

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LYNITA SUE NELSON,
INDIVIDUALLY AND AS TRUSTEE OF
THE LSN NEVADA TRUST DATED
MAY 30, 2001,
Appellant,
vs.
JEFFREY L. BURR, ESQ.; AND
JEFFREY BURR, LTD.,
Respondents.

No. 81456-COA

FILED

AUG 18 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *Elizabeth A. Brown*
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Lynita Sue Nelson, individually and as Trustee of the LSN Nevada Trust dated May 30, 2001 (collectively Lynita), appeals from a district court order dismissing a professional negligence action. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

In the early 1990s, Lynita and her husband, Eric Nelson, consulted a Nevada attorney, Jeffrey Burr, to create an estate plan that would insulate a portion of their assets from potential creditors.¹ On Burr's advice, the couple transmuted their community assets into separate property via a separate property agreement (SPA) and moved those assets into separate revocable trusts. In 2001, Burr advised Lynita and Eric that they could further protect their assets by moving them from their revocable trusts into individual self-settled spendthrift trusts (SSSTs). Lynita and Eric agreed and converted their separate property trusts into Lynita's Trust and Eric's Trust, and funded their respective SSSTs with the separate property previously held in their respective revocable trusts. Both trusts

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

contained the provision that “[a]ny property held in trust and any income earned by the trusts” would be the separate property of the trustee and distinct from “community property” or “marital property.” Thereafter, during their marriage, Lynita allowed Eric to transfer, without compensation, millions of dollars’ worth of property from her trust into Eric’s Trust, allegedly based on Burr’s advice that the couple should routinely equalize or “level off” assets between the two SSSTs, so that at any given time half of the couples’ assets would be protected from third-party creditors. Burr also allegedly advised Lynita that the establishment of Lynita’s Trust and Eric’s Trust would not adversely affect the equal distribution of the assets collectively held therein in the event of divorce. Further, Burr allegedly failed to advise Lynita that she would be unable to collect alimony or child support directly from Eric’s Trust.

In 2009, Eric filed for divorce. During the divorce proceedings, Lynita and Eric disagreed on how the assets held in their individual SSSTs should be distributed. Ultimately, the district court issued a divorce decree in Lynita’s favor by equalizing the value of the assets between Lynita’s Trust and Eric’s Trust, and by ordering that the lump sum payments awarded to Lynita for alimony and child support be paid directly from Eric’s trust. Eric appealed.

In 2017, the Nevada Supreme Court reversed the district court in part, concluding that the court erred in equalizing the assets between Lynita’s Trust and Eric’s Trust prior to distribution and in ordering alimony and child support to be paid from Eric’s Trust. *Klabacka v. Nelson*, 133 Nev. 164, 175-79, 394 P.3d 940, 949-52 (2017). Lynita alleges that as a result of the supreme court’s decision, she incurred damages in excess of \$4 million. Within two years of the decision, Lynita filed a professional negligence

complaint against Burr, alleging that he failed to properly advise her of the legal ramifications of executing the SPA and creating the SSSTs, as well as how the creation of these trusts would ultimately affect the distribution of her and Eric's assets at the time of divorce. Burr moved to dismiss the complaint under NRCP 12(b)(5), arguing that Lynita's legal malpractice action was time-barred by the statute of limitations set forth in NRS 11.207(1). The district court agreed with Burr and dismissed the case. This appeal followed.

On appeal, Lynita argues that the earliest the statute of limitations accrued for her legal malpractice claim was in 2017 when the supreme court reversed the district court's divorce decree, as this is when she first discovered the facts supporting a legal malpractice claim and sustained legal damages from Burr's alleged malpractice. Burr contends that Lynita's complaint is time-barred by NRS 11.207(1) because either (1) she sustained damages when the estate plan documents were drafted, or (2) she sustained damages and was put on inquiry notice of her claims during the divorce proceedings.² In dismissing the case, the district court found Burr's second argument persuasive. We disagree and therefore reverse.

²We understand that the district court was persuaded by Burr's argument that the statute of limitations accrued during the divorce action. Specifically, the district court expressed that it was persuaded by Burr's argument that his testimony during the divorce action put Lynita on notice regarding the restrictions of the SSSTs and thus of her legal malpractice claim. However, Burr's testimony during the divorce action actually corroborated Lynita's position and therefore could not have put her on notice of potential legal malpractice against Burr. Specifically, Burr testified that the SSST and SPA "[were] never meant to alter the rights [of Eric and Lynita] in the event of a dissolution or divorce" and that he believed the SSSTs "would not -- should not be relied upon for dissolution rights . . . because [the couple's] intent all along was to keep the balance of

“A court may dismiss a complaint for failure to state a claim upon which relief can be granted when an action is barred by the statute of limitations.” *Holcomb Condo. Homeowners’ Ass’n, Inc. v. Stewart Venture, LLC*, 129 Nev. 181, 186, 300 P.3d 124, 128 (2013) (internal quotation omitted). A motion seeking a dismissal on such grounds is treated like a motion under NRCP 12(b)(5) in that the court accepts all relevant allegations contained within the complaint as true and draws all inferences in favor of the complainant. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). Dismissing a complaint is appropriate “only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief.” *Id.* at 228, 181 P.3d at 672. But such motions may also require the court to look outside of the complaint in order to determine the truth of relevant facts that are not required to be pled as part of the complaint, such as the accrual date. In resolving those facts, “when evidence irrefutably demonstrates this accrual date [then] a district court make such a determination as a matter of law.” *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 251, 277 P.3d 458, 462 (2012).

ownership [between the SSSTs].” Additionally, the district court in the divorce action also found that Burr’s testimony “corroborated the fact that the purpose of creating the spendthrift trusts was to ‘supercharge’ the protection afforded against creditors and was not intended to be a property settlement” in the event of divorce and thus made the property distribution in Lynita’s favor. Accordingly, Lynita could not have known of the facts constituting her potential legal malpractice action against Burr during the divorce proceedings, as Burr’s testimony, as well as the resulting divorce decree, corroborated her position that the assets contained in Lynita’s Trust and Eric’s Trust were to be equally divided in the event of divorce.

NRS 11.207(1) sets forth the statute of limitations for a legal malpractice claim. It provides that a legal malpractice action must be “commenced within [four] years after the plaintiff sustains damage or within [two] years after the plaintiff discovers or through the use of reasonable diligence should have discovered the material facts which constitute the cause of action, whichever occurs *earlier*.” NRS 11.207(1) (emphasis added). Therefore, the statute of limitations does not commence until a cause of action has accrued and “a suit may be maintained thereon.” *Clark v. Robison*, 113 Nev. 949, 951, 944 P.2d 788, 789 (1997); *see also* 51 Am. Jur. 2d *Limitation of Actions* § 130 (2021) (“A cause of action does not accrue for the purposes of a statute of limitations until all elements are present . . .”). The last element of a legal malpractice cause of action is “actual loss or damage[s].” *Day v. Zubel*, 112 Nev. 972, 976, 922 P.2d 536, 538 (1996). Accordingly, a plaintiff must sustain actual damages, whether under the two-year or four-year period of limitations, for the statute of limitations for a legal malpractice claim to commence. *See Brady, Vorwerck, Ryder & Caspino v. New Albertson’s, Inc.*, 130 Nev. 632, 641-42, 333 P.3d 229, 235 (2014).

In this case, we must determine at what point Lynita suffered actual damages sufficient to sustain a legal malpractice cause of action, because that is when the cause of action accrued and the statute of limitations began to run. “Actual damages” are “[a]n amount awarded to . . . compensate for a proven injury or loss” and is synonymous with “compensatory damages.” *Davis v. Beling*, 128 Nev. 301, 316, 278 P.3d 501, 512 (2012) (first alteration in original) (quoting *Actual Damages*, *Black’s Law Dictionary* (9th ed. 2009)). Further, actual damages must be “appreciable,” *see Sorenson v. Pavlikowski*, 94 Nev. 440, 444, 581 P.2d 851,

854 (1978), and not “speculative,” *see Clark*, 113 Nev. at 951, 944 P.2d at 789-90.

The point at which actual damages are appreciable and not speculative depends on “when legal damages [have] been sustained as a result of the alleged negligence.” *Kopicko v. Young*, 114 Nev. 1333, 1337, 971 P.2d 789, 791 (1998). In *Kopicko*, the supreme court explicitly overruled in part *Gonzales v. Stewart Title*, 111 Nev. 1350, 1353, 905 P.2d 176, 178 (1992), recognizing a distinction between litigation and transactional malpractice. In the transactional context, the statute of limitations begins to run when “the plaintiffs knew or should have known of damages sustained even though the underlying litigation continued.” *Kopicko*, 114 Nev. at 1337 n.3, 971 P.2d at 791 n.3. However, *Kopicko* did not hold that legal malpractice cases must rigidly fall into one these categories. So while the categorical approach can be helpful for purposes of determining when damages are sustained, it is not absolute where, as here, the alleged malpractice at issue does not fall neatly into either category.

In Lynita’s underlying legal malpractice complaint, Burr allegedly committed malpractice when he advised Lynita and Eric regarding the creation of the trusts and the equalization and distribution of their assets between Lynita’s Trust and Eric’s Trust in the event of divorce, and not specifically in relation to any ongoing litigation against Burr concerning the validity of the trust documents. While the legality of Burr’s advice and the ultimate effect of the formation of the trusts on the property distribution upon the parties’ divorce was litigated during the divorce proceedings, the outcome remained “uncertain” until after disposition of the appeal. Therefore, although Lynita’s alleged legal malpractice case against Burr could be considered transactional in nature, the ongoing divorce

proceedings, unequivocally of a litigation-based nature, would ultimately determine the certainty of her damages as a result of the alleged malpractice.

Thus, in this case, the earliest Lynita could have discovered actual, compensable damages related to the distribution of assets from the SSSTs based on Burr's advice was when the supreme court reversed the district court's order on May 25, 2017, *see Klabacka*, 133 Nev. at 175-79, 394 P.3d at 949-52, thereby adversely affecting her distribution. Specifically, taking all inferences in Lynita's favor, it was at this time that she believed she incurred actual damages of approximately \$4 million. Further, Lynita claims that many of the assets contained in Eric's Trust were separate property gifts from her trust, which she would not have permitted to be transferred to Eric's Trust had she not relied on Burr's advice to routinely equalize the assets held between the two trusts and that doing so would have no effect on the distribution of the trust assets upon divorce. As a result, she claims she is no longer entitled to the full value of her separate property assets. Further, Lynita alleges that had she known she would not have received at least equal value for the transferred assets, she would not have agreed to transfer them to equalize the assets as Burr recommended. Therefore, taking all inferences in Lynita's favor, the decreased value of the assets she received following the supreme court's decision constituted nonspeculative, compensable damages.³ *Cf. Davis*, 128 Nev. at 316-17, 278

³In light of our disposition, we need not reach the merits of whether Burr committed legal malpractice by not advising Lynita of her inability to collect alimony and child support directly from Eric's Trust. We do note, however, that the supreme court upheld her alimony and child support

P.3d at 512 (noting that the rigid measurement of a plaintiff's damages at the time of the defendant's transgressions "would thus defeat the irrefutable goal of compensatory damages").⁴


awards, which she was entitled to collect from Eric, personally. *Klabacka*, 133 Nev. at 178-79, 394 P.3d at 951-52.

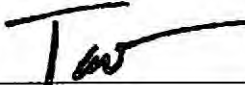
⁴Burr, relying on *Gonzales v. Stewart Title of Northern Nev.*, 111 Nev. 1350, 1353-54, 905 P.2d 176, 178 (1995), *overruled on other grounds by Kopicko*, 114 Nev. at 1337 n.3, 971 P.2d at 791 n.3, contends that Lynita suffered actual damages when her property rights were altered as a result of the SPA being executed and the SSSTs being created. We disagree for two reasons. First, Burr's reliance on *Gonzales* is misplaced. In *Gonzales*, the court held that the appellants did not sustain damages upon the erroneous drafting of a promissory note, but rather suffered actual damages years later, when the appellants incurred attorney fees as the result of litigating the meaning and effect of the erroneous promissory note. 111 Nev. at 1351, 1353, 905 P.2d at 176-78 ("In this case, the issue of damages became a reality when appellants became aware of the drafting defect upon the filing of the lawsuit."). Here, drawing all inferences favorable to Lynita, she arguably did not sustain damages until the distribution of the assets adversely affected her because of the supreme court's decision. Second, even if Lynita's property rights were altered by Burr's estate planning, and specifically at the time she executed the relevant documents, she had yet to discover compensable, ascertainable damages when the documents were executed because she was married and any alleged alteration of her property rights had yet to result in damages. *Cf. Gonzales*, 111 Nev. at 1353-54, 905 P.2d at 178; *Charleson v. Hardesty*, 108 Nev. 878, 879, 839 P.2d 1303, 1304 (1992), *superseded in part by statute as stated in Canarelli v. Eighth Judicial Dist. Court*, 136 Nev. 247, 255 n.3, 464 P.3d 114, 122 n.3 (2020); *Semenza v. Nev. Med. Liab. Ins. Co.*, 104 Nev. 666, 668, 765 P.2d 184, 186 (1988) ("[W]here damage has not been sustained or where it is too early to know whether damage has been sustained, a legal malpractice action is premature and should be dismissed."). Accordingly, we conclude that Lynita did not sustain actual damages at the time the SPA was executed and SSSTs were created, nor when the assets were transferred from Lynita's Trust to Eric's Trust, because she did not yet have ascertainable damages.

Accordingly, to the extent that Burr contends that Lynita suffered actual damages during the divorce action when she accrued damages by way of attorney fees based on his advice that the SPA and SSSTs would not affect her property rights upon divorce, we disagree. In *Gonzalez*, damages in the form of attorney fees were necessary in order to defend a lawsuit directly caused by the negligent drafting of a promissory note, or the alleged legal malpractice. 111 Nev. at 1354, 905 P.2d at 178. Here, however, any such damages, including incurring attorney fees, were related to the divorce action and not directly related to any alleged malpractice on the part of Burr. There are no allegations that there were drafting errors in the documents Burr prepared. Indeed, the district court followed Burr's interpretation as to how the documents were to operate in the event of divorce, and ultimately awarded Lynita an equal distribution of the trust assets held in the SSSTs, notwithstanding that the majority of the assets were held in Eric's Trust. Therefore, after the divorce decree was entered and until such time the supreme court reversed the district court's divorce decree, Lynita had not actually incurred any damages as a result of Burr's alleged legal malpractice, and indeed, any such future damages were at best speculative.

Thus, Lynita's complaint filed on May 16, 2019, is not time-barred because the earliest possible date Lynita incurred damages as a result of the alleged legal malpractice is May 25, 2017, when the supreme court reversed the district court's decree of divorce that equalized the assets between Lynita's Trust and Eric's Trust prior to distribution. Therefore, we

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


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Mark R. Denton, District Judge
William C. Turner, Settlement Judge
Pecos Law Group
Lipson Neilson P.C.
Eighth District Court Clerk