

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JASEN LYNN DUSHANE,
Appellant,
vs.
RAMON ACOSTA, AN INDIVIDUAL;
AND MICHAEL KENNEDY, AN
INDIVIDUAL,
Respondents.

No. 68359

FILED

DEC 16 2015

TRACIE K. LINDEMAN
CLERK OF DISTRICT COURT
BY: *[Signature]*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a legal malpractice and gross negligence action. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

The present case arises from a hearing in a federal district court case regarding alleged violations of the conditions of appellant Jasen Lynn Dushane's supervised release. After the federal district court in that case revoked Dushane's supervised release, he filed a complaint in the Second Judicial District Court, asserting claims against respondents Ramon Acosta and Michael Kennedy for legal malpractice and gross negligence. According to Dushane's complaint, Acosta represented Dushane at the revocation proceeding, but disregarded his express instructions by disclosing to the district court the strategy underlying Dushane's decision not to admit to violating a condition of his supervised release. The complaint further alleged that Kennedy also represented

Dushane¹ and that, after the revocation hearing, Dushane mailed a letter to Kennedy regarding Acosta's breach of confidentiality, but Kennedy, citing attorney-client privilege, refused to provide that letter to Dushane's replacement counsel. Acosta and Kennedy subsequently moved to dismiss Dushane's complaint for failure to state a claim on which relief could be granted, and the district court granted that motion. This appeal followed.

We review a district court's order granting an NRCP 12(b)(5) motion to dismiss de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). This court will only affirm a district court's order dismissing a complaint if, after recognizing all factual allegations in the complaint as true and drawing all inferences in the plaintiff's favor, it appears that the plaintiff's factual allegations do not entitle the plaintiff to relief under the claims being asserted. *See id.* at 228, 181 P.3d at 672.

On appeal, Dushane asserts that the district court, in dismissing his complaint, improperly failed to consider his gross negligence claim against Acosta and Kennedy as distinct from his legal malpractice claim. To support his claim, Dushane argues that the district court failed to consider that the United States Court of Appeals for the Ninth Circuit had previously determined that gross negligence is a distinct claim from legal malpractice. But Dushane did not direct this court's attention to any cases that support his argument, and our

¹On appeal, Dushane acknowledges that Kennedy did not represent him in the underlying proceeding and asserts instead that Kennedy supervised Acosta.

independent research did not reveal any Ninth Circuit case making such a distinction.

Contrary to Dushane's contention that the district court should have considered his gross negligence claim as distinct from legal malpractice, a review of the complaint reveals that Dushane's claim was one for legal malpractice. Legal malpractice involves the same elements as an ordinary negligence claim, but it is premised on an attorney-client relationship and involves a breach by the attorney of a duty owed to the client.² Compare *Sanchez ex rel. Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 824, 221 P.3d 1276, 1280 (2009) (explaining that to prevail on a negligence claim, a plaintiff must establish "(1) the existence of a duty of care, (2) breach of that duty, (3) legal causation, and (4) damages"), with *Semenza v. Nev. Med. Liab. Ins. Co.*, 104 Nev. 666, 667-68, 765 P.2d 184, 185 (1988) (providing that "legal malpractice is premised upon an attorney-client relationship, a duty owed to the client by the attorney, breach of that duty, and the breach as proximate cause of the client's damages"). Regardless of which theory or claim a plaintiff pleads, if the claim is premised on an attorney-client relationship and an allegation that the attorney breached a duty owed to the client by virtue of the attorney-client relationship, the claim is properly categorized as legal malpractice. See *Stalk v. Mushkin*, 125 Nev. 21, 29, 199 P.3d 838, 843 (2009)

²Gross negligence differs from negligence only in that gross negligence involves a heightened degree of culpability. *Hart v. Kline*, 61 Nev. 96, 100-01, 116 P.2d 672, 674 (1941) (observing that "[t]he element of culpability which characterizes all negligence is, in gross negligence, magnified to a higher degree as compared with that present in ordinary negligence").

(concluding that the plaintiffs' "breach of fiduciary duty claim [was], in essence, a legal malpractice claim, since it [was] grounded on allegations that [the defendant] breached certain duties, namely, confidentiality and loyalty, that would not exist but for the attorney-client relationship"); see also *Brush v. Gilsdorf*, 783 N.E.2d 77, 80-81 (Ill. App. Ct. 2002) (concluding that "because injury was suffered by reason of the attorneys' professional conduct during the course of legal representation, the gravamen of the claim is legal malpractice, regardless of which theory or claim has been pled").

In his complaint, Dushane alleged that Acosta and Kennedy represented him in the underlying proceeding, that Acosta disclosed confidential information, and that Kennedy failed to provide the letter to Dushane's replacement counsel. Thus, Dushane's claim was based on allegations that Acosta breached the duty of confidentiality and that Kennedy breached the duty to return client property when the representation terminates—duties that would not exist absent an attorney-client relationship. Because Dushane alleged that Acosta and Kennedy represented him and that they each breached a duty in providing legal services, the gravamen of his claim, as set forth in his complaint, was legal malpractice. See *Stalk*, 125 Nev. at 29, 199 P.3d at 843; see also *Gilsdorf*, 783 N.E.2d at 80-81. Consequently, we conclude that, to the extent Dushane asserted a claim for gross negligence, the district court correctly construed it as a claim for legal malpractice.

Dushane next appears to argue that the district court improperly dismissed his legal malpractice claim against Acosta and Kennedy. To overcome a motion to dismiss under NRCP 12(b)(5), a plaintiff asserting a claim for legal malpractice must plead that the

defendant's actions proximately caused the plaintiff's injury by alleging "that he or she has obtained appellate or post conviction relief." *Clark v. Robison*, 113 Nev. 949, 951, 944 P.2d 788, 790 (1997) (internal quotation marks omitted). Dushane's claim against Acosta was based on an allegation that Acosta's breach of confidentiality resulted in the revocation of Dushane's supervised release. Dushane did not allege, however, that he obtained relief from the federal district court's order revoking his supervised release. Accordingly, we conclude that the district court properly dismissed Dushane's legal malpractice claim against Acosta. See *id.*

With regard to Kennedy, Dushane did not allege that Kennedy's failure to forward the letter to his replacement counsel, which occurred subsequent to the revocation proceeding, caused his supervised release to be revoked. Instead, Dushane asserted that Kennedy's refusal to provide the letter caused delays in his case. Thus, the district court improperly applied *Clark* in dismissing Dushane's case, as he did not allege that his inability to obtain the letter resulted in a determination from which he could have obtained appellate relief. Nevertheless, while Dushane complained that his case was delayed without the letter, Dushane did not actually allege that he suffered damages as a result of Kennedy's failure to provide the letter, see *Semenza*, 104 Nev. at 667-68, 765 P.2d at 185, and therefore, we conclude the district court reached the right result, albeit for the wrong reason. *Sengel v. IGT*, 116 Nev. 565, 570, 2 P.3d 258, 261 (2000) (affirming a district court's decision where it reached the correct result for the wrong reason).


Similar to his argument regarding gross negligence, Dushane also argues that the district court improperly dismissed his complaint

because he asserted a separate claim for negligent supervision against Kennedy, which was distinct from his legal malpractice claim. We need not reach that issue, however, given our conclusion that Dushane did not state a viable claim for legal malpractice, as a claim for negligent supervision cannot exist without an underlying, actionable tort. See *Jordan v. State ex rel. Dep't of Motor Vehicles & Pub. Safety*, 121 Nev. 44, 74, 110 P.3d 30, 51 (2005) (explaining that a viable claim for respondeat superior requires the existence of an underlying cause of action), *overruled on other grounds by Buzz Stew*, 124 Nev. at 228 n.6, 181 P.3d at 672 n.6; see also *Schoff v. Combined Ins. Co. of Am.*, 604 N.W.2d 43, 53 (Iowa 1999) (providing that an employer is not liable for negligent supervision unless an employee commits an actionable tort).

Based on the foregoing, we affirm the district court's order dismissing Dushane's complaint.

It is so ORDERED.³


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

³We have considered Dushane's remaining arguments and conclude that they are without merit.

cc: Hon. Patrick Flanagan, District Judge
Jasen Lynn Dushane
Snell & Wilmer, LLP/Reno
Arrascada & Aramini, Ltd.
Washoe District Court Clerk