

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FRANK MILFORD PECK,
Appellant,
vs.
MARY LOU WILSON,
Respondent.

No. 69181

FILED

MAY 06 2016

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a torts action. Second Judicial District Court, Washoe County; Scott N. Freeman, Judge.

Appellant, an inmate, sued respondent, his court-appointed counsel in a post-conviction proceeding, claiming she violated his First and Fourteenth Amendment rights as well as various ethical rules. Appellant later moved to supplement his complaint under NRCP 15(d), asserting that respondent caused delay in his post-conviction proceeding and failed to investigate certain matters that would support overturning his conviction. But the district court denied that motion on the ground that appellant's proposed claims arose while respondent was representing him rather than after he filed his complaint. In turn, respondent moved for dismissal, which the district court granted, holding that respondent was entitled to discretionary-function immunity. Appellant subsequently sought reconsideration, but the court denied his request. This appeal followed.

On appeal, appellant contends the district court improperly dismissed his complaint because discretionary-function immunity does not

apply to the civil rights violations alleged in the complaint.¹ We review a district court's order dismissing a complaint under NRCP 12(b)(5) de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008).

Because discretionary-function immunity does not shield individuals from liability for constitutional torts, *see Martinez v. California*, 444 U.S. 277, 284 n.8 (1980) (explaining that state-law immunity doctrines do not prevent liability under 42 U.S.C. § 1983), we conclude that the district court improperly relied on that doctrine as a basis for dismissing appellant's claims that respondent violated his First and Fourteenth Amendment rights. Nevertheless, we affirm the district court's denial of those claims, as appellant did not set forth any facts in the complaint that would support a claim under either the First or the Fourteenth Amendment. *See W. States Constr., Inc. v. Michoff*, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992) ("A complaint need only set forth sufficient facts to demonstrate the necessary elements of a claim for relief so that the defending party has adequate notice of the nature of the claim and relief sought."); *see also Sengel v. IGT*, 116 Nev. 565, 570, 2 P.3d 258,

¹Appellant also argues that the district court incorrectly determined that respondent's request for submission was directed at her motion to dismiss and improperly construed that motion as seeking dismissal under NRCP 12(b)(5). These arguments, however, lack merit because respondent requested that the entire case be submitted to the district court for resolution and essentially argued in her motion to dismiss that appellant's complaint failed to state a claim for which relief could be granted.

261 (2000) (affirming the district court's decision where it reached the correct result for the wrong reason).

As to appellant's remaining allegations, they arguably allege a state-law based legal malpractice claim. But, as appellant's court-appointed post-conviction counsel, respondent was entitled to discretionary-function immunity on any such claims. See NRS 41.032(2) (granting discretionary-function immunity to officers of the State and any of its agencies or political subdivisions); see also NRS 41.0307(4)(b) (defining the term "officer" to include court-appointed defense counsel). Thus, we affirm the district court's dismissal of any purported legal malpractice claim as well. See *Morgano v. Smith*, 110 Nev. 1025, 1027-28, 879 P.2d 735, 736-37 (1994) (explaining that court-appointed counsel enjoy the same immunity as public defenders for discretionary decisions made in representing their clients).

With regard to the district court's denial of appellant's motion for leave to supplement his complaint, appellant contends that the district court incorrectly found that his proposed claims arose before he filed his complaint.² See NRCP 15(d) (authorizing supplemental pleadings based on transactions or occurrences that postdate the complaint). The district court apparently reached this conclusion based solely on the fact that

²Appellant also appears to argue that the district court improperly considered respondent's untimely opposition to the motion to supplement. Because we conclude that the motion to supplement was properly denied, any abuse of discretion in considering respondent's opposition did not affect appellant's substantial rights, and, thus, does not provide a basis for reversal. See NRCP 61 (requiring the court to disregard errors that do not affect a party's substantial rights).


appellant's new claims arose while respondent was still representing him. A review of the record reveals, however, that respondent continued to represent appellant in his post-conviction proceeding after he filed his complaint in the underlying case. Thus, the fact that the alleged actions occurred while respondent was representing appellant did not necessarily mean that they occurred before the underlying complaint was filed. As a result, we conclude that the district court improperly found that the events necessarily occurred before the complaint was filed, and, thus, the court abused its discretion by denying the motion to supplement on that basis. *See id.* (providing that the court may permit a party to supplement a pleading); *cf. Burnett v. C.B.A. Sec. Serv., Inc.*, 107 Nev. 787, 789, 820 P.2d 750, 752 (1991) (explaining that an order denying a motion to amend is reviewed for an abuse of discretion).


Nevertheless, we conclude that the district court reached the right result because appellant's proposed supplement was futile. *Cf. Nutton v. Sunset Station, Inc.*, 131 Nev. ___, ___, 357 P.3d 966, 973 (Ct. App. 2015) (providing that the district court need not allow futile amendments); *see also Sengel*, 116 Nev. at 570, 2 P.3d at 261. Specifically, like the assertions in appellant's complaint, the allegations in the motion to supplement arguably set forth a state-law based legal malpractice claim. But, as discussed above, such a claim could not have survived a motion to dismiss because respondent would have been entitled to discretionary-function immunity. *See Nutton*, 131 Nev. at ___, 357 P.3d at 973 (explaining that a claim that cannot survive a NRCP 12(b)(5) motion to dismiss may be deemed futile).

Accordingly, we affirm the district court's orders granting respondent's motion to dismiss and denying appellant's motion for leave to supplement.

It is so ORDERED.³


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Scott N. Freeman, District Judge
Frank Milford Peck
Mary Lou Wilson
Washoe District Court Clerk

³Appellant also argues that the district court improperly granted respondent's motion to set aside the entry of default against her and denied his post-judgment motion for reconsideration. Having considered the parties' arguments and the record on appeal, we conclude that the district court did not abuse its discretion in resolving those motions. See *Landreth v. Malik*, 127 Nev. 175, 188, 251 P.3d 163, 171 (2011) (reviewing a district court's order setting aside an entry of default for an abuse of discretion); see also *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010) (explaining that a motion for reconsideration is reviewed for an abuse of discretion when appealed with the underlying judgment).