

NOT DESIGNATED FOR PUBLICATION

No. 125,273

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STEVEN J. STRAUSS,
Appellant,

v.

TOM BATH, ROBIN FOWLER, and BATH & EDMONDS, P.A.,
Appellees.

MEMORANDUM OPINION

Appeal from Johnson District Court; DAVID W. HAUBER, judge. Opinion filed April 28, 2023.
Affirmed.

Steven J. Strauss, appellant pro se.

Michael G. Norris and Emily Tung, of Norris Keplinger Hicks & Welder, LLC, of Leawood, for appellees.

Before BRUNS, P.J., GREEN and WARNER, JJ.

PER CURIAM: Steven J. Strauss appeals from the district court's dismissal of his legal malpractice action filed against his former criminal defense attorneys, Tom Bath, Robin Fowler, and their law firm, Bath & Edmonds, P.A. The claim arises out of a federal criminal action in which Strauss was convicted of filing a false income tax return. Based on our review of the record on appeal, we conclude that the district court did not err in granting summary judgment as a matter of law and dismissing Strauss' legal malpractice claim because he failed to obtain postconviction relief from his federal conviction prior to filing this action as required by law. Thus, we affirm.

FACTS

In 2019, Strauss entered into a plea agreement and was convicted in the United States District Court for the Western District of Missouri of filing a false income tax return in violation of 26 U.S.C. § 7206(1) (2018). In the federal criminal case, Strauss was represented by Bath, Fowler, and their law firm (hereinafter "Bath and Fowler"). He was subsequently sentenced to a 28-month prison term with one year of postrelease supervision. In addition, the federal district court ordered Strauss to pay \$684,792 in restitution plus interest.

In his plea agreement, Strauss stipulated to the following facts:

"Steven Strauss owns and operates a tree service business, Classic Tree Care, a sole proprietorship. Strauss has owned and operated this business since 2005. For the tax years that were investigated by the IRS, 2012 through 2015, Strauss reported his business activities on Schedules C to his Form 1040 U.S. Individual Tax Returns. The returns were prepared and filed by Northland Accounting, a tax preparer in Gladstone, Missouri, based on information provided by Strauss.

"Strauss did not maintain a set of formal books or records for his business. Typically, he would provide handwritten notes to his tax preparer with figures that he represented to be the gross receipts and expenses for Classic Tree Care. Strauss knew that the tax preparer relied upon the figures he supplied to prepare his returns, and Strauss authorized the signing and filing of the returns that were based on those figures. The investigation revealed that Strauss did not provide accurate information to the tax preparer; he vastly understated the gross receipts for his tree business. The understatement of gross receipts caused corresponding understatements of taxable income and tax liability.

"The IRS used the bank deposits method of proof in investigating this case. Most of Classic Tree Care's customers paid by check. Deposits to Strauss' s bank account were analyzed. Deposited checks that were ostensibly payments for tree care services were

considered to be income to Strauss. Cash deposits and other deposits that could not be shown as related to tree care services were disregarded in calculating the gross receipts for the tree care business. The IRS made an effort to fairly and reasonably identify and deduct non-income items. The results of the bank deposits analysis showed that during the years 2012 through 2015, Strauss deposited approximately \$1,467,682 in business income over and above what was reported on his tax returns.

....

"Defendant agrees that as a result of his fraudulent conduct in understating his tax liabilities by \$98,094, \$102,680, \$199,286 and \$284,732 for tax years 2012, 2013, 2014 and 2015 respectively, that he owes, and hereby agrees to pay, restitution to the IRS in the total amount of \$684,792."

In April 2020, Strauss unsuccessfully filed a pro se "Motion to Correct Judgment, Sentence and Order of Restitution Pursuant to 18 U.S.C. § 3742." In denying the motion, the federal district court determined that none of the statutory modification circumstances applied. Additionally, the federal district court noted that Strauss had not appealed his conviction or sentence and that the time frame had passed for him to seek correction of his sentence pursuant to Fed. R. Crim. Proc. 35(a). Moreover, Strauss did not appeal from the federal district court's denial of his motion.

Strauss also filed a "Petition for Compassionate Release Pursuant to 18 U.S.C. § 3582" due—in part—to the COVID-19 pandemic. In denying this motion, the federal district court found that Strauss failed to demonstrate "any extraordinary and compelling reasons for his early release." Once again, Strauss did not appeal following the denial of his petition for compassionate release.

On December 6, 2021, Strauss filed a pro se action petition in the Johnson County District Court, in which he asserted that Bath and Fowler had committed legal malpractice in the federal criminal case. In response, Bath and Fowler filed an answer as

well as a motion to dismiss. Because several supporting documents from the federal criminal case were attached to the motion to dismiss, the district court treated the motion as one seeking summary judgment as a matter of law as allowed under K.S.A. 2022 Supp. 60-212(d). Moreover, at a hearing on the motion, Strauss agreed that what happened in the federal criminal case was undisputed.

On April 15, 2022, the district court issued a six-page order granting Bath and Fowler summary judgment as a matter of law and dismissing Strauss' legal malpractice claim. Specifically, the district court found that "Strauss has not obtained the required post-conviction relief in order to establish a basis to sue his former attorneys. Accordingly, the Court finds that [Strauss] has not met the condition precedent required to bring this action."

Thereafter, Strauss timely filed a notice of appeal.

ANALYSIS

On appeal, Strauss contends that the district court erred in granting Bath and Fowler summary judgment as a matter of law and dismissing his legal malpractice claim. In support of this contention, Strauss argues that whether a lawyer was negligent is a question of fact and not a question of law. He also argues that the district court erred in invoking the exoneration rule. On the other hand, Bath and Fowler contend that the district court appropriately granted them summary judgment as a matter of law and dismissed Strauss' claim based on the exoneration rule.

Under K.S.A. 2022 Supp. 60-256(c)(2), summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits or declarations show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." On appeal from a district court's

granting of summary judgment, our review is unlimited and we apply the same rules as the district court. *GFTLenexa, LLC v. City of Lenexa*, 310 Kan. 976, 981-82, 453 P.3d 304 (2019). Furthermore, K.S.A. 2022 Supp. 60-212(d) grants district courts the authority to treat motions to dismiss as motions for summary judgment when a matter outside the pleadings is presented. See *Sperry v. McKune*, 305 Kan. 469, 480-81, 384 P.3d 1003 (2016). Here, Bath and Fowler's motion to dismiss referenced several documents from the federal criminal case that were outside the pleadings in this case, and Strauss did not challenge the validity of those documents. As a result, the district court properly treated the motion to dismiss as a motion for summary judgment.

To prevail on a legal malpractice claim, a plaintiff must show "(1) the duty of the attorney to exercise ordinary skill and knowledge, (2) a breach of that duty, (3) a causal connection between the breach of duty and the resulting injury, and (4) actual loss or damage." *Bergstrom v. Noah*, 266 Kan. 847, 874, 974 P.2d 531 (1999). In addition, Kansas law imposes another requirement—known as the exoneration rule—when a convicted criminal defendant sues his or her former criminal defense attorney. This rule requires that before a criminal defendant may sue their attorneys for legal malpractice, they must first obtain postconviction relief. *Canaan v. Bartee*, 276 Kan. 116, 132, 72 P.3d 911 (2003). The interpretation and application of the exoneration rule is also a question of law over which our review is unlimited. *Garcia v. Ball*, 303 Kan. 560, 571, 363 P.3d 399 (2015).

In adopting the exoneration rule, the Kansas Supreme Court found that it represented the majority rule among states. In addition, the Kansas Supreme Court explained that there are several policy reasons to support the rule. *Canaan*, 276 Kan. at 122. In discussing the policy reasons behind the rule, our Supreme Court explained, "without exoneration, it cannot be said that the attorney's actions were the proximate cause of the guilty criminal's injury." 276 Kan. at 124.

Later, in *Garcia*, 303 Kan. 560, Syl. ¶ 4, our Supreme Court further explained:

"The exoneration rule applicable to a criminal defendant's claim that his or her attorney's legal malpractice resulted in the defendant serving an illegal sentence requires the defendant to obtain post-sentencing relief from the illegal sentence, but the rule does not require the defendant to prove that he or she was innocent of the crime for which the illegal sentence was imposed."

Here, it is undisputed that Strauss has not received postconviction relief from either his federal court conviction or from his sentence. Hence, we conclude that the exoneration rule prevents Strauss from bringing this legal malpractice claim against Bath and Fowler. Although Strauss suggests that we need not apply the exoneration rule in this case, we are an intermediate appellate court and we must follow the precedent established by our Supreme Court unless there is an indication that it is departing from its previously stated position. *State v. Rodriguez*, 305 Kan. 1139, 1144, 390 P.3d 903 (2017). Based on our review of Kansas appellate decisions, we find no indication that our Supreme Court is departing from its holding in *Canaan* or its progeny. See *Garcia*, 303 Kan. at 572-73; see also *Mashaney v. Board of Indigents' Defense Services*, 302 Kan. 625, Syl. ¶ 4, 355 P.3d 667 (2015).

Strauss further suggests that the exoneration rule should not be applied in this case because he was convicted in federal court of felony tax fraud, which is distinguishable from a defendant who is convicted of a violent crime. Strauss does not provide us with any authority to support such a distinction, and we are aware of no such authority. Even in cases involving crimes of violence, it is not unusual for a district court to award restitution to the victim for the damages suffered. Moreover, the policy stated in *Canaan*—that one cannot establish an attorney's actions as the proximate cause of the convicted defendant's damages without exoneration—equally applies under the circumstances presented in this case, and our analysis is the same.

In summary, we find that before Strauss may sue his attorneys for legal malpractice arising out of his federal criminal case, he must first obtain postconviction relief. Because he has not yet done so, we find that the district court did not err in granting Bath and Fowler summary judgment as a matter of law or in dismissing his legal malpractice claim. However, we do not take a position regarding whether Strauss may be able to assert a legal malpractice claim in the future should he subsequently obtain postconviction relief from his conviction or sentence. Accordingly, we affirm the district court.

Affirmed.