IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RONALD J. SLAUGHTER, M.D., AN INDIVIDUAL; AND KATHLEEN SLAUGHTER, AN INDIVIDUAL,
Appellants,
vs.
MARQUIS AURBACH COFFING, A NEVADA PROFESSIONAL CORPORATION,
Respondent.

No. 68911

FILED

JAN 24 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a district court summary judgment in a contracts and legal malpractice action. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Appellants hired respondent, a law firm, to challenge a probate commissioner's report and recommendation that invalidated a trust of which appellants were the beneficiaries. When respondent was unsuccessful in overturning that decision, appellants failed to pay respondent pursuant to the parties' attorney fee agreement, and respondent sued for breach of that agreement. Appellants counterclaimed for legal malpractice and for breach of contract regarding the parties' second fee agreement relating to the appeal of the decision invalidating

the trust.[1] The district court granted summary judgment in favor of respondent on all of the parties' claims and this appeal followed.

With regard to summary judgment on respondent's breach of contract claim, appellants assert that they were fraudulently induced into entering into the fee agreement based on respondent's oral statement that it could overturn the probate commissioner's decision because it was grounded on an incorrect understanding of the applicable law when, in actuality, respondent could not overturn the decision. As a result, appellants allege there is no valid contract. This alleged oral guarantee, however, directly contradicts the fee agreement's clear and unambiguous language, which provides that appellants "understand[ ] that [respondent] has not and cannot guarantee results." And, because appellants' evidence directly contradicts the written contract, it is parol evidence that the district court properly concluded was inadmissible. *See M.C. Multi-Family Dev., LLC v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008) (reviewing district court decisions regarding the admission of evidence for an abuse of discretion); *Ringle v. Bruton*, 120 Nev. 82, 91, 86 P.3d 1032, 1037 (2004) ("The parol evidence rule does not permit the admission of evidence that would change the contract terms when the terms of a written agreement are clear, definite, and unambiguous."). This is true even though appellants assert fraud in the inducement because they provide no evidence of the alleged fraud other than self-

[1]Although respondent initially presented a claim for a breach of this second contract as well, respondent voluntarily dismissed that claim below and it is not before us on appeal.

serving affidavits stating that there was a contradictory oral agreement.[2] *See Road & Highway Builders, LLC v. N. Nev. Rebar, Inc.*, 128 Nev. 384, 390, 284 P.3d 377, 381 (2012) (explaining that a party cannot get around the parol evidence rule by asserting that it was fraudulently induced into entering into the contract because a prior oral agreement contradicted the terms of the written contract).

Aside from their failed assertions that the first fee agreement is not valid based on respondent's alleged oral statements, appellants present no arguments that there are genuine issues of material fact regarding the remaining elements of a breach of contract claim which would preclude summary judgment. *See Saini v. Int'l Game Tech.*, 434 F. Supp. 2d 913, 919-20 (D. Nev. 2006) ("Nevada law requires the plaintiff in

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[2]Further, to the extent appellants argue that the agreement is invalid due to respondent's alleged negligent or fraudulent misrepresentation regarding the chances of success, those arguments also fail as appellants did not present any evidence of justifiable reliance on respondent's alleged oral guarantees, especially in light of the contradictory written agreement. *See Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 449, 956 P.2d 1382, 1387 (1998) (requiring justifiable reliance for negligent misrepresentation); *Bulbman, Inc. v. Nev. Bell*, 108 Nev. 105, 111, 825 P.2d 588, 592 (1992) (requiring justifiable reliance for fraudulent misrepresentation); *Collins v. Burns*, 103 Nev. 394, 397, 741 P.2d 819, 821 (1987) (providing that the test for justifiable reliance is "whether the recipient has information which would serve as a danger signal and a red light to any normal person of [the party's] intelligence and experience"). Additionally, appellants failed to raise their rescission argument below; therefore, we decline to address it on appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (providing that claims not argued below are waived on appeal).

a breach of contract action to show (1) the existence of a valid contract, (2) a breach by the defendant, and (3) damage as a result of the breach."). Accordingly, they have waived any such arguments and we necessarily affirm the district court's grant of summary judgment on respondent's breach of contract claim. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (holding that arguments not raised in an opening brief are deemed waived); *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (providing that summary judgment is reviewed de novo on appeal and affirmance is only proper if the pleadings and all evidence demonstrate that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law).

Appellants next argue that the district court improperly granted summary judgment in favor of respondent on their breach of contract counterclaim regarding the second fee agreement for the appeal. As to this claim, they assert that a question of material fact remains regarding whether respondent breached that agreement by failing to prosecute the appeal at no cost to appellants. Again, the evidence appellants use to support the claimed breach—namely, affidavits regarding conversations that predated the execution of the second agreement—could not be considered under the parol evidence rule because the affidavits contradicted the clear and unambiguous language in the second fee agreement wherein appellants agreed to pay the fees for an

appeal.[3] *See M.C. Multi-Family Dev.*, 124 Nev. at 913, 193 P.3d at 544; *Ringle*, 120 Nev. at 91, 86 P.3d at 1037. And without any evidence of a breach of the second fee agreement, the district court properly granted summary judgment against appellants on their breach of contract counterclaim. *See Saini*, 434 F. Supp. 2d at 919-20; *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (noting that, because the moving party pointed to an evidentiary deficiency in a claim on which the nonmoving had the burden of production, the burden then shifted to the nonmoving party to present evidence demonstrating an issue of material fact in order to avoid summary judgment).

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[3]Additionally, because appellants executed and filed a substitution of counsel, thereby preventing respondent from completing work on the appeal, appellants themselves treated the agreement as no longer binding on the parties. *See Cladianos v. Friedhoff*, 69 Nev. 41, 46, 240 P.2d 208, 210 (1952) (providing that prevention of performance may be evidenced by "any acts, conduct, or declarations of the party, evincing a clear intention to repudiate the contract, and to treat it as no longer binding"). Thus, even if appellants could demonstrate a breach of this agreement based on the arguments detailed above, the fact that appellants prevented respondent from completing its duty under the second fee agreement would excuse any such breach. *See id.* at 45, 240 P.2d at 210 (excusing a party's failure to perform under a contract when the other party's actions treat the contract as non-binding).

Appellants' final argument is that the district court erred in granting summary judgment on their legal malpractice claim.[4] Specifically, they assert that respondent breached its duty to appellants by representing that the decision invalidating the trust could be overturned without fully explaining the matter to them and by pursuing legal arguments that lacked merit in an effort to overturn that decision.[5] *See* NRPC 1.4(b) (providing that a lawyer has a duty to explain a matter to an extent that the client can make an informed decision regarding representation); *Mainor v. Nault*, 120 Nev. 750, 769, 101 P.3d 308, 321 (2004) (providing that the rules of professional conduct can be used as

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[4]The elements of a legal malpractice claim are

> (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.

Mainor v. Nault, 120 Nev. 750, 774, 101 P.3d 308, 324 (2004) (quoting *Day v. Zubel*, 112 Nev. 972, 976, 922 P.2d 536, 538 (1996)).

[5]Appellants also assert that respondent committed legal malpractice by failing to advise them whether to amend the trust's language. But the record provides uncontroverted evidence that respondent did look into amending the trust and specifically advised against it. As such, we conclude that appellants failed to demonstrate a genuine issue of material fact as to this alleged breach and summary judgment was therefore proper on that point. *See Wood*, 121 Nev. at 729, 121 P.3d at 1029.

evidence to establish the standard of care lawyers owe to their clients). Appellants supported these allegations with an expert report. *See Allyn v. McDonald*, 112 Nev. 68, 71, 910 P.2d 263, 266 (1996) ("[E]xpert evidence is generally required in a legal malpractice case to establish the attorney's breach of care . . . .").

Respondent's answering brief contains no argument against appellants' assertion that, by failing to fully explain the chances of overturning the decision invalidating the trust so as to allow them to make an informed decision regarding representation and by putting forth legal arguments that lacked merit in an effort to overturn that decision, respondent breached its duty to appellants to "use such skill, prudence, and diligence as lawyers of ordinary skill and capacity possess in exercising and performing the tasks which they undertake."[6] *Mainor*, 120 Nev. at 774, 101 P.3d at 324 (quoting *Day v. Zubel*, 112 Nev. 972, 976, 922 P.2d 536, 538 (1996)) (defining the duty attorneys owe to clients). As such, we must necessarily conclude that genuine issues of fact remain regarding these allegations of breach as they relate to the legal malpractice claim. *See id.*; *Bates v. Chronister*, 100 Nev. 675, 681-82, 691 P.2d 865, 870 (1984) (concluding that respondent confessed error by failing to respond to appellant's argument on appeal).

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[6]In contrast, respondent's answering brief presents arguments asserting that it met any duty it had with regard to the amendment of the trust, and, as noted above, we conclude that summary judgment was proper on that permutation of appellants' legal malpractice claim.

This does not end our analysis of appellants' challenge to the grant of summary judgment on this aspect of appellants' legal malpractice claim, however, as respondent asserts that appellants cannot prove that any alleged breach was the proximate cause of appellants' damages, such that summary judgment on the legal malpractice claim was appropriate. *See Mainor*, 120 Nev. at 774, 101 P.3d at 324 (providing that proximate cause is an element of a legal malpractice claim); *see also Cuzze*, 123 Nev. at 602-03, 172 P.3d at 134 (providing that if the moving party does not bear the burden of persuasion at trial on a claim, it can win on summary judgment by pointing to a lack of evidence on one of the essential elements of that claim). We agree with respondent in part. To the extent that appellants assert that respondent proximately caused them damages in the form of the trust being invalidated, the trust was invalidated before respondent was ever hired and respondent had no part in writing the trust. And with regard to the assertion that respondent proximately caused appellants to lose the trust assets, these events occurred via a settlement agreement that appellants entered into after terminating respondent—an agreement which respondent had no part in negotiating. Under these circumstances, there are no issues of fact remaining that these claims of damages were not proximately caused by respondent, and, therefore, summary judgment was proper as to these asserted damages. *See Wood*, 121 Nev. at 729, 121 P.3d at 1029.

Appellants also asserted a third category of damages, however, in the form of the retainer fee they paid to respondent and the fees they now owe to respondent based on its success on its claim for breach of the fee agreement. Appellants contend that, had respondent

properly explained to them that any attempt to overturn the decision invalidating the trust would be futile, as appellants' expert opined, appellants would not have entered into the fee agreement which obligated them to pay the retainer fee and the fees incurred during litigation. In other words, but for respondent's malpractice, appellants never would have entered into the fee agreement, paid respondent the retainer fee, or incurred the attorney fees and related costs in challenging the decision invalidating the trust. Although respondent asserts that it is entitled to these fees under the fee agreement, it does not respond to the contention that, regardless of any right to fees under that agreement, the alleged legal malpractice was the proximate cause of appellants' attorney-fees-related damages. Because respondent does not present any argument suggesting that its alleged malpractice was not the proximate cause of the attorney fees damages, we must conclude that a genuine issue of material fact remains as to that issue which precludes summary judgment. *See id.*; *Bates*, 100 Nev. at 681-82, 691 P.2d at 870.

In sum, we affirm the district court's grant of summary judgment on both the breach of contract claim[7] and counterclaim. We further conclude, however, that genuine issues of fact remain which preclude summary judgment on part of appellants' legal malpractice counterclaim. Specifically, genuine issues of fact remain regarding

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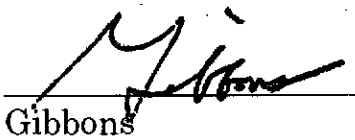
[7]While we affirm summary judgment on respondent's breach of contract claim, we recognize that the fees awarded to respondent under that claim may be offset if the district court finds for appellants on their legal malpractice claim on remand.

whether respondent breached its duty to appellants by failing to fully explain their chances of success in overturning the decision invalidating the trust and by presenting arguments in the trust case that allegedly had no merit, and whether those alleged breaches were the proximate cause of appellants' attorney-fees related damages. Accordingly, we reverse the grant of summary judgment on appellants' legal malpractice counterclaim and remand this matter for further proceedings in accordance with this decision.[8]

It is so ORDERED.

_____, C.J.
Silver

_____, J.
Tao



_____, J.
Gibbons

[8]Our decision to reverse and remand the grant of summary judgment on the legal malpractice claim should not be construed as a comment on the merits of that claim.

cc: Hon. Stefany Miley, District Judge
Robert F. Saint-Aubin, Settlement Judge
Law Offices of Mont E. Tanner
Marquis Aurbach Coffing
Eighth District Court Clerk