

IN THE SUPREME COURT OF THE STATE OF NEVADA

STAN PACK, BANKRUPTCY
TRUSTEE,
Appellant,
vs.
DESIREE RYAN, AN INDIVIDUAL;
AND BRIAN TANKO, AN INDIVIDUAL,
Respondents.

No. 48969

FILED

JUL 24 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. V. [Signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appeal from a district court summary judgment in a tort and real property contract action. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

In this action, appellant Stan Pack, bankruptcy trustee, has reopened Dawn Hyatt's Chapter 7 bankruptcy proceedings, substituting himself in her place. Accordingly, Pack, for purposes of the bankruptcy estate, has assumed Hyatt's interest in the present appeal and the five causes of action that she brought below. With respect to Hyatt's first claim, she sued respondents Desiree Ryan and attorney Brian Tanko for breach of contract and sought a fifty percent interest in the proceeds from the sale of two parcels of residential property in Cold Creek, Nevada (the property). Second, Hyatt brought a quiet title action against Ryan with respect to the property. Third, Hyatt sued Tanko for professional negligence. Fourth, Hyatt sued Tanko for the loss of use and conversion of a boat.¹ Fifth, Hyatt sued her former husband, Johnny Hyatt, for

¹Pack does not discuss the merits of his loss of use and conversion claims in his appellate brief, alluding to them only in a footnote. Thus, we
continued on next page . . .

partnership by estoppel, seeking fifty percent interest in the partnership's profit in conjunction with the sale of the property.² The district court dismissed Hyatt's quiet title action against Ryan³ and granted respondents summary judgment on all of Hyatt's remaining claims.

Pack contends that this court should reverse the district court's grant of summary judgment to the respondents because it erred when it concluded that (1) Hyatt lacked standing,⁴ (2) her contract claim was barred by judicial estoppel and the statute of frauds, and (3) her professional negligence claim failed as a matter of law because she did not suffer any injury arising from the alleged attorney-client relationship. Pack further argues that the district court abused its discretion when it

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deem the claims waived from appellate consideration. See NRAP 28(a)(4) (requiring that an opening brief contain the issues presented for review and the appellant's supporting contentions); Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006).

²Johnny Hyatt is not a party to this appeal and, thus, we do not review the merits of this contention in this appeal. See NRAP 3(c) (requiring the notice of appeal to specify the names of each party to the appeal).

³In his appellate brief, Pack does not discuss the merits of this claim, or the propriety of the district court's decision to dismiss it. Thus, we deem the claim waived from appellate consideration. See NRAP 28(a)(4); Edwards, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

⁴The issue of standing was resolved when the district court ordered that Pack be substituted in for Hyatt. The parties do not dispute the propriety of this ruling on appeal.

awarded attorney fees and costs to the respondents.⁵ We conclude that Pack's contentions lack merit. The parties are familiar with the facts of this case, and we recount them only as necessary to explain our decision.

Summary judgment

Pack contends that the district court erred when it granted respondents summary judgment on Hyatt's (1) breach of contract and (2) professional negligence claims. We disagree.

A district court's grant of summary judgment is reviewed de novo.⁶ Summary judgment is appropriate only when there is "no 'genuine issue as to any material fact.'"⁷ "A genuine issue of material fact exists when a reasonable jury could return a verdict for the non-moving party."⁸

⁵After Pack filed his notice of appeal, the district court entered a post-judgment order awarding attorney fees and costs to the respondents. We conclude that Pack's challenge to this post-judgment order is inappropriately raised because (1) he failed to amend his notice of appeal to include the district court's award of attorney fees and costs, and (2) he failed to independently appeal the district court's award. See NRAP 3A(b)(2) (permitting this court to consider an appeal "from any special order made after final judgment"); see also Lee v. GNLV Corp., 116 Nev. 424, 426, 996 P.2d 416, 417 (2000) ("A post-judgment order awarding attorney's fees and/or costs may be appealed as a special order made after final judgment, pursuant to NRAP 3A(b)(2)."). Accordingly, we do not reach the merits of his argument regarding attorney fees and costs.

⁶Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005)

⁷Id. (quoting NRCP 56(c)).

⁸Lumbermen's Underwriting v. RCR Plumbing, 114 Nev. 1231, 1234, 969 P.2d 301, 303 (1998).

On appeal, this court views “the evidence, and any reasonable inferences drawn from it. . . in a light most favorable to the nonmoving party.”⁹

1. Breach of contract claim

Pack contends that the district court erred when it concluded that judicial estoppel barred Hyatt’s claim to the property’s sale proceeds because she was ignorant of the fact that she had an interest in the property when she filed for bankruptcy. Pack further argues that the district court erred when it concluded that judicial estoppel equally applied to his claims, which he now brings on Hyatt’s behalf. We disagree with both contentions.

Judicial estoppel bars Hyatt’s breach of contract claim

This court reviews de novo a district court’s ruling on whether judicial estoppel applies.¹⁰ Judicial estoppel protects the integrity of the courts, and because it is an extraordinary remedy, this court applies it only where a party intentionally takes an inconsistent position with the goal of obtaining an unfair advantage.¹¹ Judicial estoppel has the following five elements:

“(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent;

⁹Wood, 121 Nev. at 729, 121 P.3d at 1029.

¹⁰NOLM, LLC v. County of Clark, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004).

¹¹Id.

and (5) the first position was not taken as a result of ignorance, fraud, or mistake.”¹²

Viewing the evidence in a light most favorable to Pack, we conclude that the district court did not err when it ruled that judicial estoppel barred Hyatt’s breach of contract claim because the respondents proved that all five judicial estoppel elements existed. First, the record indicates that Hyatt took two differing positions because she claimed in her 2003 and 2004 bankruptcy proceedings that she did not have an interest in any real property or any partnership interests, and then adopted a contrary position in this case when she claimed an interest in the property. Second, the positions were taken in judicial proceedings because Hyatt presented her contentions before the United States Bankruptcy Court for the District of Nevada and the Eighth Judicial District Court, Clark County. Third, Hyatt successfully asserted her first position at the United States Bankruptcy Court because she received a Chapter 7 discharge without having to sell her interest in the property to compensate creditors. Fourth, the positions were totally inconsistent because Hyatt swore, under penalty of perjury, in her Chapter 13 proceedings in 2003 and her Chapter 7 proceedings in 2004, that she did not have real property or partnership interests. Conversely, in this appeal, Pack claims that Hyatt has an interest in the proceeds from the sale of the property because of an oral contract. The record further indicates that Hyatt’s alleged oral contract with the respondents arose before her 2004 Chapter 7 proceedings. Fifth, the record indicates that

¹²Id. (quoting Furia v. Helm, 4 Cal. Rptr. 3d 357, 368 (Ct. App. 2003)).

Hyatt did not take her first position as a result of ignorance, fraud, or mistake because (1) Pack concedes that Hyatt intentionally did not put her name on the title to the property because she was considering filing for bankruptcy due to her mounting medical bills; and (2) Hyatt conveyed her joint tenancy interest on May 12, 2004, which was less than two months before she filed for Chapter 7 bankruptcy on July 9, 2004.

Judicial estoppel likewise bars Pack's breach of contract claim brought on Hyatt's behalf

We conclude that judicial estoppel likewise bars Pack's breach of contract claim brought on Hyatt's behalf. Pack stipulated with the respondents that pursuant to In re Agri Bio Tech, Inc.,¹³ he would not take any greater legal rights than Hyatt, and the district court confirmed by order this stipulation. Thus, as we conclude that the district court did not err when it ruled that judicial estoppel barred Hyatt's breach of contract claim, we likewise conclude that judicial estoppel applies to Pack's reassertion of that claim.¹⁴

2. Professional negligence claim

Pack argues that the district court erred when it granted respondents summary judgment on Hyatt's professional negligence claim because a genuine issue of material fact existed regarding whether Hyatt and Tanko formed an attorney-client relationship. While we agree with Pack that there was a genuine issue of material fact regarding the

¹³No. CV S 02 0537 PMP (D. Nev. Apr. 1, 2005) (order).

¹⁴See id. (concluding that the bankruptcy trustee could not recover against the defendant because the defense of in pari delicto applied to the debtor and applied "with equal force" to the bankruptcy trustee).

formation of an attorney-client relationship, we conclude that the district court did not err in granting Tanko summary judgment on the claim because the record indicates that Hyatt was not actually injured by any of the purported representations.

To assert a legal malpractice claim, a plaintiff must prove the following five elements:

(1) an attorney-client relationship; (2) a duty owed to the client by the attorney to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity possess in exercising and performing the tasks which they undertake; (3) a breach of that duty; (4) the breach being the proximate cause of the client's damages; and (5) actual loss or damage resulting from the negligence.¹⁵

Regarding the first element, an attorney-client relationship exists “when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney’s professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance.”¹⁶ An attorney-client relationship does not require that the parties execute a formal agreement,¹⁷ and the inquiry is highly fact-specific.¹⁸

¹⁵Day v. Zube, 112 Nev. 972, 976, 922 P.2d 536, 538 (1996).

¹⁶Todd v. State, 113 Nev. 18, 24, 931 P.2d 721, 725 (1997) (quoting DeVaux v. American Home Assur. Co., 444 N.E.2d 355, 357 (Mass. 1983)).

¹⁷Williams v. Waldman, 108 Nev. 466, 471, 836 P.2d 614, 618 (1992).

¹⁸Waid v. Dist. Ct., 121 Nev. 605, 611, 119 P.3d 1219, 1223 (2005).

Viewing the evidence in a light most favorable to Pack, we conclude that the district court erred when it ruled that a genuine issue of material fact did not exist regarding whether Hyatt and Tanko entered into an attorney-client relationship. An attorney-client relationship may have arisen because Hyatt alleged that Tanko (1) visited the property, (2) discussed the sale of the property with Hyatt, and (3) told her that she did not need to worry about the details of its sale. Furthermore, while Hyatt did not enter into a formal attorney-client contract with Tanko, a formal agreement is not necessary to form an attorney-client relationship. On the other hand, an attorney-client relationship may not have arisen because Tanko contends that Pack did not provide any evidence in the record that (1) Hyatt actually sought Tanko's advice in executing the deed, (2) his professional competence included advising clients on real estate transactions, or (3) Tanko issued Hyatt any receipts, notations, or documents, indicating that he intended to give her advice or assistance.

While the district court erred when it found that a genuine issue of material fact did not arise concerning the formation of an attorney-client relationship, we conclude that the error was harmless because Pack failed to show that Hyatt suffered any actual loss or damage.¹⁹ In Hyatt's Chapter 13 bankruptcy proceedings in March 2003, she swore under oath that she did not have any real property interests.

¹⁹See Semenza v. Nevada Med. Liability Ins. Co., 104 Nev. 666, 668, 765 P.2d 184, 186 (1988) (explaining that a professional malpractice action must be dismissed when a plaintiff has not suffered an actual injury); see also Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 111, 825 P.2d 588, 592 (1992) (concluding that summary judgment is appropriate if a plaintiff cannot prove an essential element of a claim).

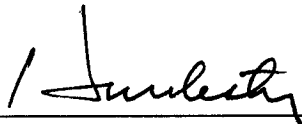
Hyatt's name was also never included on the title to the property. Thus, even if Tanko negligently advised Hyatt to sign the grant, bargain, sale deed in May 2004, Hyatt was not injured because she did not have a property interest to convey to Johnny Hyatt.²⁰

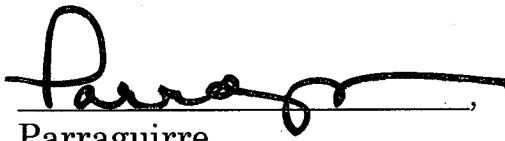
Conclusion

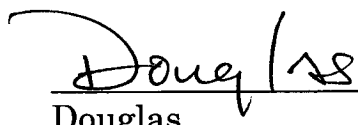
In summation, we reach two main conclusions in this order. First, we conclude that the district court did not err when it granted the respondents summary judgment on Hyatt's breach of contract claim because judicial estoppel applied. Accordingly, we do not reach the issue of whether the statute of frauds also barred Hyatt's breach of contract claim. Second, we conclude that the district court did not err when it granted Tanko summary judgment on Hyatt's professional negligence claim because Pack failed to show that the purported attorney-client

²⁰Pack contends that an attorney-client relationship also arose under a theory of detrimental reliance. See Williams, 108 Nev. at 471 n.3, 836 P.2d at 618 n.3 (explaining that detrimental reliance can form the basis of an attorney-client relationship). Assuming arguendo that he is correct, the district court still did not err when it granted Tanko summary judgment because Pack failed as a matter of law to prove that Hyatt suffered an actual injury.

relationship caused Hyatt to suffer an injury. Accordingly, we
ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Timothy C. Williams, District Judge
Carolyn Worrell, Settlement Judge
Mont E. Tanner
Jolley Urga Wirth Woodbury & Standish
Eighth District Court Clerk