STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1301
A18-1375

Gregory T. Dyrdal,
Appellant (A18-1301),

James Wallenberg, et al.,
Appellants (A18-1375),

vs.

Lawrence A. McDowell, et al.,
Respondents.

Filed May 28, 2019
Affirmed
Jesson, Judge

Pennington County District Court
File No. 57-CV-16-1028

David C. McLaughlin, Fluegel, Anderson, McLaughlin & Brutlag, Chartered, Ortonville, Minnesota (for appellant Dyrdal)

Jeramie Steinert, Steinert P.A., LuAnne M. Petricka, Petricka Law Firm P.A., Minneapolis, Minnesota (for appellants Wallenberg, et al.)

Mark A. Grainger, Neil Law Firm, P.C., East Grand Forks, Minnesota (for respondents McDowell, et al.)

Considered and decided by Jesson, Presiding Judge; Ross, Judge; and Peterson, Judge.*

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

JESSON, Judge

Appellant Gregory Dyrdal leased property from David Wallenberg with the option to purchase it. But when he attempted to exercise his option to purchase the land, he learned that the Wallenberg Family Trust actually owned the property. Appellants trustees of the Wallenberg Family Trust refused to honor Dyrdal's purchase option, and litigation ensued. Respondent Lawrence McDowell represented Dyrdal in the early stages of that litigation, which concluded with a jury award in favor of the trust.

Subsequently, Dyrdal and the trustees of the Wallenberg Family Trust commenced litigation against McDowell and respondent Wurst and McDowell Ltd. (collectively, McDowell) asserting claims for legal malpractice and slander of title, respectively. In these consolidated appeals, Dyrdal and the trustees challenge the district court's decision to grant summary judgment in favor of McDowell on each of their respective claims. Because we conclude that no genuine issues of material fact exist with either Dyrdal's or the trustees' claims, we affirm.

FACTS

Underlying litigation

In April 2009, appellant Gregory Dyrdal leased a large piece of farmland from David Wallenberg. The lease gave Dyrdal the option to purchase the land. In March 2010, Dyrdal recorded a copy of the lease with the Office of the Pennington County Recorder. Unbeknownst to Dyrdal, the farmland he was leasing was owned by the Wallenberg Family

Trust (the trust), not David Wallenberg.[1] In fact, David Wallenberg is not and has never been a trustee of the trust.

In late 2010, when Dyrdal sought to exercise his option to purchase the land, he learned that the trust owned the land in question. The trustees told Dyrdal that they were unwilling to sell the land pursuant to the terms in the lease but offered him the option to purchase the property at a higher price. Dyrdal declined. Instead, he hired an attorney—respondent Lawrence McDowell—and began pursuing a civil action against James Wallenberg as trustee and David Wallenberg as lessor.

McDowell drafted a complaint seeking specific performance of Dyrdal's purchase option in the lease. Also as part of his representation of Dyrdal, McDowell prepared a notice of lis pendens[2] and filed it with the Pennington County Recorder on January 5, 2011. But the notice of lis pendens contained several errors, including stating the wrong county in which the action was filed. Further, at the time that the notice of lis pendens was filed, the complaint had not yet been filed with the district court or formally served upon either opposing party. The complaint was personally served upon James Wallenberg as trustee three days later and upon David Wallenberg on March 2, 2011. After being served with

[1] The Wallenberg Family Trust owns a significant amount of land, including the farmland Dyrdal leased. Indeed, the record suggests that on at least one prior occasion, David Wallenberg may have been involved in a separate land transaction with the Dyrdal family, which the trust subsequently completed.

[2] A notice of lis pendens is a "warning that title to property is in litigation and impedes a property owner's right to free alienability of real estate." *Bly v. Gensmer*, 386 N.W.2d 767, 769 (Minn. App. 1986).

the complaint, trustee James Wallenberg filed counterclaims against Dyrdal seeking a judgment quieting title and asserting that Dyrdal was liable for slander of title.

McDowell withdrew as Dyrdal's counsel in August 2011, but litigation continued for several years with different counsel representing Dyrdal. In April 2013, the district court issued a nearly 27-page partial summary judgment order in which it evaluated David Wallenberg's authority to bind the trust and considered whether the trust had taken any action to ratify Dyrdal's lease during the time he occupied and farmed the land. The district court concluded that Dyrdal did not have an ownership interest in the disputed property, and accordingly, that his recorded lease and the notice of lis pendens were null and void. But with respect to the slander-of-title counterclaim, the district court determined that there were factual issues for a jury to decide.

At trial, trustee James Wallenberg presented two theories of liability: that Dyrdal committed slander of title (1) by recording the lease *and* (2) by causing the notice of lis pendens to be filed. The jury found Dyrdal liable for slander of title and awarded damages in the amount of $34,997 to the trust. But the jury's special-verdict form did not specify whether its slander-of-title finding was based on the filing of the lease, the filing of the notice of lis pendens, or both. Nor did the jury allocate damages between the alternative theories of liability.

Present Litigation

In December 2016, Dyrdal filed a lawsuit against McDowell and his law firm, claiming that McDowell breached fiduciary duties stemming from his attorney-client relationship with Dyrdal in the underlying litigation. In March 2017, the trustees—unable

to collect damages from Dyrdal—also commenced an action against McDowell and his firm, asserting that McDowell was liable for slander of title because he improperly filed the notice of lis pendens during the underlying litigation.[3] The district court consolidated the two cases.

McDowell moved for summary judgment against both Dyrdal and the trustees. The district court granted McDowell's motion, reasoning that Dyrdal could not establish that McDowell's actions were the cause of his damages and that the trustees could not demonstrate that McDowell acted with malice, a required element for slander-of-title claims. The district court further denied a motion from the trustees to amend their complaint to add causes of action and seek punitive damages. Dyrdal and the trustees appeal.

D E C I S I O N

On appeal from a grant of summary judgment, we review de novo whether the district court correctly applied the law and whether any genuine issues of material fact exist to preclude summary judgment. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). A district court should grant a motion for summary judgment when the record shows no genuine issue of material fact, and on appeal, we review the evidence in the light most favorable to the party against whom judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

[3] The trustees' action against McDowell is based on the theory that he is jointly and severally liable for the trust's damages resulting from Dyrdal's slander of title. The trustees acknowledge that they are not entitled to additional damages from McDowell arising from the same slander of title.

I. The district court correctly concluded that no genuine issues of material fact exist with respect to Dyrdal's claim against McDowell.

Dyrdal argues that the district court erred by concluding that there were no genuine issues of material fact related to his claim against McDowell. Dyrdal's claim against McDowell—that McDowell's errors in preparing and filing the notice of lis pendens constituted a breach of his fiduciary duties stemming from their attorney-client relationship—sounds in legal malpractice. In order to establish a claim for legal malpractice, Dyrdal must demonstrate (1) an attorney-client relationship, (2) acts constituting negligence or breach of contract, (3) that those acts proximately caused his damages, and (4) that but for McDowell's conduct, Dyrdal would have been successful in his action. *Frederick v. Wallerich*, 907 N.W.2d 167, 173 (Minn. 2018).

In determining that no genuine issue of material fact existed, the district court focused on the element of causation. The district court concluded that in the underlying litigation, McDowell only represented Dyrdal for a short period of time in the course of multi-year litigation. McDowell drafted a complaint and prepared and filed the notice of lis pendens, but his representation of Dyrdal ceased in August 2011. It was not until April 2013—almost two years later—that the district court granted partial summary judgment in favor of the trustees. And McDowell was not involved in the jury trial at all. As a result, the district court found that McDowell's conduct was not the proximate cause of Dyrdal's liability or the judgment against him in the underlying litigation.

Additionally, the district court determined that Dyrdal could not establish that but for McDowell's conduct, he would have been successful in defending against the slander-

of-title counterclaim. That conclusion was based on the fact that in the underlying litigation, two theories of Dyrdal's liability for slander of title were argued: liability related to his recording of the lease and liability related to the filing of the notice of lis pendens. Because the jury did not specify what conduct supported its finding of liability or allocate damages between each theory of liability, the district court concluded that Dyrdal did not—and cannot—demonstrate that but for McDowell's negligence in filing the notice of lis pendens, he would have successfully defended against the slander-of-title counterclaim in the underlying litigation. Because Dyrdal could not establish the required causation element, the district court concluded he did not establish a prima facie case for legal malpractice and granted summary judgment in favor of McDowell.

We agree with the district court. No evidence suggests that but for McDowell's errors in filing the notice of lis pendens, Dyrdal would have defeated the trustees' slander-of-title counterclaim. First, the jury in the underlying litigation was presented with arguments that Dyrdal committed slander of title *both* by recording his lease and by filing the notice of lis pendens. It is undisputed that McDowell had no involvement in the recording of the lease. And nothing on the special verdict form asked the jury to identify whether its finding of liability stemmed from the recording of the lease, the filing of the notice of lis pendens, or both. Further, damages were not allocated between differing theories of liability. Although Dyrdal could have sought changes in the format and wording of the special verdict form, he did not. Nothing in this record would provide a jury in the current litigation with the basis to conclude that the slander-of-title counterclaim against Dyrdal would have been resolved differently but for McDowell's mistakes in filing the

notice of lis pendens.[4] Accordingly, there is no genuine issue of material fact regarding causation.

Because Dyrdal failed to establish a prima facie case of legal malpractice or that the evidence in the record creates a genuine issue of material fact, we affirm the district court's grant of summary judgment with respect to Dyrdal's legal malpractice claim.

II. The district court did not err by granting McDowell's motion for summary judgment with respect to the trustees' claims.

A claim for slander of title requires four elements: (1) a false statement concerning real property owned by the plaintiff, (2) the false statement was published to others, (3) the false statement was published maliciously, and (4) the publication of the false statement caused the plaintiff loss in the form of special damages. *Paidar v. Hughes*, 615 N.W.2d 276, 279-80 (Minn. 2000). And "[t]he filing of an instrument known to be inoperative is a false statement that, if done maliciously, constitutes slander of title." *Id.* at 280. But if an individual files an instrument—like a notice of lis pendens—which he has a right to file, he does not commit slander of title. *Kelly v. First State Bank of Rothsay*, 177 N.W. 347, 347 (Minn. 1920). In slander-of-title claims, "malice requires a [r]eckless disregard concerning the truth or falsity of a matter . . . despite a high degree of awareness of probable falsity or entertaining doubts as to its truth." *Brickner v. One Land Dev. Co.*, 742 N.W.2d 706, 711–12 (Minn. App. 2007) (quotation omitted), *review denied* (Minn. Mar. 18, 2008).

[4] Dyrdal's approach would, in essence, require a second jury to rehear and the parties to retry the earlier case. Certainly, nothing in the record provides a new jury with the ability to determine how the jury in the underlying litigation apportioned damages between the two theories of liability.

The trustees' claim against McDowell for slander of title stems from his filing of the defective notice of lis pendens for Dyrdal. The trustees allege that McDowell filed the notice of lis pendens for an improper purpose, noting that he filed the instrument before a complaint had been filed.[5] *See* Minn. Stat. § 557.02 (2018) (stating that a notice of lis pendens may be filed "at the time of filing the complaint, or at any time thereafter during the pendency of such action"). Citing McDowell's years of experience as an attorney as evidence, the trustees maintain that he knew the notice of lis pendens was improper.

But the district court concluded that although the notice of lis pendens contained several legal errors, the trustees did not raise any genuine issues of material fact regarding the malice element of their claim. The district court cited statements, made by McDowell in an affidavit, that he did not do any research regarding what must be done to file a notice of lis pendens, and that he "thought that [it] could be recorded when the paperwork was processed through a process server" and "didn't realize . . . that the summons and complaint had to be filed." The district court further concluded that McDowell was acting in good faith when he filed the notice of lis pendens, noting that McDowell believed his client's claim that he was entitled to the disputed land. And that claim was neither quickly nor easily dismissed. As the district court noted, although the court in the underlying litigation ultimately concluded that Dyrdal had no claim to the land, it took nearly 27 pages of legal analysis to reach that conclusion. In sum, the district court here concluded that because

[5] It is undisputed that McDowell filed the notice of lis pendens before a complaint was filed in the underlying litigation.

McDowell was acting "with a good faith belief in his client's claim of title to the property, or [a] claim to a colorable interest in the property" when he filed the notice of lis pendens, the trustees did not demonstrate the required element of malice. We agree.

No evidence supports the conclusion that McDowell acted with "a [r]eckless disregard concerning the truth or falsity of a matter." *Brickner*, 742 N.W.2d at 711–12. On the contrary, the record warrants the conclusion that in filing the notice of lis pendens, McDowell acted in good faith based on his belief that Dyrdal had a colorable claim to the disputed property. McDowell's affidavit stated that he based his actions on information Dyrdal gave him, that he did not do a title search on the property, and that he believed Dyrdal could have an interest in the property based on the trust's actions of accepting rent payments from Dyrdal and past dealings with David Wallenberg. And this testimony is supported by Dyrdal. In a deposition, Dyrdal stated that he told McDowell he was trying to preserve any rights he had under the lease, *not* that he wanted to intentionally or unnecessarily hinder the property. Accordingly, no evidence in the record suggests that McDowell acted with malice. *See Kelly*, 177 N.W. at 347 (holding that an individual does not commit slander of title by filing an instrument which he has a right to file).

But the trustees argue that the district court erred in its decision because they are entitled to a presumption of malice where the notice of lis pendens contained false statements (that an action had already been commenced) and Dyrdal had no valid interest in the property sufficient to support the filing of a notice of lis pendens.[6] And the trustees

[6] The district court did not address this argument regarding a presumption of malice in its order.

contend that although that presumption of malice can be rebutted, it cannot be rebutted at the summary judgment stage. *See Southcross Commerce Ctr., LLP v. Tupy Props., LLC*, 766 N.W.2d 704, 709 (Minn. App. 2009) (holding that when a nonmoving party presents "undisputed evidence that conclusively establishes a rebuttable presumption in its favor, the moving party is precluded from obtaining summary judgment").

We agree that when a publication is false and made by someone with no legal interest in the disputed property, malice is presumed. *Virtue v. Creamery Package Mfg. Co.*, 142 N.W. 1136, 1136 (Minn. 1913). But if the publication is asserted by someone in good faith with a colorable claim to the disputed property, then the presumption of malice is overcome. *Id.* That is precisely what happened here.

At the time the notice of lis pendens was filed, both Dyrdal and his attorney believed that Dyrdal had a colorable claim to the disputed property. And this belief was based on and supported by Dyrdal's lease, actions of the trust, and past dealings with David Wallenberg. Accordingly, because McDowell had a good-faith belief that Dyrdal had a colorable claim to the disputed property when he filed the notice of lis pendens, the trustees are not entitled to a presumption of malice. Because the trustees were not entitled to a presumption of malice and because they did not demonstrate actual malice, the district court correctly granted summary judgment in favor of McDowell.[7]

[7] Further, the district court did not abuse its discretion by denying the trustees' motion to amend their complaint to seek punitive damages. We will not reverse a district court's denial of a motion to add a claim for punitive damages unless there is a demonstrated abuse of discretion. *McKenzie v. N. States Power Co.*, 440 N.W.2d 183, 184 (Minn. App. 1989). And punitive damages are allowed only in cases where clear and convincing evidence establishes that a defendant's acts "show deliberate disregard for the rights or safety of

In sum, the district court correctly concluded that no genuine issues of material fact exist with respect to either Dyrdal's or the trustees' claims against McDowell. As such, the district court properly granted summary judgment in favor of McDowell.

Affirmed.

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others." Minn. Stat. § 549.20, subd. 1(a) (2018). The district court determined that the trustees did not make a prima facie showing that McDowell showed deliberate disregard for their rights, reasoning that McDowell had a good-faith belief that Dyrdal "had a colorable claim" to the land in dispute when he filed the notice of lis pendens. This conclusion is supported by the record. Although McDowell's actions in filing the notice of lis pendens were error-ridden, the record does not demonstrate that his actions rise to the level of "deliberate disregard" required for a district court to allow a claim for punitive damages. *See Jensen v. Walsh*, 623 N.W.2d 247, 251 (Minn. 2001) (noting that the focus in determining whether punitive damages should be allowed is on the wrongdoer's conduct rather than the resulting damages).