

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID COWAN,
Appellant,
vs.
WILLIAM ERRICO; AND WILLIAM
ERRICO & ASSOCIATES, PC,
Respondents.

No. 57550

FILED

MAY 10 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY Angela
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order dismissing appellant's complaint for failure to state a claim in a legal malpractice action. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Respondents were appellant's counsel in a prior action for wrongful death and parent-child loss of consortium that stemmed from the death of appellant's daughter. Here, appellant brought a legal malpractice claim against respondents, alleging that respondents breached the standard of care when they failed to timely serve process in appellant's wrongful death action, resulting in a dismissal. Respondents filed a motion to dismiss the complaint for failure to state a claim, arguing that there were no provable damages because appellant's wrongful death action would have been dismissed pursuant to NRCP 12(b)(5), even if it was not dismissed under NRCP 12(b)(4). The district court considered the orders issued in the wrongful death action, and granted respondents' motion to dismiss appellant's complaint. Appellant then filed the instant appeal.

Generally, when the district court rules on a failure to state a claim motion, it may not consider matters outside of the pleading being attacked, and if it does, the motion shall be treated as one for summary judgment. NRCP 12(b); Breliant v. Preferred Equities Corp., 109 Nev. 842, 858 P.2d 1258 (1993). Summary judgment is appropriate when there

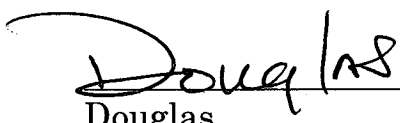
is no genuine issue of material fact, and thus, the moving party is entitled to judgment as a matter of law. Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). When reviewing a motion for summary judgment, “the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party.” Id. This court reviews an order granting summary judgment de novo. Id.


Appellant argues on appeal that the involuntary dismissal of his complaint for wrongful death and loss of consortium did not address his wrongful death claim against the Casablanca defendants, and that he “properly abandoned the dismissal of his [] loss of consortium claim and claims against the Schmidt parties on appeal.” He asserts that the dismissal precluded him from pursuing a “viable wrongful death claim against Casablanca [defendants].” We agree that appellant may have suffered damages from the dismissal, even though his appeal was unsuccessful, as the record shows that the Casablanca defendants did not raise a NRCP 12(b)(5) argument against appellant’s wrongful death cause of action, and thus that cause of action was dismissed pursuant only to NRCP 12(b)(4).¹ Cf. Hewitt v. Allen, 118 Nev. 216, 222, 43 P.3d 345, 348 (2002) (holding that where an “appeal would most likely be denied, then litigants should be able to forgo an appeal . . . without abandoning their legal malpractice actions”). Therefore, we conclude that dismissal of

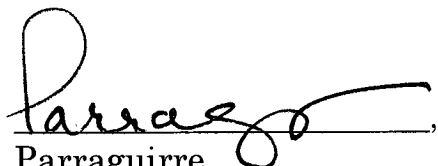
¹Although this court’s order affirming the dismissal of appellant’s claims in Cowan v. Bergeron, Docket No. 49759 (Order of Affirmance, December 19, 2008), is ambiguously worded in that it indicates that appellant’s failure to raise arguments pursuant to NRCP 12(b)(5) was fatal to his appeal from the dismissal of his claims against the Casablanca and Schmidt defendants, the Casablanca defendants never raised a NRCP 12(b)(5) argument in seeking dismissal of appellant’s wrongful death claim and the district court’s dismissal of that claim was based only on failure to timely serve process under NRCP 12(b)(4).

appellant's legal malpractice claim was premature. On remand, we direct the district court to determine whether respondents breached the standard of care in their representation of appellant pursuant to NRCP 4(i) as to appellant's wrongful death cause of action against the Casablanca defendants, and, if so, whether the breach caused appellant actual loss or damage sufficient to sustain a legal malpractice claim against respondents.² See Mainor v. Nault, 120 Nev. 750, 774, 101 P.3d 308, 324 (2004). Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.³


_____, J.
Douglas


_____, J.
Gibbons


_____, J.
Parraguirre

²Appellant also argues that an unsuccessful appeal does not necessarily indicate a lack of damages in a legal malpractice claim, that subsequent legal malpractice does not break the chain of causation from the original tortfeasor, and that judicial estoppel prevents respondents from raising certain defenses. Because we remand the matter to the district court for further proceedings, we decline to address these arguments here as they go to the merits of appellant's legal malpractice claim and will be considered below.

³We have determined that this appeal should be submitted for decision on the briefs and appellate record without oral argument. See NRAP 34(f)(1).

cc: Hon. Jessie Elizabeth Walsh, District Judge
William C. Turner, Settlement Judge
Stovall & Associates
Thorndal Armstrong Delk Balkenbush & Eisinger/Las Vegas
Eighth District Court Clerk