

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

OCT 31 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

LYLE GERALD JOHNS,)	2 CA-CV 2012-0101
)	DEPARTMENT B
Plaintiff/Appellant,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
CHERYL J. STURM,)	Appellate Procedure
)	
Defendant/Appellee.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20118848

Honorable Kyle Bryson, Judge

AFFIRMED

Lyle G. Johns

Tucson
In Propria Persona

Cheryl J. Sturm

Chadds Ford, PA
In Propria Persona

K E L L Y, Judge.

¶1 Appellant Lyle Johns appeals from the trial court’s order granting appellee Cheryl Sturm’s motion to dismiss his complaint. On appeal he argues the court erred in concluding his complaint failed to state a claim on which relief could be granted. He also claims the court should have granted him leave to amend his complaint. For the following reasons, we affirm.

Background

¶2 On appeal from an order granting a motion to dismiss, we treat the allegations in the complaint as true and view the facts in the light most favorable to the plaintiff. *Johnson v. McDonald*, 197 Ariz. 155, ¶ 2, 3 P.3d 1075, 1077 (App. 1999). Johns, a prison inmate, hired Sturm to represent him in an appeal from his federal convictions and sentences. Although the appellate court reversed one of Johns’s convictions, the appeal otherwise was unsuccessful, and Johns filed a legal malpractice action in superior court alleging Sturm had provided him ineffective representation. Sturm moved to dismiss the complaint for failure to state a claim upon which relief could be granted. *See* Ariz. R. Civ. P. 12(b)(6). The trial court granted the motion and dismissed the complaint with prejudice. This appeal followed.

Discussion

¶3 We review a trial court’s grant of a motion to dismiss for an abuse of discretion, but review issues of law de novo. *Dressler v. Morrison*, 212 Ariz. 279, ¶ 11, 130 P.3d 978, 980 (2006). “We will ‘uphold dismissal[] would not be entitled to relief under any facts susceptible of proof in the statement of the claim.’” *Id.*,

quoting *Mohave Disposal, Inc. v. City of Kingman*, 186 Ariz. 343, 346, 922 P.2d 308, 311 (1996) (modification in *Dressler*). In her motion to dismiss, Sturm argued the complaint failed to state that the criminal proceedings against Johns had been terminated favorably to him, a required element of a legal malpractice action. See *Glaze v. Larsen*, 207 Ariz. 26, ¶ 35, 83 P.3d 26, 35 (2004) (“[A] cause of action for legal malpractice that occurs during the course of criminal litigation does not accrue until proceedings in the criminal matter have been terminated favorably to the criminal defendant.”).

¶4 On appeal Johns asserts that “based on the Superior Court’s own statements” he has raised a claim and, therefore, the trial court erred in dismissing his complaint. In support, he cites a previous ruling in which the court stated Johns’s complaint had “allege[d] various legal malpractice claims.” But in order to survive a motion to dismiss, Johns was required to present “a claim upon which relief can be granted.” See Ariz. R. Civ. P. 12(b)(6). Johns does not dispute that his complaint failed to allege that the proceedings against him had been terminated favorably. Therefore, his complaint lacked a required element of a legal malpractice action. See *Glaze*, 207 Ariz. 26, ¶ 31, 83 P.3d at 34 (“[F]avorable termination of the criminal proceedings is an element of the cause of action for malpractice.”). Because Johns’s complaint did not state a claim upon which relief could be granted, the court properly dismissed it. See Ariz. R. Civ. P. 12(b)(6); *Dressler*, 212 Ariz. 279, ¶ 11, 130 P.3d at 980.

¶5 Johns also contends the trial court erred because it “ignored” his request for leave to amend his complaint. However, leave may be denied when amendment would be futile, *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, ¶ 40, 160 P.3d 1216, 1229 (App.

2007), as it apparently would be here. Although Johns argues he should have been permitted to file an amended complaint to cure any deficiencies, he has not explained how his complaint could have been amended to survive dismissal. Nor did he explain this to the trial court when he first requested leave to amend in his motion for reconsideration of the court's dismissal. We therefore find no error.

Disposition

¶6 The trial court's order is affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed August 15, 2012.