

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico

Filed 9/15/2026 9:12 AM

KIRK LEBOW,

Plaintiff-Appellant,

v.

No. A-1-CA-43368

TYE CHRISTOPHER

HARMON, HARMON,

BARNETT & MORRIS, P.C.,

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY

Timothy Rose, District Court Judge

Western Agriculture, Resource & Business Advocates, LLP

A. Blair Dunn

Jared R. Vander Dussen

Albuquerque, NM

for Appellant

Rodey, Dickason, Sloan, Akin & Robb, P.A.

Jack Brant

Albuquerque, NM

for Appellees

MEMORANDUM OPINION

HENDERSON, Judge.

{1} Plaintiff appeals from the district court's grant of Defendant's motion for summary judgment on Plaintiff's legal malpractice and breach of fiduciary duty claims. This Court issued a calendar notice proposing to affirm. Plaintiff has filed a

1 memorandum in opposition and Defendant has filed a memorandum in support, both
2 of which we have duly considered. Unpersuaded, we affirm.

3 {2} Plaintiff maintains that the district court erred in granting Defendant’s motion
4 for summary judgment on Plaintiff’s legal malpractice claim, arguing that “had
5 [Defendant] competently advised [Plaintiff] of [the] requirements [of a valid will],
6 the will could have been validly executed.” [MIO 4; 3-6] But as this Court explained
7 in its notice of proposed disposition, it is undisputed that “Defendant’s incorrect
8 legal advice did not contribute to the ‘invalid execution of [Plaintiff]’s mother’s will
9 and the resulting loss of inheritance.’” [CN 4] And despite Plaintiff’s argument,
10 whether or not competent advice may have resulted in a valid will, “Defendant did
11 not draft the invalid will or participate in the will’s execution.” [CN 4] Rather, it is
12 undisputed that “Plaintiff ultimately created and executed the will without
13 Defendant’s involvement or participation” because “Plaintiff and his mother did not
14 use Defendant’s advice in the creation or execution of the will submitted to the
15 probate court.” [CN 4-5]

16 {3} Plaintiff argues that whether his and his mother’s conduct is a superseding
17 cause to Plaintiff’s damages should be a question for the jury, citing to Plaintiff’s
18 affidavit. [MIO 5-6] But as previously discussed, it is undisputed—based on
19 Plaintiff’s own admissions—that Defendant’s incorrect legal advice was not a
20 contributing factor of Plaintiff’s invalid execution of the will because Plaintiff and

1 his mother executed his mother's will without Defendant's involvement. [CN 3-5]
2 Accordingly, any claim that Plaintiff may have acted differently if Defendant had
3 provided the correct requirements of a valid will is too speculative to create a
4 genuine issue of material fact on causation in light of these undisputed facts. [MIO
5 3-6] *See Paez v. Burlington N. Santa Fe Ry.*, 2015-NMCA-112, ¶ 14, 362 P.3d 116
6 (affirming the grant of summary judgment, explaining that a "plaintiff must show
7 that the breach was the cause in fact and proximate cause of any damages" and that
8 proximate cause requires a plaintiff show "that the injury would not have occurred
9 without it").

10 {4} Plaintiff also cites to his expert's affidavit, which stated Defendant's "conduct
11 was a contributing cause of Plaintiff's damages" and Defendant "was negligent in
12 not providing complete advice to [Plaintiff] on all of the proper manner and methods
13 available to validity execute a will in New Mexico, which may have damaged
14 [Plaintiff]." [MIO 4-6; RP 100 ¶¶ 7, 10] But Plaintiff's reliance on his expert's
15 affidavit is misplaced because the expert's statements in his affidavit amount to legal
16 conclusions. Because experts cannot testify as to legal conclusions, any testimony
17 to that effect cannot create a genuine issue of material fact such that summary
18 judgment is improper. *See Beal v. S. Union Gas Co.*, 1960-NMSC-019, ¶¶ 29-30, 66
19 N.M. 424, 349 P.2d 337 (concluding that expert testimony was properly stricken at
20 trial because it is not the function of any witness to state an opinion on a matter of

1 law); *State v. Clifford*, 1994-NMSC-048, ¶ 20, 117 N.M. 508, 873 P.2d 254
2 (explaining that “opinion [evidence] that seeks to state a legal conclusion is
3 inadmissible”); *Wilde v. Westland Dev. Co.*, 2010-NMCA-085, ¶ 28, 148 N.M. 627,
4 241 P.3d 628 (stating that a court cannot consider evidence at the summary judgment
5 stage “if the substance of the evidence is inadmissible at trial” (emphasis omitted)).

6 {5} Plaintiff similarly maintains that the district court erred in granting
7 Defendant’s motion for summary judgment on Plaintiff’s breach of fiduciary duty
8 claim, because Defendant prepared an affidavit and testified to confidential
9 communications with Plaintiff to aid parties adverse to Plaintiff during the probate
10 proceeding. [MIO 6-8] We proposed to conclude that, assuming without deciding
11 that Defendant did breach his fiduciary duty, Defendant’s breach did not adversely
12 affect Plaintiff during the probate proceedings. This is because “[i]t is undisputed
13 that the probate court found that the will was not valid because it was improperly
14 executed” and Defendant’s affidavit and testimony did not contribute to the probate
15 court’s decision because the will was executed before the disclosures occurred. [CN
16 6-7]

17 {6} Plaintiff now argues that this Court misunderstood Plaintiff’s breach of
18 fiduciary claim—“[Plaintiff]’s fiduciary-duty claim does not allege that the
19 disclosure invalidated the will” but rather that “[u]nauthorized disclosure of a
20 client’s confidential communications in an adverse proceeding may give rise to

1 independent liability for breach of fiduciary duty,” citing to Rule 16-106 NMRA.
2 [MIO 6-7] Despite this, Plaintiff acknowledges that Plaintiff is still required to
3 establish damages to prevail on a legal malpractice claim and that the only damages
4 alleged were loss of inheritance from the invalid will. [MIO 7-8] *See Spencer v.*
5 *Barber*, 2013-NMSC-010, ¶ 19, 299 P.3d 388 (explaining that “the Rules of
6 Professional Conduct cannot be used as a basis for civil liability”); *Encinias v.*
7 *Whitener Law Firm, P.A.*, 2013-NMSC-045, ¶ 8, 310 P.3d 611 (“The elements of
8 legal malpractice are: (1) the employment of the defendant attorney; (2) the
9 defendant attorney’s neglect of a reasonable duty; and (3) the negligence resulted in
10 and was the proximate cause of loss to the client.” (text only) (citation omitted)); *see*
11 *also* UJI 13-2404 NMRA use notes (explaining that the breach of fiduciary duty
12 instruction should be used in a legal malpractice claim where “an attorney’s breach
13 of a fiduciary duty or duties is alleged to have caused injury or harm”). Because it is
14 undisputed that Defendant’s affidavit and testimony—if they breached Defendant’s
15 fiduciary duty to Plaintiff—was immaterial to the probate court’s decision that
16 Plaintiff’s mother’s will was invalid, Plaintiff failed to create a genuine issue of
17 material fact such that summary judgment was improper.

18 {7} As such, Plaintiff does not now direct this Court to any new fact, law, or
19 argument that persuades us that our notice of proposed disposition was incorrect.
20 *See Hennessy v. Duryea*, 1998-NMCA-036, ¶ 24, 124 N.M. 754, 955 P.2d 683 (“Our

1 courts have repeatedly held that, in summary calendar cases, the burden is on the
2 party opposing the proposed disposition to clearly point out errors in fact or law.”);
3 *State v. Mondragon*, 1988-NMCA-027, ¶ 10, 107 N.M. 421, 759 P.2d 1003 (stating
4 that “[a] party responding to a summary calendar notice must come forward and
5 specifically point out errors of law and fact,” and the repetition of earlier arguments
6 does not fulfill this requirement), *superseded by statute on other grounds as stated*
7 *in State v. Harris*, 2013-NMCA-031, ¶ 3, 297 P.3d 374. We therefore refer Plaintiff
8 to our previous analysis in our proposed summary disposition.

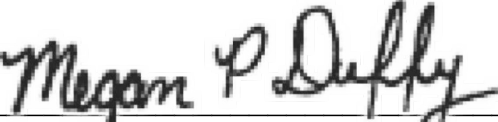
9 {8} For the reasons stated in our notice of proposed disposition and herein, we
10 affirm.

11 {9} **IT IS SO ORDERED.**

12
13 
SHAMMARA H. HENDERSON, Judge

14 **WE CONCUR:**

15 
16 JENNIFER L. ATTREP, Judge

17 
18 MEGAN P. DUFFY, Judge