IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SHEIDA HUKMAN,
Appellant,
vs.
DR. KAREN LEAH CRUEY,
Respondent.

No. 87363-COA

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Sheida Hukman appeals from a district court order dismissing a civil complaint. Eighth Judicial District Court, Clark County; Joseph Hardy, Jr., Judge.

Hukman had been a customer service agent with US Airways since May 2007. Due to concerns about whether Hukman was fit to perform the duties of her position, US Airways required Hukman to submit to a company paid independent medical examination (IME). On January 18, 2013, respondent Karen Leah Cruey, M.D., a psychiatrist, performed an IME of Hukman. Cruey prepared a report which diagnosed Hukman with various disorders, the report was sent to US Airways, and Hukman was ultimately removed from her employment.

On April 13, 2023, Hukman filed a complaint against Cruey in district court asserting seven different causes of action: "Plaintiff had no Medical Record-Dr. Cruey created Medical Record for her"; "Dr. Cruey created a False Independent Medical Examination for Ms. Hukman & removed her from service"; "Dr. Cruey Misdiagnosed Ms. Hukman"; "Defamation of Character"; "Negligence"; Cruey made "false Testimonies on April 21, 2021 in Ms. Hukman's [Occupational Safety and Health

Administration (OSHA)] Case"; and "Invasion of [P]rivacy." Hukman's complaint generally asserted that Cruey misdiagnosed her, created and shared a false IME that ruined her reputation, provided false testimony at an April 21, 2021, hearing in Hukman's OSHA case against US Airways, and Cruey's actions caused Hukman harm.

In June 2023, Cruey filed a motion to dismiss Hukman's complaint arguing that the gravamen of her complaint was rooted in professional negligence, and thus the applicable one-year statute of limitations barred Hukman's claims. She further asserted that Hukman failed to provide an expert affidavit in compliance with NRS 41A.071, and that Hukman's complaint otherwise failed to state a claim and should therefore be dismissed pursuant to NRCP 12(b)(5). Hukman filed an opposition to the motion to dismiss, arguing that her complaint clearly identified her causes of action, and she asserted claims that were not subject to the one-year statute of limitations. She also noted that Cruey was a witness in Hukman's OSHA case, gave testimony during an April 21, 2021, hearing in that matter, and that Hukman timely filed her complaint within two years of April 21, 2021. Subsequently, the district court held a hearing on the motion and entered an order dismissing Hukman's complaint. Specifically, the court found that Hukman's claims sounded in professional negligence, and therefore, an expert affidavit was required. The court further found that her complaint was time-barred as Hukman was on inquiry notice of the alleged professional negligence "during her Independent Medical Examination on January 18, 2013, when she was allegedly misdiagnosed." This appeal followed.

On appeal, Hukman argues the district court erred in dismissing her entire complaint as she asserted causes of action that were

not barred by the statute of limitations, including certain causes of action which she alleges were not subject to the one-year limitations period for professional negligence actions. This court directed Cruey to file a response to the issues raised in Hukman's informal brief. In her answering brief, Cruey argues that the district court properly dismissed Hukman's complaint as all the claims arose out of professional negligence. Thus, Cruey argues that the complaint required a medical expert affidavit in compliance with NRS 41A.071 and was filed beyond the statute of limitations for professional negligence actions.[1] Cruey further asserts that none of Hukman's contentions have any merit.

"We review a district court order granting a motion to dismiss de novo." *Zohar v. Zbiegien*, 130 Nev. 733, 736, 334 P.3d 402, 404 (2014). In doing so, we deem "all factual allegations in [the plaintiff's] complaint as true and draw all inferences in [the plaintiff's] favor." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). A "complaint should be dismissed 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.* We also review a "district court's decision to dismiss

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[1]Cruey also asserts, among other things, that even if the complaint were construed as an action for anything other than professional negligence, it would be barred by the absolute litigation privilege and Nevada's anti-SLAPP statute, and that Hukman cannot demonstrate cognizable damages as a result of any conduct during an NRCP 35 exam or subsequent testimony related thereto. As these claims were not raised before the district court in the first instance, we decline to consider them on appeal. *See Old Aztec Mine, Inc. v. Brown,* 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (recognizing that arguments not raised in district court generally will not be considered for the first time on appeal). Nonetheless, in light of our determination that this matter must be reversed, the district court may consider these arguments on remand in the first instance.

[a] complaint for failing to comply with NRS 41A.071 de novo." *Yafchak v. S. Las Vegas Med. Invs., LLC*, 138 Nev., Adv. Op. 70, 519 P.3d 37, 40 (2022).

NRS 41A.097(2) requires claims for professional negligence occurring on or after October 1, 2002, and before October 1, 2023, to be filed "within one year of the injury's discovery and three years of the injury date," whichever occurs first. *See Engelson v. Dignity Health*, 139 Nev., Adv. Op. 58, 542 P.3d 430, 437 (Ct. App. 2023). Additionally, under NRS 41A.071(1), a professional negligence action requires a supporting affidavit from a medical expert. *Washoe Med. Ctr. v. Second Jud. Dist. Ct.*, 122 Nev. 1298, 1304, 148 P.3d 790, 794 (2006).

Here, Hukman's complaint asserted various causes of action alleging that Cruey misdiagnosed Hukman as set forth in her claims that: "Plaintiff had no Medical Record-Dr. Cruey created Medical Record for her"; "Dr. Cruey created a False Independent Medical Examination for Ms. Hukman & removed her from service"; "Dr. Cruey Misdiagnosed Ms. Hukman"; and "Negligence." On appeal, Hukman fails to provide any argument the district court erred in construing these specific claims as claims for professional negligence and concluding they were time-barred under the statute of limitations set forth in NRS 41A.097(2), and that dismissal was likewise warranted based on the absence of the required expert witness affidavit. *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 deemed waived). Moreover, the record reflects that Hukman's complaint was not filed with an affidavit from a medical expert to support these claims. *See* NRS 41A.071 (providing the district court shall dismiss an action for professional negligence if it was filed without the requisite affidavit from a medical expert); *Washoe Med. Ctr.*, 122 Nev. at 1304, 148

P.3d at 794 (holding that "a medical malpractice complaint filed without a supporting medical expert affidavit is void ab initio"). Likewise, the record reflects that Hukman received the report in 2013, but she failed to timely file her complaint within the one-year statute of limitations. As a result, we conclude Hukman's foregoing claims, which addressed issues regarding professional negligence, were properly dismissed due to her failure to comply with the statute of limitations and failure to comply with NRS 41A.071's affidavit requirement.

Next, we conclude that Hukman's claim for invasion of privacy was also properly dismissed. To recover for an invasion of privacy based upon intrusion upon seclusion, a party must prove the following elements:

> 1) an intentional intrusion (physical or otherwise); 2) on the solitude or seclusion of another; 3) that would be highly offensive to a reasonable person. In order to have an interest in seclusion or solitude which the law will protect, a plaintiff must show that he or she had an actual expectation of seclusion or solitude and that that expectation was objectively reasonable.

People for Ethical Treatment of Animals v. Bobby Berosini, Ltd., 111 Nev. 615, 630-31, 895 P.2d 1269, 1279 (1995), *overruled on other grounds by City of Las Vegas Downtown Redev. Agency v. Hecht*, 113 Nev. 644, 650, 940 P.2d 134, 138 (1997).

Here, Hukman's allegations did not establish how Cruey took any action that resulted in an invasion of privacy. Specifically, Hukman failed to allege facts demonstrating that she had a reasonable expectation the report would not be read by US Airways given that US Airways paid for and directed Hukman to undergo the IME with Cruey based on its concerns with Hukman's fitness for her employment duties. To the extent Hukman argues the report was then read by personnel at her subsequent employer,

Southwest Airlines, she does not allege facts that suggest that Cruey herself provided the report to or otherwise allowed the report to be read by various personnel at Southwest Airlines as she specifically asserts in her complaint that a former US Airways employee informed Southwest Airlines about the report. Thus, Hukman failed to allege facts demonstrating the existence of each of the elements of this type of claim against Cruey, and we conclude that dismissal of the invasion of privacy claim was warranted, pursuant to NRCP 12(b)(5), due to Hukman's failure to state a claim for relief. *See Pack v. LaTourette*, 128 Nev. 264, 267, 277 P.3d 1246, 1248 (2012) (holding that appellate courts may affirm a district court order on different grounds than those used by the district court).

Finally, turning to Hukman's claims for defamation and false testimony, we agree with Hukman that the district court erred in dismissing these claims on the same grounds it dismissed the professional negligence claims. "An action for defamation requires the plaintiff to prove four elements: (1) a false and defamatory statement. . . ; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages." *Clark Cnty. Sch. Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. 374, 385, 213 P.3d 496, 503 (2009) (omission in original) (internal quotation marks omitted). In her defamation claim, Hukman alleged that Cruey's report and her testimony as a witness in the OSHA case contained defamatory statements that were published to third parties and caused damage to Hukman's reputation. With respect to Hukman's false testimony claim, although she did not title it as a defamation claim, her complaint nonetheless alleged that Cruey made various false testimonies on April 21, 2021, as a witness in Hukman's OSHA case, and thus, this claim likewise sounds in defamation. *See Otak Nev.*,

LLC v. Eighth Jud. Dist. Ct., 129 Nev. 799, 809, 312 P.3d 491, 498 (2013) (explaining that this court analyzes "a claim according to its substance, rather than its label"); *State Farm Mut. Auto. Ins. Co. v. Wharton*, 88 Nev. 183, 186, 495 P.2d 359, 361 (1972) (explaining the appellate courts look to the nature of the grievance rather than the form of the pleadings when determining the character of the action).

Below, the district court summarily dismissed the entire complaint, including the defamation and false testimony claims, as it construed Hukman's entire complaint as sounding in professional negligence. But for both the defamation and false testimony claims, Hukman's complaint alleged facts specific to the elements of defamation, which were independent of the professional negligence claims. Moreover, defamation is a distinct tort with its own two-year statute of limitations, yet the district court erroneously treated all of Hukman's claims as claims for professional negligence and applied the statute of limitations for professional negligence to all of Hukman's claims.[2] *See* NRS 11.190(4)(c) (establishing a two year statute of limitations for libel and slander); *Franchise Tax Bd. of Cal. v. Hyatt*, 130 Nev. 662, 685-86, 335 P.3d 125, 141 (2014) (recognizing defamation as a distinct tort), *vacated on other grounds*, 578 U.S. 171 (2016). Under these circumstances, the district court erred in dismissing Hukman's defamation and false testimony claims, and thus, we reverse the dismissal of those claims and remand this matter for further proceedings as to the defamation and false testimony claims.

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[2]We note that, in her defamation claims, Hukman specifically referenced that Cruey made defamatory statements during the April 21, 2021, OSHA hearing. While we make no comment on the merits of the statute of limitation as to these claims, on remand, the district court should be mindful of this aspect of Hukman's complaint.

Accordingly, 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.[3]

_____, C.J.
Bulla

_____, J.
Gibbons

_____, J.
Westbrook

cc: Hon. Joseph Hardy, Jr., District Judge
Sheida Hukman
John H. Cotton & Associates, Ltd.
Eighth District Court Clerk

[3]To the extent Hukman raises other arguments that are not specifically addressed in this order, we have considered the same and conclude they do not present a basis for relief.