STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0344

County of Rice,
Respondent,

vs.

Brad Cervenka, et al.,
Defendants,

James C. Schmitz, et al.,
Appellants.

Filed September 24, 2012
Reversed and remanded
Wright, Judge

Rice County District Court
File No. 66-CV-11-257

G. Paul Beaumaster, Rice County Attorney, Terence Swihart, Assistant Rice County Attorney, Faribault, Minnesota (for respondent)

Loren Gross, Bloomington, Minnesota (for appellants)

Considered and decided by Wright, Presiding Judge; Schellhas, Judge; and Larkin, Judge.

U N P U B L I S H E D O P I N I O N

WRIGHT, Judge

In this condemnation dispute, appellants James and Sharon Schmitz, the owners of property taken by respondent Rice County, appealed the award of the condemnation

commissioners to district court. The district court later dismissed the matter for appellants' failure to prosecute the appeal and denied their subsequent motion to reopen the case. Appellants now appeal to this court, arguing that the district court should have reopened the case. For the reasons addressed below, we reverse and remand.

FACTS

The condemnation commissioners in this eminent-domain proceeding awarded James and Sharon Schmitz (the landowners) $107,000 for a taking of their property by Rice County. On January 21, 2011, the landowners, through their attorney, appealed the award to district court, seeking damages of $223,000. When neither side filed scheduling information, the district court ordered the parties to do so by April 25, 2011. The county complied with the district court's order. The landowners, however, did not. The district court subsequently dismissed the matter for the landowners' failure to prosecute but stayed the dismissal until May 24, "to allow either party to seek alternate relief." *See* Minn. R. Civ. P. 41.02(a) (allowing dismissal for failure to prosecute).

On May 16, 2011, the district court filed a scheduling order, which set a pretrial hearing for November 10, and a two-day court trial starting on November 21. The district court's order advised: "**Failure to comply with the provisions of this Order may result in default relief, the imposition of sanctions, including refusal to allow designated claims, or other sanctions as appropriate.**" On May 23, the landowners filed an informational statement requesting a jury trial.

On June 7, the landowners filed a substitution of attorneys. The county filed its witness list and statement of the case on November 2. At the pretrial hearing on November 10, the county appeared, but there was no appearance for the landowners.

In its November 16, 2011 order, the district court detailed the procedural history of the case and dismissed the landowners' appeal with prejudice. The district court observed that, on June 6, 2011, the county served the landowners' attorney with interrogatories, a request for production of documents, and a demand for disclosure under Minn. Stat. § 117.165, subd. 2 (2010). But the district court found that, "three months later, there still had not been a response. Therefore, even if the matter had proceeded to trial, [the landowners] would have been precluded from presenting any expert evidence pursuant to Minn. Stat. § 117.165, subd. 3."

The district court also found that, although the substitution of counsel identified a new attorney as the landowners' counsel, the new attorney "did not file a Certificate of Representation and made no appearance on behalf of [the landowners]." The district court noted that, because the landowners' first attorney "did not serve any Notice of Withdrawal pursuant to Rule 105 of the General Rules of Practice . . . the County's attorney continued to operate with the belief that [the first attorney] represented [the landowners]."

After observing the landowners' failure to appear at the pretrial hearing, the district court found as follows:

> 16. [The landowners] failed to timely file an Informational Statement, failed to seek alternate relief to vacate the Court's Dismissal Order [signed] April 25, 2011

> [and filed April 26, 2011], failed to file an Individual Statement of the Case, failed to respond to the County's demand for disclosure pursuant to Minn. Stat. § 117.165, subd. 2, failed to respond to discovery requests served by the County's attorney, and failed to serve a Notice of Withdrawal pursuant to Minn. R. Gen. Pract. 105.
>
> 17. No party appeared and provided any reasonable excuse why there has been a failure to respond, to file or take any action.
>
> 18. Other than the timely filing of the Appeal of the Condemnation award, there has been no other timely action or other action on the part of the Landowner or his representative/attorney.

Represented by their new counsel, the landowners moved the district court on November 30, 2011 to reopen the case under Minnesota Rules of Civil Procedure 60.02 and to set the matter for a jury trial. In an affidavit accompanying the landowners' motion, the landowners' attorney stated that, although he had been responsible for the matter, his client, James Schmitz, had been receiving daily treatment in another city for a life-threatening illness; and the landowners' attorney admitted his own "inattention" to the file. The county opposed the landowners' motion. After a hearing, the district court denied the landowners' motion to reopen the case, and this appeal followed.

D E C I S I O N

I.

The procedural missteps culminating in the dismissal of the landowners' appeal to the district court were largely attributable to the omissions of the landowners' original and successor attorneys. The affidavit of the landowners' second attorney, filed in

support of the landowners' motion to reopen the case, was admirably forthright about his handling of the case.

Courts generally try to avoid penalizing a party for problems arising in a legal matter that are not attributable to the party. *See Duenow v. Lindeman*, 223 Minn. 505, 518, 27 N.W.2d 421, 429 (1947) (observing that "[a] litigant is not to be penalized for the neglect or mistakes of his lawyer"). "Courts will relieve parties from the consequences of the neglect or mistakes of their attorney, when it can be done without substantial prejudice to their adversaries." *Id.* This principle is particularly applicable in a condemnation case, which involves a party's constitutional right to be adequately compensated for a taking of the party's property:

> The decisions in this state have never unduly restricted the owner's constitutional right to just compensation where there has been a taking of private property for public use under the powers of eminent domain. Attempts on the part of a condemnor by technical means to defeat the landowner's right to his day in court have never been viewed with favor. Every owner is constitutionally entitled to a just and equal application of the rule that what he owns shall not be taken from him or destroyed or damaged for public use without just compensation.

State by Lord v. Rust, 256 Minn. 246, 253, 98 N.W.2d 271, 276 (1959); *see Hous. & Redev. Auth. ex rel. City of Richfield v. Adelmann*, 590 N.W.2d 327, 338 (Minn. 1999) (Anderson, Paul H., J., concurring specially) (quoting this aspect of *Rust* when addressing the disfavor with which courts view a condemnor's attempts to deprive a property owner of his day in court, and noting that this disfavor is "especially [the case] when the constitutional right to just compensation for the taking of land is involved").

Here, the district court found that, if this case were reopened, "[n]o prejudice would result to Rice County other than the ordinary delay associated with proceedings in a lawsuit" and that this prejudice was "insufficient to show 'substantial prejudice.'" Thus, because the failure to comply with the district court's orders is not attributable to the landowners, but rather their counsel, the district court's decision to dismiss the condemnation proceeding is contrary to the general principles that afford property owners their day in court.

The affidavit of the landowners' second attorney filed in support of the landowners' motion to reopen the case states that, after he received the file, "my client [James Schmitz] was suffering some very severe life-threatening health problems" and was "driving to Rochester every day for treatment of those problems." To the extent that the breakdown in communication between attorney and client caused the failure to pursue the condemnation in district court, we decline to hold that a district court's otherwise appropriate efforts to manage its calendar trump a party's need for daily treatment of a life-threatening illness. *Cf. Nye v. Swan*, 42 Minn. 243, 245, 44 N.W. 9, 10 (1889) (affirming district court's vacation of default judgment when, among other things, defendants' failure to answer was prompted by their attorney's "serious illness"). This is particularly so when, as here, the affidavit of the landowners' attorney states that "Mr. Schmitz has [recovered] to reasonably good health and his condition should not be reason for delay in getting this matter before a jury."

The district court's decision also is inconsistent with the principles underlying Minnesota Rules of Civil Procedure 60.02, which allows the district court to relieve a

party of an otherwise final ruling and to order a new trial or other relief as may be just, for one or more of the reasons recited in that rule. In support of their opposition to dismiss, the landowners cited *Rose v. Neubauer*, 407 N.W.2d 727, 728 (Minn. App. 1987), *review denied* (Minn. Aug. 19, 1987), which involves a motion to reopen based on a claim of excusable neglect under rule 60.02(a).

Although the rules of civil procedure do not govern eminent-domain proceedings to the extent that those rules are inconsistent with the eminent-domain statute, *Adelmann*, 590 N.W.2d at 332, an eminent-domain proceeding that occurs after an appeal to district court of an award of damages by condemnation commissioners is sufficiently similar to apply the rules of civil procedure here. *State by Humphrey v. Baillon Co.*, 503 N.W.2d 799, 803 (Minn. App. 1993); *see State by Lord v. Pearson*, 260 Minn. 477, 489, 110 N.W.2d 206, 215 (1961) (making a similar statement regarding a prior version of the eminent-domain statutes); *cf.* Minn. Stat. § 117.175, subd. 1 (2010) (stating that generally, an appeal to district court is to be tried "as in the case of a civil action").

We review the district court's decision as to relief under rule 60.02 for an abuse of discretion. *Kern v. Janson*, 800 N.W.2d 126, 132 (Minn. 2011); *Nelson v. Siebert*, 428 N.W.2d 394, 395 (Minn. 1988). In addressing whether to grant relief under rule 60.02, district courts

> [apply] a four-prong test enunciated in *Finden v. Klaas*, 268 Minn. 268, 271, 128 N.W.2d 748, 750 (1964). To obtain relief, a party must establish: (1) a reasonable defense on the merits; (2) a reasonable excuse for the failure or neglect to answer; (3) duly diligent action after notice of entry of the judgment; and (4) that no prejudice will occur to the judgment creditor.

Roehrdanz v. Brill, 682 N.W.2d 626, 632 (Minn. 2004). Caselaw refers to these factors as the "*Finden* factors." *Nguyen v. State Farm Mut. Auto. Ins. Co.*, 558 N.W.2d 487, 490 (Minn. 1997). Each of the four *Finden* factors must be satisfied to justify relief under rule 60.02. *Id.* But a weak showing as to one factor may be offset by a strong showing as to the others. *Reid v. Strodtman*, 631 N.W.2d 414, 419 (Minn. App. 2001). Moreover, caselaw interpreting rule 60 strongly favors granting relief when judgment is entered through no fault of the client. *Nguyen*, 558 N.W.2d at 491; *see also Charson v. Temple Israel*, 419 N.W.2d 488, 491 (Minn. 1988) (stating that "ordinarily courts are loath to 'punish' the innocent client for the counsel's neglect").

Here, the district court ruled that the landowners acted with diligence in seeking to reopen the case and that reopening the case would not prejudice the county. The county did not challenge these determinations. Thus, our review of the district court's denial of the landowners' motion for relief under rule 60.02 focuses on the remaining *Finden* factors—whether the landowners alleged a reasonable case on the merits, and whether the landowners had a reasonable excuse for their prior neglect in these proceedings.

The district court determined that the landowners "offered almost no information or argument regarding the likelihood of their success on the merits" and "no specific information, by affidavit or otherwise, to support their position on the merits." Based on the record before us, we disagree.

It is undisputed that the county condemned land owned by the landowners and that, as owners of condemned land, the landowners are constitutionally entitled to "fair

and equitable compensation" for the land taken by the county. Minn. Const. art. XIII, § 4. The landowners appealed the amount of compensation awarded to them by the condemnation commissioners to district court, contending that the award was "inadequate." And they sought a jury trial. When an appeal is taken to the district court from the award of commissioners, the landowner shall be entitled to a jury trial. Minn. Stat. § 117.165, subd. 1 (2010). This statutory entitlement to a jury trial on the adequacy of damages is one of the rights that the landowners are seeking to vindicate here. Because the landowners seek to vindicate a statutory entitlement, they have a strong case on the merits of their right to have a jury determine the amount of damages that is "fair and equitable compensation" for the county's taking of their land.

We decline to address whether the landowners have a strong case on the merits concerning the land's value because the right to a jury trial to determine just compensation is the right that the parties seek to vindicate. Minn. Stat. § 117.165, subd. 1. This right is not contingent on the likelihood that the jury will award more compensation than the condemnation commissioners. Just compensation for the county's taking of the landowners' property is the issue to be determined at trial. This fact issue cannot be the basis for determining whether the statutory trial right should be vindicated.

As to the remaining *Finden* factor, the district court found that

> [i]t was the responsibility of [the landowners'] attorney to apprise himself of any existing scheduling order and of any scheduled hearing dates, even if [that landowner's] previous attorney failed to forward his entire file—including the Scheduling Order issued on May 16, 2011—to their current attorney. [The landowners'] attorney could have readily

> obtained the scheduling information from the court file or by contacting the court.

The district court then concluded that the landowners "made a weak showing of excuse [for their neglect to act]."

The district court correctly observed that counsel have an obligation to know the status of cases they are litigating. But using errors attributable to counsel to deny the landowners' motion to reopen is both inconsistent with the general principle that courts try to avoid penalizing a party for mistakes not attributable to the party and inconsistent with "the spirit of Rule 60.02," which invokes a "liberal policy conducive to the trial of causes on their merits[.]" *Charson*, 419 N.W.2d at 491 (quoting *Finden*, 268 Minn. at 271, 128 N.W.2d at 750). Moreover, it is unrefuted that James Schmitz was receiving daily treatments for a life-threatening illness during the time that counsel did not act.

Thus, as to the *Finden* factors, we agree with the district court's determination that the first two are satisfied. As to the remaining *Finden* factors, the record establishes that the landowners have a strong case that they are entitled to a jury trial and that the failures the district court relied on to deny the landowners' motion to reopen the case are largely attributable to counsel. While the district court's frustration with the delays associated with the case is not unwarranted, we conclude that on these unique facts, it was an abuse of its discretion to decline to reopen the case.

II.

The district court ruled that the landowners' failure to respond to the county's requests for disclosure of the landowners' experts precluded the landowners from

presenting expert evidence at any trial that would occur. The landowners assert that they should be allowed to present expert evidence at trial on remand. The county maintains that these matters are beyond our scope of review on appeal from the order denying the landowners' motion to reopen the case. The county also opposes the merits of the landowners' arguments for presenting evidence from experts at trial.

In condemnation proceedings, the "proper appeal" is "from the final decision, order or judgment." *Park & Recreation Bd. of City of Minneapolis v. Carl Bolander & Sons Prop.*, 436 N.W.2d 481, 482 (Minn. App. 1989). Here, the orders filed in November and December 2011 dismissed "with prejudice" the landowners' appeal to district court. A dismissal with prejudice finally resolves a case. *Brazinsky v. Brazinsky*, 610 N.W.2d 707, 712 (Minn. App. 2000). But the orders filed in November and December 2011 were not immediately appealable because, except in circumstances that are not present here, a proper and timely motion for relief under rule 60 precludes the appeal of an otherwise appealable ruling until the motion for relief under rule 60 is resolved. Minn. R. Civ. App. P. 104.01, subd. 2(e). Because it is undisputed that the landowners' motion for relief under rule 60.02 was proper and timely for purposes of rule 104.01, the orders filed in November and December 2011 did not become appealable until the landowners' motion for relief under rule 60.02 was decided in January 2012.

While the landowners' notice of appeal identified the order filed in January 2012 as the ruling being appealed, notices of appeal are "liberally construed in favor of their sufficiency." *Kelly v. Kelly*, 371 N.W.2d 193, 195 (Minn. 1985). They are not ruled insufficient for defects that "could not have been misleading." *Id.* at 196. Here, the

county could not have been misled about whether the landowners were challenging portions of the orders filed in November and December 2011 that address the landowners' ability to present expert evidence at trial. The county was served with the landowners' brief to this court a month before it filed its respondent's brief. Therefore, we construe this appeal to include the landowners' challenges to the portions of the orders dismissing the proceeding that address the landowners' ability to present expert evidence at trial. *See Steeves v. Campbell*, 508 N.W.2d 817, 818-19 (Minn. App. 1993) (construing an appeal to be from a ruling not identified in notice of appeal where notice of appeal was not misleading).

Except for good cause shown, a party is not permitted at the trial to use any expert witness on the matter of damages whose name, address, and appraisal were not disclosed to the other party after a written demand. Minn. Stat. § 117.165, subd. 3 (2010). The landowners assert that, despite their failure to identify their expert witnesses in response to the county's discovery demand, there will be no prejudice to the county if the landowners are allowed to present expert evidence at trial because the county already saw this expert evidence when that evidence was introduced in the proceedings before the condemnation commissioners. This argument is consistent with Minnesota Rules of Civil Procedure 61, which requires courts to ignore harmless error. *See City of St. Paul v. Rein Recreation, Inc.*, 298 N.W.2d 46, 51 (Minn. 1980) (applying harmless error analysis to district court's admission of expert testimony that allegedly violated section 117.165, subdivision 3). Moreover, the landowners' failure to respond to the county's request for disclosure of experts was prompted, at least partially, by counsel's failures to act. We,

therefore, conclude that the landowners may introduce at trial the expert evidence that they presented to the condemnation commissioners.

Reversed and remanded.