STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1104

D. Eugene Rogers,
Appellant,

Michalee Rogers,
Plaintiff,

vs.

James W. Hess, et al.,
Respondents.

Filed September 16, 2008
Affirmed
Worke, Judge

Sherburne County District Court
File No. 71-C3-04-000915

John Rolland Neve, Neve & Associates, PLLC, 7760 France Avenue South, Suite 1100, Edina, MN 55435 (for appellant)

Kelly A. Putney, Paula M. Semrow, Bassford Remele, P.A., 33 South Sixth Street, Suite 3800, Minneapolis, MN 55402-3707 (for respondents)

Considered and decided by Peterson, Presiding Judge; Worke, Judge; and Schellhas, Judge.

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

WORKE, Judge

Appellant challenges the judgment as a matter of law granted in favor of respondents in his legal-malpractice claim. Because the evidence produced at trial is insufficient as a matter of law to support appellant's claim, we affirm.

D E C I S I O N

In reviewing a judgment as a matter of law (JMOL), this court makes "an independent determination of the sufficiency of the evidence to present a fact question to the jury." *Nemanic v. Gopher Heating & Sheet Metal, Inc.*, 337 N.W.2d 667, 669 (Minn. 1983). "In making such a determination, we review the evidence in a light most favorable to the nonmoving party." *Boone v. Martinez*, 567 N.W.2d 508, 510 (Minn. 1997).

Judgment as a Matter of Law

Appellant D. Eugene Rogers argues that the evidence was sufficient to preclude the JMOL granted in favor of respondents, his attorneys James W. Hess, John W. Terpstra, Ronald G. Black, Kim E. Brandell, and Jeffrey J. Jensen. To prevail in a legal-malpractice action, it must be shown that: (1) an attorney-client relationship existed; (2) the attorney acted negligently or in breach of contract; (3) such acts were the proximate cause of the client's damages; and (4) but for the attorney's conduct, the client would have been successful in the underlying action. *Rouse v. Dunkley & Bennett, P.A.*, 520 N.W.2d 406, 408 (Minn. 1994). Failure to prove any one of these four elements defeats recovery. *Id.*

An essential element in a legal-malpractice action is a showing that "but for" the attorney's deficient conduct, the client would have succeeded in the underlying action. *Id.* The ultimate issue is "whether [the client] would have been successful in the underlying action had the lawyers performed as he claims they should have." *Id.* at 409. The underlying action must be recreated to determine "whether the [client] would have succeeded, had the attorney not performed negligently." *Id.* Thus, appellant was required to show that he would have been successful in proving his inverse condemnation/taking claims, and that he would have been more successful if he had gone to trial rather than settling. *See Hyduke v. Grant*, 351 N.W.2d 675, 677 (Minn. App. 1984) (requiring showing that an appeal from the verdict in the underlying action would have resulted in reversal or a new trial), *review denied* (Minn. Oct. 16, 1984).

Appellant presented evidence of an underlying dispute regarding 2.5 acres he owned in Coon Rapids. Appellant gained access to this property by way of a public road that the city had continuously maintained. In 1992, appellant sued the city, claiming that the city approved a plat that allegedly cut off access to his property, inverse condemnation, and loss of value to his property. The district court bifurcated the case to first determine the access issue. In 1996, a jury decided in appellant's favor on the access issue, finding a "publicly dedicated road" that was 28 feet wide. Because this 28-foot-wide road, however, was not wide enough for a two-way street necessary for development, appellant requested that respondents appeal the jury's seemingly inconsistent verdict. Respondents instead filed an inverse-condemnation complaint alleging that the city's plat approval constituted a taking of appellant's property and a

violation of his civil rights. Appellant's case was removed to federal court and was ultimately settled for $55,000. In the current malpractice action, appellant was required to recreate and prove that he would have won the inverse-condemnation claim.

Minnesota courts have held that if governmental action or activity causes a definite and measurable decrease in the value of one's property and interferes with the current practical enjoyment of the property, a compensable taking has occurred. *Alevizos v. Metro. Airports Comm'n*, 298 Minn. 471, 486, 216 N.W.2d 651, 661-62 (1974); Minn. Const. art. I, § 13 (requiring just compensation when the government performs an act that, although for the public good, takes, damages, or destroys private property). Here, appellant was required to prove that but for respondents' negligence, it would have been proved in the underlying action that the city's actions amounted to a compensable taking—that the city interfered with appellant's existing property rights and caused a definite and measurable decrease in the value of his property.

Appellant argues that he presented sufficient evidence that "but for" respondents' negligence, he would have been successful in the underlying case. We disagree. Appellant would have us rely on the opinions of his expert witnesses, attorney Steven Sunde and developer Mark Kleckner. Sunde testified that respondents failed to amend the complaint to include the element of intent in the civil rights claim, conduct full discovery, and appropriately evaluate appellant's damages. Sunde generally stated that "[appellant] would have been successful" if the complaint had been pleaded correctly, and that "[appellant] would have been successful at trial" if respondents had properly conducted discovery and tried the case.

Although Sunde opined that appellant would have prevailed at trial, he offered no basis for how he reached this conclusion. Sunde did not testify as to *why* appellant would have been successful at trial. He made no detailed analysis of specific evidence that would support the underlying claims of inverse condemnation or the elements of a compensable takings claim and failed to give any direct testimony regarding whether there was a permanent taking. Likewise, Kleckner testified regarding the obstacles to appellant's ability to develop the property because of the limited "driveway" access, but did not testify that appellant had any greater or developable access before 1991. Although the jury found a 28-foot road, appellant failed to show that a wider, developable access road existed prior to 1991 that would have allowed development. Accordingly, appellant's evidence was legally insufficient to establish his takings claim regarding his access route. *See Johnson v. City of Plymouth*, 263 N.W.2d 603, 607 (Minn. 1978) (holding a property owner was not entitled to compensation despite fact that curbs and gutters abutting the property owner's business restricted access to the property because the owner was not denied reasonable access).

Nor did appellant give any factual evidence or direct testimony that: (1) the city's change in the comprehensive plan amounted to a compensable taking; (2) the existence of an easement by the city provided appellant with any actionable property right to have a road actually built; or (3) appellant's hope to develop his 2.5 acres by means of a proposed street was legally actionable. Thus, the evidence appellant presented regarding the "but for" element is not legally sufficient to support a claim for malpractice based on respondents' failure to pursue or litigate the underlying claim. We conclude that the

expert's testimony that appellant would have been successful if respondents had amended the complaint, conducted discovery, and had not settled is legally inadequate to prove the causation or "but for" elements of a legal-malpractice claim.

At most, appellant presented evidence of a temporary taking by the city from 1991 to 1996, during which time it denied the existence of appellant's east/west access. In granting respondents' motion for judgment as a matter of law, the district court held that appellant did not present sufficient evidence of damages resulting from this temporary taking. We agree. At trial, Sunde testified regarding three areas of claimed damages—loss of development opportunity, loss of homestead, and attorney fees—but did not present specific evidence of damages and did not discuss damages pertaining to a temporary taking. Kleckner testified that the 2.5 acres were worthless without some "legal access," and that the initial jury verdict established only limited access. Kleckner further testified that the 2.5 acres could not be developed without using the surrounding property that appellant purchased after the jury verdict, which purchase actually secured developable access to the 2.5 acres. Kleckner never testified that appellant had fully developable access prior to 1991, he did not refer to how wide the access was prior to the plat approval, and he did not testify regarding any damages specifically with respect to that access. Thus, we agree with the district court that appellant failed to prove that his damages recoverable for the temporary taking would have been better than the settlement he received.

We also note that, generally, legal-malpractice claims based on dissatisfaction with a settlement are legally insufficient and contrary to public policy. The supreme

court has remarked on its "disapprov[al] [of] allowing a client who has become dissatisfied with a settlement to recover against an attorney solely on the ground that a jury might have awarded him more than the settlement." *Rouse*, 520 N.W.2d at 410 n.6. A malpractice claim based solely on professional judgment or strategy is insufficient to show a negligent act. *Noske v. Friedberg*, 713 N.W.2d 866, 874 (Minn. App. 2006) (holding trial strategy resulting from exercise of professional judgment is not actionable malpractice), *review denied* (Minn. July 19, 2006).

Regardless of whether the evidence supports a claim for negligence, appellant failed to establish that he would have been successful in the underlying claim or that he would have received more than his settlement. Because appellant's underlying claim was legally insufficient, he failed to show the "but for" causation element necessary to prevail in a legal-malpractice case. In light of the public policy disfavoring malpractice claims based on dissatisfaction with settlements, judgment as a matter of law was appropriate because appellant has failed to make a prima facie case for malpractice. Because we conclude that the district court did not err in granting respondents' motion for a JMOL, we do not address appellant's remaining trial-related issues.

Expert-Witness Fees

Appellant's argument that respondents should not have been awarded expert-witness fees for witnesses who did not testify at trial is without merit. The prevailing party in a district court action "shall" be allowed costs and reasonable disbursements. Minn. Stat. §§ 549.02, subd. 1, .04, subd. 1 (2006). Under Minn. Stat. § 357.25 (2006), the court may allow just and reasonable fees and compensation for any expert witness

"summoned or sworn and examined." "An award of costs and disbursements has generally been allowed within the sound discretion of the [district court]. As such, we review for an abuse of that discretion." *Kellar v. Von Holtum*, 605 N.W.2d 696, 703 (Minn. 2000) (citations omitted).

Here, the district court evaluated respondents' application for costs and disbursements, analyzed the value the expert added to the proceedings, scrutinized the rate and the amount of work the expert expended on the case, and addressed appellant's concerns regarding expert witnesses. After its evaluation, the district court allowed all of respondents' requested expert-witness fees and trial costs, except for the cost of mediation. Respondents submitted a breakdown of the witnesses' costs through affidavits setting forth the amount of time the expert billed and the total cost, upon which the district court decided that the amounts were reasonable and necessary. *See In re Trust Created by Boss*, 487 N.W.2d 256, 262-63 (affirming allowance of fees incurred for preparation of expert witness outside courtroom when such preparation was necessary, expert's costs were customary and reasonable, and preparation time was reasonable and useful), *review denied* (Minn. Aug. 11, 1992); *Johnson v. S. Minn. Mach. Sales, Inc.*, 460 N.W.2d 68, 73 (Minn. App. 1990) (affirming expert-witness fees in excess of $10,000 as within the district court's discretion even when deposition was not used at trial). Based on this analysis, we conclude that the district court did not abuse its discretion in awarding fees and costs.

Affirmed.