IN THE COURT OF APPEALS OF THE STATE OF NEVADA

WILLIAM W. PLISE,
Appellant,
vs.
LENARD E. SCHWARTZER; AND SCHWARTZER & MCPHERSON LAW FIRM, A NEVADA PROFESSIONAL CORPORATION,
Respondents.

No. 79121-COA

FILED

AUG 19 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

William W. Plise appeals from a district court order granting respondents' motion for attorney fees and costs in a legal malpractice action. Eighth Judicial District Court, Clark County; Adriana Escobar, Judge.

In 2012, Plise filed for Chapter 7 bankruptcy in the United States Bankruptcy Court in Las Vegas.[1] Several months later, the bankruptcy trustee (Trustee) filed an adversary action, challenging the accuracy of Plise's discharge statement. Plise subsequently retained respondents Lenard E. Schwartzer and Schwartzer & McPherson Law Firm (collectively, Schwartzer) to represent him in the Chapter 7 bankruptcy proceeding and to defend against the Trustee's adversary action. The Trustee moved for partial summary judgment on the issue of "whether [Plise] knowingly and fraudulently made a false oath or account" in his discharge statement. The bankruptcy court granted partial summary judgment for the Trustee, concluding that Plise knowingly made a false declaration in his discharge statement, and the federal district court subsequently affirmed. *See Plise v. Krohn*, No. 2:14-cv-00186-GMN, 2015

[1]We do not recount the facts except as necessary to our disposition.

20-30589

WL 1268038 (D. Nev. Mar. 19, 2015). The United States Court of Appeals for the Ninth Circuit, however, reversed, concluding "that the bankruptcy court erred in granting partial summary judgment in favor of [the Trustee]." *In re Plise*, 719 F. App'x 622, 625 (2018).

Prior to the Ninth Circuit's disposition, Plise filed a complaint in Nevada state district court, alleging that Schwartzer committed legal malpractice. Specifically, Plise complained that Schwartzer "knew or should have known that material issues of fact existed regarding the element of intent" related to the denial of his discharge statement. Plise alleged that Schwartzer was negligent because he failed to use available information to show that there was a genuine dispute of material fact and successfully oppose the Trustee's motion for partial summary judgment. After the Ninth Circuit reversed, Schwartzer requested that Plise stipulate to dismissing the legal malpractice claim without prejudice because until the bankruptcy proceeding was completed, the claim, if any, was premature. Although Plise purportedly initially agreed to the dismissal, he later refused to sign one and instead insisted on a stay, which Schwartzer rejected. Schwartzer ultimately moved to dismiss the claim without prejudice and also requested fees and costs pursuant to NRS 18.010(2)(b). The district court granted Schwartzer's motion to dismiss without prejudice, and awarded Schwartzer fees and costs under NRS 18.010(2)(b), concluding that Plise maintained the legal malpractice action without reasonable grounds. This appeal followed.

On appeal, Plise argues that the district court abused its discretion when it awarded Schwartzer attorney fees and costs for maintaining an action without reasonable grounds pursuant to NRS 18.010(2)(b). Plise appears to agree that once the Ninth Circuit reversed the bankruptcy court's order granting partial summary judgment, his

malpractice claim against Schwartzer based on conduct resulting in the partial summary judgment was no longer at issue. Nevertheless, Plise contends that the malpractice action should have been stayed, rather than dismissed, pending the complete resolution of the underlying bankruptcy action.[2] However, Plise points to no additional claims against Schwartzer that would warrant staying the case versus dismissing it. Instead, Plise avers that because it was reasonable to request a stay, he was not unreasonably maintaining his legal malpractice case against Schwartzer by refusing to dismiss the action without prejudice. We disagree and therefore affirm.

This court reviews a district court's decision to grant attorney fees for an abuse of discretion. *Frederic & Barbara Rosenberg Living Tr. v. MacDonald Highlands Realty, LLC*, 134 Nev. 570, 580, 427 P.3d 104, 112 (2018). Under NRS 18.010(2)(b), the "district court may award attorney fees to a prevailing party when it finds that the opposing party brought or maintained a claim without reasonable grounds." *MacDonald Highlands Realty,* 134 Nev. at 580, 427 P.3d at 113. "For purposes of NRS 18.010(2)(b), a claim is frivolous or groundless if there is no credible evidence to support it." *Id.* (citing *Semenza v. Caughlin Crafted Homes,* 111 Nev. 1089, 1095, 901 P.2d 684, 687-88 (1995)). Furthermore, a defendant need not mount a successful merits-based defense in order to be a prevailing party. *See, e.g., CRST Van Expedited, Inc. v. Equal Emp't Opportunity Comm'n,* 578 U.S. ___, ___, 136 S. Ct. 1642, 1651 (2016) ("[A] defendant need not obtain a

[2]While Plise did not move for a stay, it appears that he offered one, which he contends was a reasonable resolution. Thus, Plise suggests that the district court abused its discretion in awarding attorney fees because his insistence on a stay was not frivolous.

favorable judgment on the merits in order to be a 'prevailing party.'"); *see also Sunlight Tr. v. Hsieh Ying-Man*, Docket No. 77660, at *2 (Order of Reversal and Remand, Dec. 13, 2019) (citing *CRST* with approval).

Relying on *Semenza v. Nevada Medical Liability Insurance Co.*, 104 Nev. 666, 765 P.2d 184 (1991), Plise argues that either a stay or a dismissal without prejudice is appropriate in cases where a premature legal malpractice action is filed. Consequently, Plise contends that the district court erred when it dismissed his claim (rather than issuing a stay) and awarded Schwartzer attorney fees based on a finding that Plise maintained the action without reasonable grounds.

In *Semenza*, an insurance company brought a legal malpractice action against its attorney, Semenza, after he failed to successfully defend against a medical malpractice claim. *Id.* at 667, 765 P.2d at 185. While an appeal on the underlying medical malpractice claim was pending, the insurer's legal malpractice action against Semenza proceeded to trial, and the jury returned a verdict in favor of the insurance company. *Id.* Shortly thereafter, in *Mishler v. McNally*, 102 Nev. 625, 730 P.2d 432 (1986), the supreme court reversed the judgment on the underlying medical malpractice claim. *Semenza*, 104 Nev. at 667, 765 P.2d at 185. Based on the supreme court's reversal, Semenza appealed from the legal malpractice judgment, arguing that "the trial court erred in finding him guilty of legal malpractice." *Id.*

The Nevada Supreme Court agreed with Semenza and reversed, reasoning that "it is simply premature to proceed to trial on a legal malpractice claim until the appeal of the original judgment on the underlying cause of action has been finally resolved." *Id.* at 668, 765 P.2d at 186. This is so because "it is too early to know whether damage[s have]

been sustained." *Id.* And where damages have not "been sustained, a legal malpractice action is premature and *should be dismissed.*" *Id.* (emphasis added); *see also Morgano v. Smith*, 110 Nev. 1025, 1028 n.2, 879 P.2d 735, 737 n.2 (1994) (citing damages as a required element of a legal malpractice claim). Applying this logic, the *Semenza* court reversed and concluded "that the trial court erred in rejecting the motion by Semenza's counsel to *hold the trial in abeyance* pending the outcome of the *Mishler* [medical malpractice] appeal." 104 Nev. at 668, 765 P.2d at 186 (emphasis added).

We conclude that *Semenza* is distinguishable from the instant case and we are not persuaded by Plise's argument. First, the Ninth Circuit heard the appeal and reversed the summary judgment order of the bankruptcy court; thus, there was no appeal pending at the time Schwartzer moved to dismiss. Second, the *Semenza* court did not conclude, or necessarily imply, that stays are one of two preferred remedies where a premature legal malpractice claim has commenced. Rather, the court stated that ordinarily premature claims "should be dismissed." *Id.* The court concluded that the district court erred because it failed "to hold the trial in abeyance," where the *defendant requested* a stay and the appeal on the underlying action was still pending. *Id.* Thus, the *Semenza* court's primary focus was on ensuring that courts do not proceed to trial on legal malpractice claims while appeals are pending. Therefore, because Semenza requested that the malpractice action be held in abeyance pending the result of the underlying appeal, the supreme court concluded that the district court erred by denying his request and proceeding to trial.

Here, Schwartzer did not move for a stay, or request that the trial be held in abeyance, and there was no reason to do so because the appeal in the underlying case was resolved. Schwartzer, in fact, contacted

Plise in an attempt to negotiate a stipulation. Specifically, Schwartzer requested that the parties agree to dismiss the malpractice claim without prejudice until the bankruptcy action was fully resolved. Despite this overture, Plise insisted on a stay, notwithstanding the fact that his alleged malpractice claim on which he based his state court complaint was moot, and any alleged future claim for malpractice was not yet ripe, as no damages had accrued, nor was the statute of limitations set to expire. *See, e.g., Branch Banking & Tr. Co. v. Gerrard*, 134 Nev. 871, 873, 432 P.3d 736, 738 (2018) ("[A] malpractice claim does not accrue and its statute of limitations does not begin to run during a pending appeal of an adverse ruling from the underlying litigation." (internal quotation marks omitted)); *see also K.J.B., Inc. v. Drakulich*, 107 Nev. 367, 370, 811 P.2d 1305, 1307 (1991) (concluding that a premature legal malpractice action was warranted where there was "a reasonable belief that the statute of limitations might preclude the action if it were filed at a later date"). In other words, Plise insisted on maintaining a legal malpractice cause of action even though he could not satisfy every element of that claim, nor was filing the complaint necessary to preserve the statute of limitations for any possible future claim.

Based on these facts, we conclude that the district court properly dismissed Plise's malpractice claim as premature. Moreover, because Plise insisted on a stay, even in the absence of existing damages, it was not unreasonable for the district court to conclude that Plise "brought or *maintained* [his claim] without reasonable ground[s]." NRS 18.010(2)(b) (emphasis added). Therefore, the district court did not abuse its discretion in awarding Schwartzer attorney fees pursuant to NRS 18.010(2)(b).

Additionally, Plise's cause of action, as pleaded in his amended complaint, could never accrue or become viable. The legal malpractice claim

against Schwartzer was predicated on his alleged failure to properly oppose the Trustee's motion for partial summary judgment. However, the Ninth Circuit concluded that the bankruptcy court erred in granting partial summary judgment for the Trustee, reasoning that when viewing the evidence that Schwartzer presented to the bankruptcy court—namely, Plise's affidavit—in the light most favorable to Plise, "a reasonable finder of fact could find that his version of events does not support a finding of fraudulent intent." *Plise*, 719 F. App'x at 625. The court noted further that "[b]y disregarding such evidence the bankruptcy court was, in effect, weighing [Plise's declaration] and making a credibility determination," which is impermissible at the summary judgment stage. *Id.* As a result, the Ninth Circuit reversed and concluded "that the bankruptcy court erred in granting partial summary judgment in favor of [the Trustee]." *Id.* In other words, Schwartzer presented evidence legally sufficient to overcome the Trustee's partial summary judgment motion and was therefore not negligent. Thus, a legal malpractice claim against him based on this conduct was moot. *See Morgano*, 110 Nev. at 1028 n.2, 879 P.2d at 737 n.2 (stating that breach of duty is a necessary element of a professional malpractice claim).

In light of this disposition, we conclude that Plise's legal malpractice claim, as formulated in his amended complaint, was no longer sustainable once the Ninth Circuit reversed the partial summary judgment. Therefore, Plise's malpractice claim against Schwartzer based only on the same occurrence should have been dismissed, since there was no longer any alleged professional misconduct from which to recover damages. And although the district court did not employ this exact logic when it concluded that Plise maintained his claim without reasonable grounds, this court may,

where appropriate, affirm a district court's ruling on alternative grounds.[3] *Cf. Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) ("This court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason.").

Therefore, we conclude that the district court did not abuse its discretion when it awarded Schwartzer attorney fees based on Plise's maintenance of a frivolous claim, because the record shows that Plise's claim was indeed meritless, as damages, a necessary element of the claim, could never be realized; consequently, his existing legal malpractice cause of action against Schwartzer was not legally cognizable. *See Frederic*, 134 Nev. at 580, 427 P.3d at 113 (explaining that "a claim is frivolous or groundless if there is no credible evidence to support it"). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_______________, C.J.
Gibbons

_______________, J.
Tao

_______________, J.
Bulla

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[3]The district court found that it was unreasonable for Plise to insist on a stay rather than a dismissal without prejudice, since his claim was premature, and therefore, fees and costs were justified under NRS 18.010(2)(b). However, the exact claim that Plise pleaded was in fact rendered moot by the reversal and no other legal malpractice claims existed. While it is possible that a future claim might exist, since the bankruptcy proceeding had not yet been completed, Schwartzer was willing to enter into a dismissal without prejudice to ensure any possible future legal malpractice case that Plise might have would not be barred. Thus, the district court did not abuse its discretion by finding that Plise's insistence on a stay was unreasonable.

cc: Hon. Adriana Escobar, District Judge
John Boyer, Settlement Judge
Carl M. Hebert
Lipson Neilson P.C.
Eighth District Court Clerk