

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

OCEANIA INSURANCE  
CORPORATION,  
Appellant,  
vs.  
JEFFREY A. COGAN; AND JEFFREY  
A. COGAN, ESQ., LTD., A NEVADA  
PROFESSIONAL ENTITY,  
Respondents.

No. 74958-COA

**FILED**

**MAY 28 2019**

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

*ORDER OF REVERSAL AND REMAND*

Oceania Insurance Corporation appeals from a district court order granting a motion to dismiss in a tort action. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

Oceania sued Jeffrey A. Cogan, Esq., and his law firm for legal malpractice and breach of fiduciary duty in connection with his prior representation of the company in a federal case.<sup>1</sup> Oceania alleged that Cogan committed malpractice when he failed to get a default that had been entered against the company set aside, leading to the entry of a default judgment in excess of \$5 million. The district court dismissed Oceania's complaint for failure to state a claim, concluding that the company could present no set of facts that would show that Cogan's professional negligence caused its damages. The court also concluded that Oceania's breach of fiduciary duty claim was duplicative of the malpractice claim and therefore suffered the same defect. Finally, the court concluded that any attempt on the part of Oceania to amend its complaint would be futile.

On appeal, Oceania argues that the district court erred because Oceania could present facts showing that Cogan's negligence caused the

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<sup>1</sup>We do not recount the facts except as necessary to our disposition.

federal court to enter the default judgment. Oceania further argues that the district court incorrectly concluded that the breach of fiduciary duty claim was the same cause of action as the malpractice claim. Finally, it argues that the district court should have considered Cogan's motion to dismiss as a motion for summary judgment and granted Oceania's NRCP 56(f) request to conduct discovery.<sup>2</sup>

As a preliminary matter, we note that the district court's order dismissing Cogan's complaint clearly shows that the district court did not treat the underlying motion as a motion for summary judgment under NRCP 56. The district court based its decision solely upon the text of Oceania's complaint and the underlying federal district court order denying Oceania's motion to set aside the default, which Oceania attached to its complaint as an exhibit. Moreover, to the extent the district court considered any of the

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<sup>2</sup>Cogan presents an additional issue for the first time on appeal. He argues that Oceania does not have standing to maintain this action because of the public policy prohibiting the assignment of legal malpractice claims. *See Tower Homes v. Heaton*, 132 Nev. 628, 633, 377 P.3d 118, 121 (2016) (noting the general public-policy prohibition on assignment of legal malpractice claims); *Chaffee v. Smith*, 98 Nev. 222, 223-24, 645 P.2d 966, 966 (1982) (“[W]e cannot permit enforcement of a legal malpractice action which has been transferred by assignment or by levy and execution sale, but which was never pursued by the original client.”); *see also Applera Corp. v. MP Biomedicals, LLC*, 93 Cal. Rptr. 3d 178, 192 (Ct. App. 2009) (“A party's standing can be raised at any time in the litigation, even for the first time on appeal.”). He notes that the federal court in 2017 ordered that the majority of Oceania's shares “and all causes of action belonging to Oceania are executed and applied toward satisfaction of [the plaintiff's] default judgment against [Oceania's original majority shareholder] under NRS § 21.230.” Because of that, Cogan reasons that the plaintiff from the federal case is now maintaining Oceania's legal malpractice claim in violation of public policy. However, Oceania, not the federal plaintiff, brought the instant action, and Oceania—the entity—was Cogan's original client. Because the legal malpractice claim still technically belongs to and is being litigated by Oceania, Cogan's argument on this point is without merit.

other documents Oceania attached to its opposition to Cogan's motion to dismiss, those documents were all matters of public record from the federal district court case. *See Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993) (noting that "the court may take into account matters of public record, orders, items present in the record of the case, and any exhibits attached to the complaint when ruling on a motion to dismiss for failure to state a claim upon which relief can be granted"). Accordingly, the district court was not required to treat the motion as one for summary judgment and did not grant summary judgment in Cogan's favor, and this case therefore does not present the potentially problematic scenario in which a court entered summary judgment against a party without first giving that party notice that it would need to defend its claims under the NRCP 56 standard. *See Renown Reg'l Med. Ctr. v. Second Judicial Dist. Court*, 130 Nev. 824, 828, 335 P.3d 199, 202 (2014) (noting that the district court's power to enter summary judgment "is contingent upon giving the losing party notice that it must defend its claim" (internal quotation marks and citation omitted)).

We now turn to whether the district court erred in granting Cogan's motion to dismiss. Oceania argues that the federal court denied its motion to set aside the default—and ultimately entered a default judgment—because of numerous legal and procedural errors Cogan made leading up to and during the briefing on the motion. Cogan counters that the district court below correctly concluded that the federal court denied the motion to set aside on grounds of Oceania's culpable conduct, not Cogan's, and thus Oceania's complaint failed to show that Cogan caused Oceania's damages.

When reviewing a district court's order granting a motion to dismiss for failure to state a claim under NRCP 12(b)(5), "this court applies a rigorous, de novo standard of review." *Pack v. LaTourette*, 128 Nev. 264,

267, 277 P.3d 1246, 1248 (2012). We must “accept the plaintiff’s factual allegations as true and then determine whether [they] are legally sufficient to satisfy the elements of the claim asserted.” *Id.* at 267-68, 277 P.3d at 1248. We must also draw all inferences from the allegations in the plaintiff’s favor. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

“Under Nevada law, to establish a claim of legal malpractice, a plaintiff must demonstrate the following: the existence of an attorney-client relationship, a duty owed to the client by the attorney, breach of that duty, and the breach is the actual and proximate cause of the client’s damages.” *Kahn v. Morse & Mowbray*, 121 Nev. 464, 477 n.16, 117 P.3d 227, 236 n.16 (2005) (internal quotation marks and alterations omitted). For purposes of his motion to dismiss, Cogan challenged the sufficiency of Oceania’s complaint solely with respect to the element of causation.

Here, we note that the federal court’s order denying Oceania’s motion to set aside was ambiguous as to the extent to which it relied upon Cogan’s conduct as opposed to Oceania’s. While it specifically identified Oceania’s conduct as culpable, the majority of the federal court’s analysis focused on Cogan’s legal and procedural mistakes.<sup>3</sup> Moreover, courts commonly refer to both parties and their counsel by the parties’ names in written orders. By concluding that the federal court unambiguously did not find that Cogan’s conduct warranted denying the motion, the district court

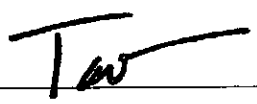
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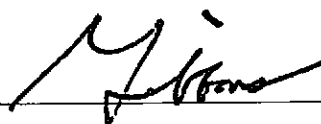
<sup>3</sup>We reject Cogan’s argument that the federal court gave full consideration to the merits of his motion and reply and, therefore, clearly did not base its decision on his failure to timely file the motion. While the court did not outright deny the motion solely because it was untimely, that does not mean that Cogan’s conduct did not still cause the court to rule in the manner it did, especially when the majority of the court’s analysis focused on Cogan.

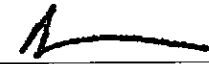
below did not accept Oceania's allegations to be true as it was required to do. Accordingly, accepting the allegations of Oceania's complaint as true and drawing all inferences in its favor, one might reasonably conclude that Cogan's conduct is what caused the federal court to deny the motion to set aside the default and ultimately enter a default judgment. Therefore, Oceania stated a claim upon which relief could be granted, and the district court erred in granting Cogan's motion to dismiss.<sup>4</sup>

Based on the foregoing, we

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

 \_\_\_\_\_, J.  
Tao

 \_\_\_\_\_, C.J.  
Gibbons

 \_\_\_\_\_, J.  
Bulla

<sup>4</sup>We note that the district court correctly determined that Oceania's breach of fiduciary duty claim is the same cause of action as its legal malpractice claim. *Stalk v. Mushkin*, 125 Nev. 21, 29-30, 199 P.3d 838, 844 (2009) (“[C]laims for breach of fiduciary duty arising out of an attorney-client relationship are legal malpractice claims . . .”). Accordingly, because duplicative claims constituting the same cause of action “necessarily stand or fall together,” *Cervantes v. Health Plan of Nev., Inc.*, 127 Nev. 789, 793 n.4, 263 P.3d 261, 264 n.4 (2011) (concluding that a plaintiff's pleaded claims of negligence and negligence per se were, in actuality, both the same claim of negligence and declining to consider them separately), the district court erred in dismissing the fiduciary-duty claim for the same reason it dismissed the legal malpractice claim.

cc: Hon. Linda Marie Bell, Chief Judge  
Department 8, Eighth Judicial District Court  
Carney Badley Spellman  
Black & LoBello  
Jeffrey A. Cogan, Esq., Ltd.  
Eighth District Court Clerk