise to a particular employee, but by a policy embodied in law or regulation, inuring to the benefit of the general public. *See Foley*, 765 P.2d at 377; *Smith*, 991 P.2d at 1141. In fact, recognizing that the basis of liability is a duty imposed by public policy rather than a promise, jurisdictions that accept the public policy exception usually view the claim as an action in tort, not contract. *See* 82 Am. Jur. 2d *Wrongful Discharge* § 58; Restatement of Employment Law, *supra*, § 5.01 *et seq.* (Chapter 5. The Tort of Wrongful Discharge in Violation of Public Policy); *see also* W. Page Keeton, *Prosser and Keeton on the Law of Torts* § 92 (5th ed. 1984) ("Tort obligations are in general obligations that are imposed by law—apart from and independent of promises from the manifested intention of the parties . . . ."). The fundamental difference in the claims' theoretical underpinnings is manifested even more clearly in the widely divergent elements of proof required for each claim, respectively. For the contract claim, the focus is on the intention of the parties. For the tort claim, however, the parties' intentions toward each other are rarely at issue: what matters is whether the employer acts in contravention to a law or regulation embodying a public policy.

[¶ 24] Our plenary review of the case below demonstrates that Uludong moved for summary judgment on a wrongful termination claim based only on public policy embodied in statute and regulation. We reach this conclusion for multiple reasons. First, it is unclear whether Uludong's complaint contained a claim for breach of an implied-in-fact contract relying on the manual. The only claim mentioning a breach of contract is in Count V, but it is plain that that claim relates to an alleged contract arising not from language found in the manual but from oral expressions of PNCC management explaining how negotiations on a new contract offer under the Bona Fide Process would proceed. Only Counts III and IX are premised on a violation of the manual's terms, but it is not clear that those Counts state a breach of contract claim. Nowhere in them does Uludong refer to contractual rights or breach, and we have difficulty identifying any language in Counts III and IX

suggesting that his claim is based on PNCC's failure to meet the intentions—manifested to him in the manual—which induced him to accept the offer of employment as a facility maintenance manager. Rather, even with a liberal construction, it seems the complaint's references to the manual are part of a claim that PNCC's actions violated rights protected by statute and regulation. Specifically, the complaint asserts that PNCC's violation of the manual contravened the statutory requirements that employment actions should be taken by the GM and in accordance with Board-promulgated policies, as well as the regulatory requirement, contained in the section L of the manual, that termination only be for one of 27 listed offenses.[8]

[¶ 25] Second, regardless of whether the complaint stated a wrongful termination claim based on a breach of an implied-in-fact contract, it is clear to us that Uludong did not move for summary judgment on such a claim, despite his assertion to the contrary in his supplemental brief.[9] Although his summary judgment motion lacked clarity, it plainly argued a theory that PNCC lacked statutory and regulatory authority to terminate Uludong's employment and did not assert a breach of contractual duties owed to Uludong arising from promises manifested by PNCC's conduct toward him personally. Further, in its opposition to summary judgment, PNCC understood the motion to be based on violations of statute and regulation rather than contract. Its primary argument was that the Board's adoption of the Bona Fide Process satisfied any statutory or regulatory prerequisites for ending Uludong's employment. Only as an afterthought, did PNCC, in a single sentence, address liability premised on a contract theory, which was the first and only instance that either party mentioned the issue in their

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[8] We do not conclusively determine whether Uludong's complaint stated a claim for breach of an implied-in-fact contract based on the terms of the manual because that issue is not before us. We merely note our difficulty in identifying such a claim in the complaint to show that it is unlikely that the parties understood Uludong's motion for summary judgment to present such a claim. For purposes of remand, the issue is not determined in this opinion.

[9] As we have stated, we are not bound by the parties' characterization of the record, especially where rejecting the parties' characterization is necessary to correct a misunderstanding of the law. *See supra*, pp. 9-10. Where the parties' characterization and the record conflict, we let the record speak for itself.

summary judgment filings. Most importantly, the Trial Division expressly determined that Uludong had not raised the claim in his summary judgment motion and decided to address the claim despite acknowledging Uludong's failure to raise it. In light of the parties' summary judgment filings and the Trial Division's acknowledgement, we conclude that Uludong did not move for summary judgment on a wrongful termination claim based on breach of an implied-in-fact contract.

[¶ 26] We now turn to the Trial Division's two reasons for entering summary judgment on the claim despite Uludong's failure to raise it: (1) that a wrongful termination claim and a breach of an implied-in-fact contract claim are inseparable under *Ngotel*, and (2) that courts should employ a heightened duty to pro se litigants. The first reason is an incorrect statement of the law. Our decision in *Ngotel* did not state that wrongful termination claims are coterminous with claims for breach of an implied-in-fact employment contract. In fact, the *Ngotel* decision expressly stated that wrongful termination claims sound in tort as well as contract. 20 ROP at 19. And as our above overview of wrongful termination claims demonstrates, although a breach of an implied-in-fact employment contract often forms the basis of a wrongful termination claim, plaintiffs may raise other bases for wrongful termination as well. Thus, a wrongful termination claim based on breach of contract is separable from one based on public policy and, absent the required notice, a trial court is not free to *sua sponte* grant summary judgment on the former when only the latter has been raised in a motion for summary judgment. The Trial Division's decision to do so here was error.

[¶ 27] In previous cases, we have recognized "a long standing, and oftentimes unspoken, tradition in the United States and here in Palau of courts employing a heightened duty to its pro se litigants." *Ikluk v. Koror State Public Lands Authority*, 20 ROP 128, 131 (2013) (brackets omitted) (quoting *Whipps v. Nabeyama*, 17 ROP 9, 11 n. 2 (2009). "[T]his tradition serves the interest of justice in helping to ensure meaningful access to the courts of Palau to all Palauan citizens, regardless of their socio-economic status." *Whipps*, 17 ROP at 11 n.2. In general, when a litigant appears pro se, courts should liberally construe the litigant's pro se filings. *See Kee v. Ngiraingas*, 20 ROP 277, 282 n.6 (2013); *Mikel v. Saito*, 20 ROP 95, 100 n.2 (2013) (citing *Suzuky v. Petrus*, 17 ROP 244, 244 n.1 (2010)). However,

courts may not use their responsibility to liberally construe pro se filings, as an excuse to "tak[e] on the impermissible advocatory role of argument-creator." *Suzuky*, 17 ROP at 244 n.1. Absent the required notice, a trial court's raising a claim for summary judgment that it acknowledges has not been raised in a pro se litigant's summary judgment motion crosses over the line from liberal construction to advocacy and argument-creation. Moreover, a civil litigant's pro se status, does not grant him a license to ignore the rules of procedure generally applicable to all civil litigants, whether pro se or represented. *See McNeil v. United States*, 508 U.S. 106, 113 (1993) ("[W]e have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel.").

[¶ 28] In *Adelbai*, we recognized the procedural rule that a trial court may not *sua sponte* grant summary judgment to a litigant unless it gives reasonable notice to the litigant's opponent. This procedural rule applies regardless of whether the litigant is represented by counsel: a litigant's pro se status does not permit the litigant or the trial court to sidestep this rule. Because trial courts may not act as both judge and advocate for a pro se litigant and because a pro se civil litigant must abide by the same rules that apply to represented civil litigants, we hold that the policy of employing a heightened duty to pro se litigants does not permit trial courts to dispense with *Adelbai*'s notice requirement. Accordingly, the Trial Division's decision to dispense with the notice requirement here is not excused by Uludong's pro se status.

[¶ 29] Although a trial court may grant summary judgment on an issue not raised by a movant, it must first provide the non-movant reasonable notice of its intention to do so, in order that the non-movant "ha[s] an adequate opportunity to argue and present evidence on that issue." *Adelbai*, 13 ROP at 187. Here, the Trial Division did not provide any notice to PNCC that it intended to consider a theory of liability not raised in Uludong's summary judgment motion.[10] In the absence of the required notice to the non-

[10] A hearing was held between the filing of the cross-motions for summary judgment and the Trial Division's entering partial summary judgment, presenting the only instance in which the Trial Division could have provided

movant, a trial court's entry of summary judgment on an issue not raised by the movant is error that is reversible on appeal unless it is shown to be harmless.

II. The Trial Division's error was not harmless.

[¶ 30] Although *Adelbai*'s notice requirement is strictly enforced, we will not reverse summary judgment for noncompliance with the requirement if the trial court's error was harmless. *See Adelbai*, 13 ROP at 187. "[S]ummary judgment will be considered harmless if the nonmovant has no additional evidence or if all of the nonmovant's additional evidence is reviewed by the appellate court and none of the evidence presents a genuine issue of material fact." *Id.* (citing *Resolution Trust Corp. v. Sharif-Munir-Davidson Dev. Corp.*, 992 F.2d 1398, 1403 n.7 (5th Cir. 1993)).

[¶ 31] Here, we cannot conclude that the Trial Division's entry of summary judgment was harmless. Usually, an appellant should demonstrate that it has additional evidence it did not present in its opposition to summary judgment or else point to evidence raising a genuine dispute that it did present to the trial court. However, where the theory of liability on which the trial court granted summary judgment was not clearly at issue until it was *sua sponte* raised and decided in summary judgment by the trial court, harm exists because the non-movant was never on notice that evidence regarding the issue should be presented. *See, e.g.*, *Smith v. Perkins Bd. of Educ.*, 708 F.3d 821, 831 (6th Cir. 2013) ("Had Plaintiff been given notice that the

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the required notice. Our review of the transcript of that hearing reveals that the Trial Division provided no such notice to PNCC. Even if the Trial Division had notified PNCC at that time, we question whether the hearing, which occurred only 11 calendar days before entry of partial summary judgment, provided PNCC enough time to respond as to constitute reasonable notice. We note that, in granting PNCC summary judgment on all remaining claims, the Trial Division misinterpreted *Adelbai*, believing it held that a trial court must provide a non-movant 10 day's notice before granting summary judgment *sua sponte*. Our decision in *Adelbai* does not specify a 10-day time period, but—if it had—any notice provided at the hearing would have been insufficient, as only seven days would have been counted. *See* ROP R. Civ. P. 6(a).

district court was considering granting summary judgment on alternative grounds, she could conceivably have sought or produced additional evidence to defend against summary judgment."); *Mannesman Demag Corp. v. M/V CONCERT EXPRESS*, 225 F.3d 587, 595 (5th Cir. 2000) (finding error harmful because non-movant "ha[d] a potentially valid defense that it was not on notice to raise").

[¶ 32] Here, it appears that PNCC was not on notice that it should present evidence to defend against a claim of wrongful discharge under a breach of an implied-in-fact contract theory of liability. As we have stated, that claim was not clearly alleged in Uludong's complaint, and it was not raised in Uludong's summary judgment motion. PNCC was not provided sufficient notice of the claim or the impending summary judgment to be entered on it and, thus, PNCC was not afforded an opportunity to present evidence on the claim. Accordingly, the Trial Division's *sua sponte* entry of summary judgment without notice cannot be deemed harmless. Because we cannot say that the error was harmless, we must vacate the Trial Division's summary judgment and the resulting damages judgment.

CONCLUSION

[¶ 33] For the foregoing reasons, the Trial Division's partial summary judgment on Uludong's claims of wrongful termination and violation of due process and the judgment awarding Uludong damages thereon are **VACATED**. The matter is **REMANDED** to the Trial Division for further proceedings consistent with this opinion. In light of Justice Pate's departure, the case will be re-assigned to a new trial judge.

SO ORDERED, this 14th day of June, 2016.