138 Nev., Advance Opinion 85

IN THE SUPREME COURT OF THE STATE OF NEVADA

LYNITA SUE NELSON, INDIVIDUALLY AND AS TRUSTEE OF THE LSN NEVADA TRUST DATED MAY 30, 2001,
Appellant,
vs.
JEFFREY L. BURR, ESQ.; AND JEFFREY BURR, LTD.,
Respondents.

No. 81456

Appeal from a district court order granting a motion to dismiss a legal malpractice action. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

Affirmed.

Pecos Law Group and Curtis R. Rawlings, Henderson,
for Appellant.

Lipson Neilson P.C. and Joseph P. Garin and Amber M. Williams, Las Vegas; Lewis Roca Rothgerber Christie LLP and Daniel F. Polsenberg, Joel D. Henriod, and Abraham G. Smith, Las Vegas;
for Respondents.

Julia S. Gold and Dara J. Goldsmith, Reno,
for Amicus Curiae Probate and Trust Law Section of the State Bar of Nevada.

22-40920

BEFORE THE SUPREME COURT, EN BANC.[1]

OPINION

By the Court, HARDESTY, C.J.:

In this opinion, we clarify that legal malpractice claims that arise from legal advice given in the course of drafting an estate plan are transactional legal malpractice claims. While the statute of limitations set forth in NRS 11.207(1) applies to both transactional and litigation-based legal malpractice claims, this court's litigation-malpractice tolling rule applies only to litigation-based legal malpractice claims, meaning claims that arise from legal representation during litigation. For transactional legal malpractice claims, this court interprets NRS 11.207(1) consistently with its jurisprudence in *Gonzales v. Stewart Title of Northern Nevada*, 111 Nev. 1350, 905 P.2d 176 (1995), *overruled on other grounds by Kopicko v. Young*, 114 Nev. 1333, 971 P.2d 789 (1998), which held that such an action accrues when the plaintiff suffers damages and discovers (or should have discovered) the material facts of the case.

While appellant Lynita Nelson asks this court to determine that her legal malpractice claim is neither strictly litigation-based nor transactional, we determine that her claim is plainly transactional, and we therefore do not apply the litigation-malpractice tolling rule to it. Rather, we determine that under NRS 11.207(1) and *Gonzales*, the statute of limitations on Lynita's malpractice claim began to run when she retained

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[1]The Honorable Ron D. Parraguirre, Justice, did not participate in the decision in this matter. The Honorable Mark Gibbons, Senior Justice, was appointed by the court to sit in place of the retired Honorable Abbi Silver, Justice. Nev. Const. art. 6, § 19; SCR 10.

independent counsel to review the legal documents that were the subject of her claim and thus sustained the expense of hiring such counsel to litigate the documents' meaning. As she retained counsel more than two years before filing her malpractice claim, the claim is barred by the statute of limitations, and we affirm the district court's order dismissing Lynita's complaint.

BACKGROUND

Lynita and Eric Nelson married in 1983 and divorced in 2013. During their marriage, Eric sought respondent Jeffery L. Burr's counsel in the creation of an estate plan that would insulate his and Lynita's estate from creditors. To this end, Lynita and Eric entered into a separate property agreement drafted by Burr and thereafter moved their assets into separate revocable trusts. During this time, Lynita retained independent counsel recommended by Burr. Lynita alleges that she was never given time to research and retain independent counsel of her own choosing and rather reasonably relied on Burr's explanation of the legal effects of the separate property agreement and the separate trusts.

In 2001, Burr advised Eric to utilize individual self-settled spendthrift trusts to further protect his and Lynita's community assets. Eric and Lynita agreed and converted their separate property trusts into self-settled spendthrift trusts—the Eric L. Nelson (ELN) Trust and the Lynita S. Nelson (LSN) Trust. They funded these trusts with the separate property previously held in their respective revocable trusts. Lynita alleges that Burr advised her that the spendthrift trusts would have no legal effect on the distribution of Eric and Lynita's assets in the event of a divorce and that she relied on this advice despite being independently represented. Eric subsequently transferred millions of dollars from the LSN Trust to the ELN Trust during their marriage, allegedly based on Burr's advice to level off or

equalize the holdings of the trusts to protect the assets from third-party creditors.

In 2009, Eric filed for divorce. During the divorce proceedings, Eric and Lynita disagreed on how the assets held in their individual spendthrift trusts should be distributed. Burr testified in 2010 regarding the intended effects of the separate property agreement and the spendthrift trusts and his representations to Lynita regarding what the documents would accomplish. Specifically, he testified that the purpose of the trusts was to protect the family from creditors, that he had never intended the trusts to alter Eric's and Lynita's property rights in the event of a divorce, and that he had advised both Eric and Lynita of this. With respect to the separate property agreement, Burr testified that it did not direct how any community property acquired after its execution would be divided and that the parties could therefore still have community property issues arise after the agreement's execution.

A decree of divorce was issued in 2013. It equalized the property in the ELN and LSN Trusts between Eric and Lynita and provided that Lynita's support arrears, lump sum alimony, and attorney fees were to be paid from the ELN Trust. Eric appealed, and in May 2017, this court partly reversed the divorce decree, determining that the assets in the spendthrift trusts could not be equalized or levied against through court order for any purpose, that the separate property agreement was valid, and that the parties' property was validly separated into their respective separate property trusts at the time of its execution. *See Klabacka v. Nelson*, 133 Nev. 164, 165, 394 P.3d 940, 943 (2017).

Within two years of the decision, Lynita filed a legal malpractice complaint against Burr. Lynita alleged that this court's

reversal of the divorce decree meant that she was no longer entitled to over $5,000,000, and that these damages were caused by Burr's failure to properly advise her on the legal ramifications of executing the separate property agreement and creating the spendthrift trusts. Burr responded with a motion to dismiss under NRCP 12(b)(5), arguing that Lynita's malpractice claim is time-barred by the statute of limitations set forth in NRS 11.207(1).

The district court granted the motion to dismiss. It reasoned that Lynita's legal malpractice claim is transactional and that the statute of limitations for transactional legal malpractice claims, unlike for litigation-based legal malpractice claims, begins to run prior to the completion of the litigation arising from the alleged malpractice. The court found that Burr's testimony in 2010 during the divorce trial triggered the two-year statute of limitations under NRS 11.207(1) and that Lynita's 2019 malpractice claim is thus time-barred. After Lynita appealed, the Court of Appeals reversed and remanded. We granted Burr's subsequent petition for review under NRAP 40B, and we now issue this opinion addressing the parties' arguments.

DISCUSSION

Lynita argues on appeal that the district court erred in finding that her malpractice claim began to accrue during the divorce trial. She further contends that she could not have known of the facts constituting her legal malpractice claim or suffered damages until this court reversed the divorce decree in 2017. Burr responds that Lynita's claim is clearly transactional, arguing that Lynita sustained damages and discovered or should have discovered the material facts constituting her cause of action when she assumed the expense of litigating the meaning of the separate property agreement and trust documents during the divorce proceedings.

Standard of review

A district court's order granting a motion to dismiss under NRCP 12(b)(5) is reviewed de novo. *See Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). A complaint should be dismissed for failure to state a claim "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Id.* This standard is rigorous, with every inference drawn in favor of the nonmoving party. *Id.* at 227-28, 181 P.3d at 672. And when, as here, the facts are uncontroverted, "the application of the statute of limitations is a question of law that this court reviews de novo."[2] *Holcomb Condo. Homeowners' Ass'n, Inc. v. Stewart Venture, LLC*, 129 Nev. 181, 186-87, 300 P.3d 124, 128 (2013). The statute of limitations is an appropriate ground on which to bring a motion to dismiss under NRCP 12(b)(5). *See id.* at 186, 300 P.3d at 128.

This court has consistently held that the litigation-malpractice tolling rule applies only to claims that arise from litigation representation

NRS 11.207(1) sets forth the statute of limitations for legal malpractice claims as follows:

> An action against an attorney . . . to recover damages for malpractice, whether based on a breach of duty or contract, must be commenced within 4 years after the plaintiff sustains damage or within 2 years after the plaintiff discovers or through the use of reasonable diligence should have

[2]Lynita seemingly argues that the facts are not uncontroverted because the parties disagree about whether Burr's 2010 testimony put her on notice of a legal malpractice claim. We reject this argument because Lynita does not dispute the content of Burr's testimony, but rather the legal effect of that testimony.

> discovered the material facts which constitute the cause of action, whichever occurs earlier.

This court has explained that "[a]s a general rule, a legal malpractice action does not accrue until the plaintiff knows, or should know, all the facts relevant to the [malpractice] elements and damage has been sustained." *Hewitt v. Allen*, 118 Nev. 216, 221, 43 P.3d 345, 347-48 (2002).

When the alleged legal malpractice occurs during the course of litigation, the malpractice claim does not accrue until the underlying litigation and any appeal of an adverse ruling from the underlying litigation are resolved. *Id.* at 221, 43 P.3d at 348. This rule, known as the litigation-malpractice tolling rule, delays the commencement of the statute of limitations until the litigation in which the malpractice occurred ends and damages are certain. *Brady, Vorwerck, Ryder & Caspino v. New Albertson's, Inc.*, 130 Nev. 632, 642, 333 P.3d 229, 235 (2014). The rationale for the litigation-malpractice tolling rule is that a client cannot discover the material facts for a litigation malpractice claim until the litigation concludes because any damages arising from an attorney's error during litigation may be altered or eliminated altogether on appeal. *See id.* ("When the litigation in which the malpractice occurred continues to progress, the material facts that pertain to the damages still evolve as the acts of the offending attorney may increase, decrease, or eliminate the damages that the malpractice caused."); *see also K.J.B., Inc. v. Drakulich*, 107 Nev. 367, 370, 811 P.2d 1305, 1306 (1991) (explaining that when legal malpractice is alleged to have occurred during litigation, damages "are premature and speculative until the conclusion of the underlying lawsuit").

The same is not true for legal malpractice claims arising out of transactional work. *See Kim v. Dickinson Wright, PLLC*, 135 Nev. 161, 166, 442 P.3d 1070, 1074 (2019) ("[T]he tolling rule does not apply to non-

adversarial or transactional representation."). For those claims, the material facts constituting transactional malpractice can be discovered prior to the completion of any litigation arising out of that malpractice. *See Kopicko v. Young*, 114 Nev. 1333, 1337 n.3, 971 P.2d 789, 791 n.3 (1998) (distinguishing transactional malpractice claims from litigation-based malpractice claims). In *Gonzales v. Stewart Title of Northern Nevada*, we explained that a malpractice "action accrues when the litigant discovers, or should have discovered, the *existence* of damages, not the exact numerical extent of those damages." 111 Nev. 1350, 1353, 905 P.2d 176, 178 (1995). A litigant who files or has to defend against a lawsuit occasioned by transactional malpractice "sustains damage by assuming the expense, inconvenience and risk of having to maintain such litigation" and thus is aware of the existence of damages at that time, even though the amount of the damages is uncertain. *Id.* at 1353-54, 905 P.2d at 178 (internal quotation marks omitted).[3] Thus, there is no need to toll commencement of the limitations period for transactional malpractice claims, and the period begins to run when the material facts of the claim, including the existence of damages, becomes known or discoverable.

Lynita's legal malpractice claim is transactional, and the litigation-malpractice tolling rule therefore does not apply

Lynita argues that the district court erred in finding her malpractice claim to be transactional because Lynita's complaint alleged that Burr failed to properly advise her on the legal effects of the property agreement and trust documents that he drafted. Because Burr's alleged

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[3]Further, we take this opportunity to clarify that the rules set forth in *Gonzales* regarding when the statute of limitations generally begins to run for transactional legal malpractice claims survived the 1997 legislative amendment to NRS 11.207(1) and are still applicable.

malpractice occurred in giving legal advice related to the drafting of estate planning documents, we conclude that the malpractice claim was clearly transactional.[4] *See Viner v. Sweet*, 70 P.3d 1046, 1048 (Cal. 2003) (defining transactional work in the context of a malpractice claim as "giving advice or preparing documents for a business transaction").

Lynita next argues that she could not have discovered the facts forming the basis of her malpractice claim simply by reviewing the separate property agreement and spendthrift trusts because they were not facially defective. She contends that she did not learn of Burr's allegedly negligent advice and did not suffer any damages from the negligence until this court reversed the divorce decree on appeal in 2017. Contrary to Lynita's assertions, a legal document need not be obviously defective for a client to be put on notice of the facts forming the basis of her transactional malpractice claim. Indeed, in *Gonzales*, this court held that the plaintiffs had notice of the facts constituting malpractice when the legal effect of the document drafted by their attorney was called into question and the plaintiffs incurred expenses in hiring an attorney and litigating the issue. 111 Nev. at 1351-52, 905 P.2d at 177.

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[4]Further, we reject Lynita's argument that her claim is neither transactional nor litigation-based but is instead seemingly a hybrid category. Lynita offers no legal basis to support the existence of a hybrid category, let alone to support her argument that her plainly transactional claim should be considered a hybrid, and we decline to create that category now. *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); NRAP 28(a)(10)(A) (requiring the argument section of appellant's briefing to contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies").

Here, the legal effect of the separate property agreement and spendthrift trusts on the distribution of assets was called into question and extensively litigated during the divorce trial, with Burr being called as a witness in 2010 to testify about those documents. Though Lynita had already retained counsel to represent her in the divorce, she necessarily incurred the additional expense of litigating the meaning of those documents during the trial. Consistent with *Gonzales*, then. the two-year statute of limitations for Lynita's claim began to run during the divorce trial when she retained counsel to review the allegedly faulty documents prepared by Burr. *See Gonzales*, 111 Nev. at 1354, 905 P.2d at 178-79. Even drawing every inference in the light most favorable to Lynita as the nonmoving party, the two-year statute of limitations under NRS 11.207(1) expired by the time Lynita filed her malpractice complaint in 2019. We therefore conclude that the district court did not err in finding Lynita's claim time-barred under NRS 11.207(1), and we affirm.

_____, C.J.
Hardesty

We concur:

_____, J.
Stiglich

_____, J.
Cadish

_____, J.
Pickering

_____, J.
Herndon

_____, Sr. J.
Gibbons