

IN THE SUPREME COURT OF THE STATE OF NEVADA

TAE-SI KIM, AN INDIVIDUAL; AND
JIN-SUNG HONG, AN INDIVIDUAL,
Appellants,

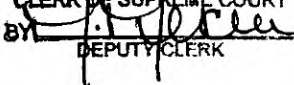
vs.

DICKINSON WRIGHT PLLC, A
NEVADA PROFESSIONAL LIMITED
LIABILITY COMPANY; JODI
DONETTA LOWRY, ESQ., AN
INDIVIDUAL; AND JONATHAN M.A.
SALLS, ESQ., AN INDIVIDUAL,
Respondents.

No. 85671

FILED

MAY 16 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting summary judgment in an attorney malpractice action. Eighth Judicial District Court, Clark County; Jessica K. Peterson, Judge.

Appellants Tae-Si Kim and Jin-Sung Hong (collectively, “Kim”) filed a complaint against respondents Dickinson Wright, PLLC, and several individuals for legal malpractice, intentional and negligent misrepresentation, and breach of fiduciary duties. Kim alleges that Dickinson Wright failed to file a legal malpractice cause of action in state court against attorney Charles Damus prior to the expiration of the statute of limitations.

Kim’s claims arise from a failed 2005 real estate deal. In 2008, Kim retained Damus to pursue claims against Kim’s real estate agent and mortgage broker and to prevent foreclosure of his property. Damus failed to take any legal action, and as a result, the property was foreclosed upon

in 2009. Thereafter, Kim retained the law firm Gibson Lowry Burris to pursue potential claims related to the underlying real estate deal. Attorneys Gibson and Lowry pursued Kim's claims in federal court, and later amended the complaint to include a claim against Damus for legal malpractice. Shortly after the amendment, Gibson and Lowry began working at Dickinson Wright and continued representing Kim. In 2010, the federal district court dismissed the claim against Damus for lack of supplemental jurisdiction. The remaining claims were litigated with varying degrees of success until 2015. Then, in 2015, Dickinson Wright terminated its representation of Kim and informed Kim that it had not filed state claims against Damus, that it would not do so because it was terminating its representation of Kim, and that Kim should contact other counsel to pursue such claims.

In 2017, Kim filed the instant action against Dickinson Wright based on the firm's failure to file a state action against Damus prior to the expiration of the statute of limitations. Dickinson Wright moved to dismiss, and the district court granted the motion on several grounds, including that 28 U.S.C. § 1367(d) tolled the statute of limitations until the entire federal action was dismissed in September 2015. Thus, the court determined that Kim had time to retain other counsel to pursue such claims as advised by Dickinson Wright but failed to do so. Kim appealed, and we reversed and remanded, concluding that the federal tolling statute tolls a state claim only until the individual claim is dismissed, rather than when the entire federal action is dismissed. *Kim v. Dickinson Wright, PLLC*, 135 Nev. 161, 165, 442 P.3d 1070, 1074 (2019). As such, the statute of limitations began to run again when the federal claim was dismissed in 2010, and the statute of limitations expired in early 2014 during the firm's representation of Kim.

See NRS 11.207(1) (providing a four-year statute of limitations for legal malpractice actions); *Kim*, 135 Nev. at 165, 442 P.3d at 1074.

Upon remand, litigation continued and both parties moved for summary judgment. The district court granted summary judgment to Dickinson Wright on the basis that Kim failed to retain an expert witness to establish the standard of care and breach of duty. Kim now appeals, arguing that (1) an exception to the expert witness rule applies because there was obvious breach; and (2) even if expert testimony was required, summary judgment was improper as other triable claims remained.

We review a district court's grant of summary judgment de novo. *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.* All evidence must be viewed in the light most favorable to the nonmoving party. *Id.*

An expert was required to prove Kim's legal malpractice claim

Kim contends that an expert witness was not required because we clarified the tolling statute in the previous appeal, such that Dickinson Wright clearly breached its duty by failing to meet the statute of limitations on the claim against Damus. But Kim misunderstands the role of the expert witness and fails to account for the lack of clarity that surrounded the tolling statute prior to our decision in *Kim*.

To establish a prima facie case of legal malpractice a plaintiff must demonstrate that (1) an attorney-client relationship existed, (2) the attorney owed a duty to the client, (3) the attorney breached that duty, (4) the attorney's breach was the proximate cause of the client's damages, and (5) the damages themselves. *Semenza v. Nev. Med. Liab. Ins. Co.*, 104 Nev. 666, 667-68, 765 P.2d 184, 185-86 (1988). And "expert evidence is generally

required in a legal malpractice case to establish the attorney's breach of care[.]” *Allyn v. McDonald*, 112 Nev. 68, 71, 910 P.2d 263, 266 (1996). An exception to the expert evidence requirement exists, however, “where the breach of care or lack thereof is so obvious that it may be determined by the court as a matter of law or is within the ordinary knowledge and experience of laymen.” *Id.*

We identified this narrow exception in *Allyn*, explaining that where a statute of limitations is *clear and unambiguous*, an attorney's failure to meet the statute of limitations would be “so apparent as to make expert evidence as to the standard of care and deviation therefrom unnecessary.” *Id.* at 72, 910 P.2d 266. But we also cautioned that, “if issues regarding tolling of the statute exist[], the case might extend beyond the realm of ordinary experience and knowledge of the layman, thus requiring an expert witness to establish the attorney's breach of the duty of care.” *Id.*

Kim relies on the exception established in *Allyn* but fails to heed our caution. As a result of the complex facts, actors, and timeline surrounding this matter, coupled with the unsettled nature of Nevada law during the relevant time period, Kim was required to provide expert evidence. Instead, Kim argues that the statute of limitations and tolling statute were clear, and are clear, *because* we clarified the tolling statute in 2019. However, this argument is circular. The tolling statute cannot have been clear and unambiguous in 2010 simply because we clarified it later by adopting an interpretation that happened to be in Kim's favor. *See, e.g., Kim*, 135 Nev. at 162, 442 P.3d at 1072 (“We *clarify* that § 1367(d) distinguishes between an ‘action’ and a ‘claim[.]’” (emphasis added)). The need to seek our involvement to clarify the tolling statute arose because the district court originally adopted Dickinson Wright's interpretation. The

issue was *not* clear or settled law in Nevada in 2010, further highlighting the need for expert testimony on the elements of duty and breach. The *Kim* opinion did not eliminate the need for expert evidence, especially as to whether the statute was uncertain at the time of representation, or whether Dickinson Wright's interpretation comported with its duties to Kim.

In sum, the narrow *Allyn* exception does not apply, and Kim failed to provide necessary expert evidence to demonstrate duty and breach. We therefore conclude that summary judgment in Dickinson Wright's favor was proper.

Kim's remaining arguments are inadequate

Kim argues that summary judgment was improper because additional triable claims remained. Kim further contends that Dickinson Wright had no discretion in determining whether to sue Damus in state court after the claim's dismissal from federal court. But this is essentially the same argument as above, regarding *Allyn*. Again, this is not an instance where breach is so obvious that it may be determined without expert testimony. As for Kim's assertion that there are other triable claims, Kim fails to support his argument with legal authority or identify which other claims should have remained. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (stating that we need not consider arguments not adequately briefed, not supported by relevant authority, and not cogently argued). Moreover, Kim failed to include relevant documents in support of this argument in the record. As such, we decline to consider Kim's remaining arguments.

Therefore, we


ORDER the judgment of the district court AFFIRMED.



_____, J.
Herndon



_____, J.
Lee



_____, J.
Bell

cc: Hon. Jessica K. Peterson, District Judge
Stephen E. Haberfeld, Settlement Judge
West Coast Trial Lawyers / Henderson
Kaempfer Crowell/Las Vegas
Eighth District Court Clerk