

DA 20-0288

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 42N

BRIAN D. SMITH,

Plaintiff and Appellant,

v.

KATIE GREEN,

Defendant and Appellee.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause No. DV-20-58
Honorable Leslie Halligan, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Brian D. Smith, Self-Represented, Boulder, Montana


For Appellee:

Rutherford B. Hayes, Risk Management and Tort Defense Division,
Helena, Montana

Submitted on Briefs: January 6, 2021

Decided: February 16, 2021

Filed:


Clerk

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Brian D. Smith, representing himself, appeals an order from the Fourth Judicial District Court, Missoula County, granting Katie Green's motion to dismiss. We affirm.

¶3 Green represented Smith as a public defender from 2011 to 2012. During that time, the State prosecuted Smith on criminal charges before the Fourth Judicial District Court, the Honorable Ed McLean presiding (DC-11-161). Smith pled guilty and the court sentenced him to a twenty-year prison term without parole on May 9, 2012.

¶4 Smith asserts that after sentencing Green stopped communicating with him and failed to file an appeal of his guilty plea. Smith filed a petition for postconviction relief, which the District Court denied on February 14, 2017 (DV-16-698). This Court affirmed the denial of the petition on June 18, 2018. *See generally Smith v. State*, 2018 MT 115N, 392 Mont. 553, 416 P.3d 1054. Smith filed a second petition for postconviction relief, which was also denied by the District Court. He appealed and the matter is currently pending before this Court, although separate from this proceeding.

¶5 On January 16, 2020, Smith filed a civil complaint against Green alleging legal malpractice. He specifically asserted Green failed to secure a forensic mental health evaluation rather than a general mental health evaluation. Smith also asserted Green had

a contractual obligation to assist him through the appeal process, which was breached when she ceased communication in 2012. Smith alleges Green's contractual obligation stems from a 2011 omnibus hearing memorandum.

¶6 Green filed a motion to dismiss for failure to state a claim on March 18, 2020. The District Court granted her motion on April 23, 2020. The District Court held Smith and Green's relationship was created by appointment pursuant to § 46-8-101(2), MCA, rather than through contract. The District Court concluded the omnibus hearing memorandum was not a contract under general principles of contract law and dismissed Green's claim of breach of contract. The District Court also held Smith's legal malpractice claims were time-barred and that Smith additionally had not demonstrated how receiving a general mental health evaluation would have made any difference in the outcome of the proceeding. Smith appeals.

¶7 This Court reviews a District Court's decision granting a motion to dismiss for failure to state a claim de novo for correctness. *Anderson v. ReconTrust Co., N.A.*, 2017 MT 313, ¶ 7, 390 Mont. 12, 407 P.3d 692. An asserted claim is subject to dismissal if, as pled, it is insufficient to state a cognizable claim entitling the claimant to relief. M. R. Civ. P. 12(b)(6). Under Rule 12(b)(6), the court must take all well-pled factual assertions as true and view them in the light most favorable to the claimant, drawing all reasonable inferences in favor of the claim. *Anderson*, ¶ 8 (citing *Kleinhesselink v. Chevron, U.S.A.*, 277 Mont. 158, 161, 920 P.2d 108, 110 (1996)). A claim is subject to M. R. Civ. P. 12(b)(6) dismissal only if it either fails to state a cognizable legal theory for relief or states an otherwise valid legal claim but fails to state sufficient facts that, if true,

would entitle the claimant to relief under that claim. *Anderson*, ¶ 8 (citing *Kleinhesselink*, 277 Mont. at 161, 920 P.2d at 110).

¶8 We conclude the District Court properly held that an omnibus hearing memorandum did not constitute a contract between Smith and Green. To bring his claim against Green, Smith had to demonstrate that their relationship was formed through contract and not through operation of law. *See* § 28-1-102, MCA. Green, as a public defender, was appointed to represent Smith. Thus, their relationship was established by operation of law and is not a contract. *See* § 46-8-101(2), MCA (“[I]f the defendant desires assigned counsel because of financial inability to retain private counsel and the offense charged is a felony . . . the court shall order the office of state public defender . . . to assign counsel to represent the defendant”); *see also* § 46-8-103(1), MCA (“When counsel has been assigned, the assignment is effective until final judgment, including any proceeding upon direct appeal to the Montana supreme court, unless relieved by order of the court that assigned counsel or that has jurisdiction over the case.”). Moreover, the omnibus hearing memorandum cannot be considered a contract between Green and Smith. The District Court was correct to dismiss Smith’s contractual claim.

¶9 Smith additionally alleges the District Court erred in dismissing his legal malpractice claim against Green. However, the District Court properly held that Smith’s claim was time-barred. Montana law provides a three-year limitations period for actions against an “attorney based upon the person’s alleged professional negligent act or for error or omission in the person’s practice.” Section 27-2-206, MCA. Such actions

commence when “the plaintiff discovers or through the use of reasonable diligence should have discovered the act, error, or omission, whichever occurs last.” Section 27-2-206, MCA. Smith alleges Green concealed material facts from him during his previous proceedings and that he was not aware of such facts until an affidavit she filed in the postconviction proceeding. However, Smith was aware of all relevant facts by the end of his appeal in July 2012, over seven years prior to filing his complaint in January 2020. Smith’s claim for malpractice is time-barred.

¶10 The District Court also did not err in dismissing Smith’s assertion that Green did not seek a forensic mental health evaluation. Smith did not offer any reasons why a forensic evaluation would have made a difference in the outcome of the proceeding and he was not blindsided by information presented in Green’s 2017 affidavit.

¶11 The District Court’s dismissal of Smith’s complaint against Green is affirmed.

¶12 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

¶13 Affirmed.

/S/ LAURIE McKINNON

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ INGRID GUSTAFSON
/S/ JIM RICE