

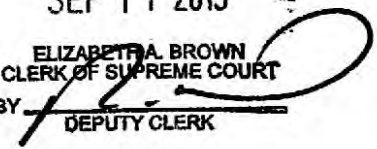
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

IGOR NAGEZ, AN INDIVIDUAL,
Appellant,
vs.
JAMES W. KWON, AN INDIVIDUAL;
JAMES KWON LLC; ESTATE OF
JEFFREY G. POIRIER; CO-
ADMINISTRATORS OF THE ESTATE
OF JEFFREY G. POIRIER; AND
ELAINE PATENAUDE, AN
INDIVIDUAL,
Respondents.

No. 76673-COA

FILED

SEP 11 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

*ORDER AFFIRMING IN PART,
REVERSING IN PART AND REMANDING*

Igor Nagez appeals from a district court order granting summary judgment in a contract and tort action. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Following the intestate death of Nagez's former partner, Jeffrey Poirier, Nagez and Elaine Patenaude—Poirier's mother and sole heir—retained attorney James Kwon to represent them in connection with a possible claim for wrongful death. Kwon advised Nagez and Patenaude that a probate action would need to be filed to open Poirier's estate before they would be able to file a wrongful death action. All three then signed a retainer agreement relating to the probate action. Nagez and Patenaude also signed an agreement purporting to divide Poirier's property between them in accordance with his last wishes. They signed yet another written

agreement wherein they promised to split evenly between them any funds recovered in the wrongful death action, whether they be recovered by the estate, Nagez, or Patenaude individually.

Kwon went on to initiate both the probate and wrongful death actions. The district court presiding over the wrongful death case dismissed Nagez as a plaintiff on grounds that he did not have standing to bring the claim under Nevada's wrongful death statute. Patenaude and the estate ultimately settled that claim, and Nagez later filed the underlying action against the respondents. In his second amended complaint, Nagez asserted multiple causes of action, alleging primarily that Kwon's law firm engaged in legal malpractice, breached fiduciary duties and contracts, and defrauded Nagez in connection with both the wrongful death and probate matters. Nagez additionally alleged that Patenaude breached their written agreements and that she, the estate, and Kwon's law firm have been unjustly enriched by retaining funds that Nagez claims are owed to him. Finally, Nagez alleged that Kwon's treatment of him throughout their professional relationship amounted to negligent infliction of emotional distress.

Following the close of discovery, respondents moved for summary judgment. In his opposition to the motion, Nagez failed to provide affidavits or declarations to support many of the facts or allegations stated therein, but he did provide various documents, including excerpts of the record from the probate case, copies of the written agreements at issue, and a couple of partial deposition transcripts. The district court concluded that Nagez had failed to demonstrate a genuine issue of material fact with respect to any of his claims and granted summary judgment in favor of

respondents. In its written order, the district court also purported to dismiss all of Nagez's claims with prejudice. This appeal followed.

This court reviews a district court's order granting summary judgment de novo. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.* When deciding a summary judgment motion, all evidence must be viewed in a light most favorable to the nonmoving party. *Id.* General allegations and conclusory statements do not create genuine issues of fact. *Id.* at 731, 121 P.3d at 1030-31.

We first address Nagez's argument that summary judgment was unwarranted because he provided evidence showing that, under his agreement with Patenaude, he was entitled to half of the proceeds—as well as litigation costs—from the settlement of the wrongful death litigation. It is undisputed that Nagez and Patenaude entered into the agreement purporting to divide the proceeds as Nagez states. However, the district court granted summary judgment on this issue on grounds that, at the time of the motion practice below, Nagez had a pending creditor's claim in the probate action wherein he sought to recover settlement proceeds and litigation costs from the estate. To the extent Nagez asserts claims seeking to have the district court in this case distribute what may be assets of the estate, the district court was correct that those matters should be litigated only in the probate case. *See Bergeron v. Loeb*, 100 Nev. 54, 58, 675 P.2d 397, 400 (1984) (noting that, in probate, "the court acquires jurisdiction over the estate and all persons for the purpose of determining their rights to any

portion of the estate,” and it does so “to the exclusion of any other court, even to the point of enjoining proceedings in the other court”); *Smith v. Hutchins*, 93 Nev. 431, 432, 566 P.2d 1136, 1137 (1977) (holding that a party is prohibited from splitting causes of action and maintaining separate actions on the same claims).

But even under these circumstances, it was improper for the district court to grant summary judgment on those claims and dismiss them with prejudice, which amounts to a final judgment with preclusive effect.¹ See *Lee v. GNLV Corp.*, 116 Nev. 424, 427-28, 996 P.2d 416, 418 (2000) (noting that an “order granting summary judgment, which adjudicate[s] the rights and liabilities of all parties and dispose[s] of all issues presented in the case, [i]s final”); see also *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054, 194 P.3d 709, 713 (2008) (noting that the entry of a valid final judgment may lead to the application of claim preclusion). To the extent Nagez asserted claims that truly are duplicative of the asset distribution matters pending in the probate case, the district court should have dismissed them without prejudice for lack of jurisdiction. See *Five Star*, 124 Nev. at 1054 n.27, 194 P.3d at 713 n.27 (noting that final judgments for purposes of claim preclusion do not include cases that are “dismissed without prejudice or for some reason (jurisdiction, venue, failure to join a

¹We note that the district court appears to have dismissed all of Nagez’s claims with prejudice on the same grounds that it entered summary judgment, but NRCP 56 does not provide for dismissal upon a grant of summary judgment. Nevertheless, because the district court ruled in the manner it did, we necessarily construe its order as a final judgment on the merits with preclusive effect.

party) that is not meant to have preclusive effect"). Accordingly, we reverse the district court's order granting summary judgment on those claims.

However, with respect to Nagez's claims against the estate and Patenaude individually stemming from his written agreements with Patenaude, we see no reason why the district court would not have jurisdiction to consider those claims, at least insofar as they do not involve the distribution of estate assets. Thus, with regard to these claims, the district court erred in granting summary judgment on jurisdictional grounds.

We recognize that fully adjudicating these claims may require the district court to await final determinations from the probate court. For example, with respect to Nagez's claim to the settlement proceeds, because the probate matter is ongoing, we cannot discern from the record in this case the extent to which the proceeds from the wrongful death settlement are the property of the estate or of Patenaude individually. See NRS 41.085(4)-(5) (providing that both heirs and personal representatives may maintain wrongful death actions and recover different categories of damages). Accordingly, to the extent that the ultimate resolution of that claim or any other remaining claims may depend upon determinations made in the probate case, the district court is free to stay this action pending completion of the probate case. See *Maheu v. Eighth Judicial Dist. Court*, 89 Nev. 214, 217, 510 P.2d 627, 629 (1973) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936))); cf. *VanSickle v. Kohout*, 599 S.E.2d 856, 861 (W. Va. 2004)

(noting in a malpractice action that a court may stay its own proceedings “in order to await the conclusion of some other proceeding that might establish a [plaintiff]’s damages”).

In sum, to the extent that the district court entered summary judgment on Nagez’s claims solely on the ground that related matters were pending in the probate case, that decision was in error, and thus we reverse the district court’s decision to that extent and remand this matter for further proceedings consistent with this order.²

We next consider Nagez’s argument that the district court erred in granting summary judgment on all of his claims relating to the probate retainer. The district court ruled in favor of Kwon’s law firm on these claims because it concluded that Nagez was not identified as a client in the agreement and therefore never had an attorney-client relationship with Kwon in the probate case. But as Nagez argues, both below and on appeal, the very first provision in the probate retainer agreement plainly identifies Nagez, Patenaude, and her husband as “[c]lient[s]” for purposes of the agreement. Accordingly, the district court erred in granting summary judgment on these grounds, as Nagez demonstrated that there is a genuine

²This rationale applies equally to Nagez’s breach of contract and unjust enrichment claims stemming from his written agreement with Patenaude purporting to divide Poirier’s property between them, as well as any other claim that may depend upon an outcome in the probate case.

issue of fact as to whether he had an attorney-client relationship with Kwon.³

Finally, we consider Nagez's argument that the district court improperly granted summary judgment on his negligent infliction of emotional distress claim against Kwon. We conclude it did not, as such a claim "is inappropriate in the context of a legal malpractice suit when the harm resulted from pecuniary damages." See *Kahn v. Morse & Mowbray*, 121 Nev. 464, 478, 117 P.3d 227, 237 (2005). To the extent that Nagez mislabeled this claim and meant to assert a claim of intentional infliction of emotional distress, summary judgment was still proper. Notably, Nagez failed to provide any evidence with his opposition to respondents' motion for summary judgment demonstrating that Kwon engaged in extreme and outrageous conduct. See *Maduikie v. Agency Rent-A-Car*, 114 Nev. 1, 4, 953 P.2d 24, 26 (1998) (defining "extreme and outrageous conduct" as "that which is outside all possible bounds of decency and is regarded as utterly intolerable in a civilized community" (internal quotation marks omitted)); *Switzer v. Rivera*, 174 F. Supp. 2d 1097, 1108 (D. Nev. 2001) (concluding that "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities" do not amount to extreme and outrageous conduct under

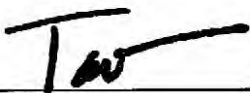
³In reversing summary judgment on the grounds set forth above, we take no position as to whether any of Nagez's allegations against respondents are true, but conclude only that questions of fact exist under the rigorous standard of NRCP 56.

Nevada law (internal quotation marks omitted)). Thus, we affirm the district court's decision on this issue.⁴

Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.⁵


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

⁴To the extent Nagez raises additional arguments not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal. We also necessarily affirm the district court's grant of summary judgment with respect to all of the claims not specifically addressed by Nagez in this appeal as stated above, including any legal malpractice, breach of fiduciary duty, or breach of contract claims against Kwon or his law firm stemming from his representation of Nagez in the wrongful death action. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that issues not raised on appeal are waived).

⁵Although this court generally will not grant a pro se appellant relief without first providing the respondent an opportunity to file an answering brief, *see* NRAP 46A(c) (stating the same), based on the record before us, the filing of an answering brief would not aid this court's resolution of these issues, and thus, no such brief has been ordered.

cc: Hon. Stefany Miley, District Judge
Igor Nagez
James W. Kwon
Eighth District Court Clerk