STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2418

Kimberly A. Mosman as successor to Wayne L. Mosman, et al.,
Appellants,

vs.

Lindquist & Vennum, P. L. L. P., et al.,
Respondents.

Filed February 12, 2008
Affirmed
Wright, Judge

Hennepin County District Court
File No. 27-CV-04-009942

Paul A. Sortland, Sortland Law Office, 120 South Sixth Street, Suite 1510, Minneapolis, MN 55402 (for appellants)

Jack M. Fribley, Bruce Jones, Krisann Kleibacker Lee, 2200 Wells Fargo Center, 90 South Seventh Street, Minneapolis, MN 55402 (for respondents)

Considered and decided by Peterson, Presiding Judge; Lansing, Judge; and Wright, Judge.

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

WRIGHT, Judge

In this appeal from the district court's award of summary judgment in favor of respondents, appellants argue that (1) the district court erred by applying the "but for"

causation legal standard in a case alleging transactional legal malpractice; (2) even if the district court applied the correct legal standard, there are genuine issues of material fact as to "but for" causation; (3) the district court abused its discretion by denying appellants' motion to expedite the trial; and (4) the district court abused its discretion by awarding costs and disbursements to respondents. We affirm.

FACTS

On March 30, 2000, Wayne Mosman executed an asset-purchase agreement with Parsons Electric Co. (Parsons), in which he sold Parsons the assets of his company, appellant A.U.S. Communications, Inc. (A.U.S.). In preparation for the sale, David Lantz, an analyst for the investment-banking firm R.J. Steichen, reviewed A.U.S.'s finances and negotiated preliminary elements of the asset-purchase agreement. Respondent Girard Miller, an attorney with respondent Lindquist & Vennum (collectively respondents), reviewed the documentation, assisted in preparing to close the asset-purchase agreement, and represented Wayne Mosman and A.U.S. at the closing.

The asset-purchase agreement included a three-year employment agreement between Wayne Mosman and Parsons, as well as a noncompetition agreement. The asset-purchase agreement divided Wayne Mosman's compensation into a cash payment at the closing, four equal future payments, and up to twelve "earn out" payments contingent on Parsons's performance during Wayne Mosman's three-year employment term. In the event of Wayne Mosman's termination without cause, the asset-purchase agreement required Parsons to pay Wayne Mosman $1,000,000, minus the earn-out

payments that had been made. But the contingent future earn-out payments were not otherwise secured.

In fall 2001, Parsons experienced financial difficulties because of its parent company, Bracknell Corporation, and it discontinued the earn-out payments. An equity investor purchased Parsons's assets, and the management group from Parsons and four other contractors formed a new company, Parsons Electric, LLC. Wayne Mosman was not asked to join the new company and his employment was terminated in late November 2001. Parsons Electric, LLC did not assume Parsons's obligations under the asset-purchase agreement.

In early 2002, Wayne Mosman sought compensation from Parsons Electric, LLC for the loss he claimed under the asset-purchase agreement. Through the efforts of Miller and Jonathan Miesen, a debtor/creditor attorney from Lindquist & Vennum, Parsons Electric, LLC agreed to pay Wayne Mosman $50,000 and to return to Wayne Mosman the vehicle that he had been driving when he entered the asset-purchase agreement.

On June 28, 2004, Wayne Mosman and A.U.S. commenced a legal-malpractice lawsuit against respondents. Because he was terminally ill, Wayne Mosman moved the district court in November 2004 for an expedited trial date. The district court denied the motion. Wayne Mosman died in February 2005, and the district court permitted Wayne Mosman's wife, appellant Kimberly Mosman, to continue the lawsuit as his successor.

A jury trial in July 2005 resulted in a hung jury. Before the retrial, the Minnesota Supreme Court issued its decision in *Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811 (Minn. 2006) (*Jerry's Enterprises*). Arguing that

Jerry's Enterprises made "but for" causation a requirement in transactional-legal-malpractice claims, respondents moved for summary judgment based on the absence of "but for" causation. The district court granted the motion and entered judgment in favor of respondents. This appeal followed.

D E C I S I O N

I.

Kimberly Mosman and A.U.S. (collectively appellants) argue that the district court erred by granting summary judgment because "but for" causation is not required in a transactional-legal-malpractice case. They also maintain that if "but for" causation is required, the existence of genuine issues of material fact as to "but for" causation precludes summary judgment.

On appeal from summary judgment, we determine whether genuine issues of material fact exist and whether the district court erred as a matter of law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). In doing so, we view the evidence in the light most favorable to the party against whom summary judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

Summary judgment is appropriate when the nonmoving party bears the burden of proof and fails to establish the existence of an element essential to its case, *Bersch v. Rgnonti & Assocs., Inc.*, 584 N.W.2d 783, 786 (Minn. App. 1998), *review denied* (Minn. Dec. 15, 1998), or when "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party," *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct.

1348, 1356 (1986)). Although causation generally is a question of fact for the jury, it "becomes a question of law where different minds can reasonably arrive at only one result." *Paidar v. Hughes*, 615 N.W.2d 276, 281 (Minn. 2000) (quotation omitted). Thus, although causation may be demonstrated through circumstantial evidence, such evidence must create more than a "metaphysical doubt as to a factual issue" in order to survive a motion for summary judgment. *DLH*, 566 N.W.2d at 71.

A.

On a claim of legal malpractice, the plaintiff must establish four basic elements: (1) the existence of an attorney-client relationship, (2) acts constituting negligence or breach of contract, (3) that those acts were the proximate cause of the plaintiff's damages, and (4) that "but for" the defendant's conduct, the plaintiff would have been successful in the prosecution or defense of the underlying action. *Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 816 (Minn. 2006). Prior to *Jerry's Enterprises*, it was generally understood that "but for" causation was not required for transactional-legal-malpractice claims because there is no underlying cause of action. *See, e.g.*, *First Bank of Minn. v. Olson*, 557 N.W.2d 621, 623 (Minn. App. 1997) (stating that "when an attorney's negligence harms a plaintiff by some means other than destruction of or damage to a cause of action, the ['but for' causation] element is inapplicable"), *review denied* (Minn. Mar. 18, 1997).

The Minnesota Supreme Court's decision in *Jerry's Enterprises* clarified that a transactional-legal-malpractice plaintiff must demonstrate that, "but for defendant's conduct, the plaintiff would have obtained a more favorable result in the underlying

transaction than the result obtained." 711 N.W.2d at 819. As such, "but for" causation is a prerequisite to a transactional-legal-malpractice claim in Minnesota, and a plaintiff's failure to present evidence to establish this element results in failure of the entire claim. *Id.* at 816, 819 ("If the plaintiff does not provide sufficient evidence to meet all . . . elements, the claim fails."). In light of the explicit holding of *Jerry's Enterprises*, appellants' argument that "but for" causation is not an element of a transactional-legal-malpractice claim is wholly without merit.

B.

Appellants advance two scenarios for evaluating "but for" causation: (1) a "better deal" scenario, and (2) a "no deal" scenario. Under the better-deal scenario, they argue that, but for Miller's alleged negligence in failing to obtain a security interest for the contingent earn-out payments, Wayne Mosman not only would have obtained security for the earn-out payment, but he also would have collected on that security. Under the no-deal scenario, appellants contend that, but for Miller's alleged negligence in failing to advise Wayne Mosman that the contingent earn-out payments were unsecured, Wayne Mosman would not have entered into the asset-purchase agreement.

1.

When viewed in the light most favorable to appellants, the evidence fails to establish a genuine issue of fact that Wayne Mosman would have negotiated a better deal producing a more favorable result. Rather, the evidence establishes that the negotiators for Parsons would not have agreed to security for the earn-out payments even if Miller or Wayne Mosman had sought such security. Indeed, the evidence is uncontroverted that

Parsons and Bracknell Corporation could not have agreed to a security interest on the earn-out payments because of specific conditions contained in their then-existing financial-obligations agreement. And Parsons had never agreed to provide security in similar transactions.

Rather than disputing this evidence, appellants rely on Wayne Mosman's belief, based on his experience as a salesman, that "there's always a way to negotiate terms that people will agree to." David Kaufman, appellants' standard-of-care expert witness, opined that, because Parsons and Bracknell "may have been tied up sort of legally," a repurchase option would have been "the most likely possibility." These opinions, which have no basis in fact, raise nothing more than a "metaphysical doubt" regarding Parsons's inability to grant the desired security. *DLH*, 566 N.W.2d at 71; *see also Rouse v. Dunkley & Bennett, P.A.*, 520 N.W.2d 406, 411 (Minn. 1994) (finding plaintiff's uncorroborated testimony insufficient to raise genuine fact issue). As such, they fall short of establishing a genuine issue of material fact as to Wayne Mosman's ability to secure a better deal.

Moreover, there is no evidence of the likely value of the security interest had Wayne Mosman been able to obtain one. The record contains uncontroverted evidence that the same financial obligations that would have prevented Parsons from granting Wayne Mosman security for the earn-out payments would have prevented Wayne Mosman, a junior creditor, from recovering anything. The most definitive evidence of a potential security interest's value is Kaufman's opinion that the security would have given Wayne Mosman a "place at the bargaining table." The record is devoid of

evidence as to what assets, if any, would have been available for repossession or repurchase. And the only evidence regarding the likely value of Wayne Mosman's earn-out payments, which were contingent on Parsons's performance, indicates that the telecommunications industry was declining severely during the remainder of Wayne Mosman's earn-out period. Consequently, appellants' claim is nothing more than a mere assertion that any security interest would have led to Wayne Mosman and A.U.S. recovering any amount above the $1.155 million that Wayne Mosman received from Parsons. Viewing the record in the light most favorable to appellants' claim, there is not a genuine issue of material fact regarding "but for" causation under the "better deal" scenario.

2.

The "no deal" scenario involves two alternatives: (1) Wayne Mosman could have secured another buyer for A.U.S., or (2) he could have continued to operate A.U.S. as an independent company.[1] Wayne Mosman acknowledged that he did not have any

[1] Because *Jerry's Enterprises* requires the plaintiff to show "a more favorable result in the underlying transaction," 711 N.W.2d at 819, arguably the district court was permitted to consider only the "better deal" scenario. A "no deal" scenario purports to show what would have happened in a hypothetical circumstance rather than in a variation on what actually occurred. It, therefore, requires more speculative evidence, which may misconstrue the purpose of "but for" causation and mislead a jury. In *Viner v. Sweet*, 70 P.3d 1046 (Cal. 2003), which the *Jerry's Enterprises* court acknowledged as adopting a "similar approach" to "but for" causation in transactional-legal-malpractice cases, *Jerry's Enters.*, 711 N.W.2d at 819 n.3, the California Supreme Court did not limit the plaintiff's showing to a more favorable result in the "underlying transaction," *Viner*, 70 P.3d at 1051 n.4 ("Phrases such as . . . 'no deal' scenario[ ] and 'better deal' scenario describe methods of proving causation, not the causation requirement itself or the test for determining whether causation has been established."). The *Viner* court considered a "no deal" scenario, as did the district court here, which we now review.

alternative buyers, and there is no evidence of the likely value that Wayne Mosman could have realized from an alternative sale. Thus, there is no genuine issue of fact as to the feasibility of selling A.U.S. to another buyer.

Because appellants frame the other "no deal" scenario as A.U.S. functioning as an independent company, we consider whether there is a genuine issue of material fact as to whether A.U.S.'s value was greater during the earn-out period than $1.155 million, the entire amount that Wayne Mosman actually received from Parsons. Appellants rely on investment-banking analyst Lantz's estimate from early 2000 that A.U.S. was worth $1.5 million. But they acknowledge that Lantz's estimate represented A.U.S.'s potential value to a purchaser based on synergies between A.U.S. and the purchasing company, not the value of A.U.S. as an independent entity. As such, the $1.5 million figure is not a relevant comparison and fails to establish a material-fact question.

The only record evidence of A.U.S.'s independent value indicates a net loss for the year 1999 and a number of "loss years" during the late 1990s. According to the record, Wayne Mosman's salary of $160,000 during this period was "a significant amount," given the company's financial situation. Without more, the probative value of Wayne Mosman's salary to demonstrate the company's profitability or ultimate worth is purely speculative. Moreover, the modest A.U.S. income that Lantz projected for 2000 and 2001, even when considered with Wayne Mosman's salary, constitutes less than half the amount Wayne Mosman actually received from Parsons in the entire asset-purchase transaction.

Moreover, the undisputed evidence demonstrates that any projected profit for A.U.S. was based on incomplete and inaccurate information. When evaluating A.U.S. for the sale to Parsons, Lantz anticipated a modest profit for A.U.S. in 2000 based on Wayne Mosman's belief that the market would continue to improve. But the record is replete with evidence that the telecommunications industry was faltering severely during that time. Despite considering a scenario in which A.U.S. operated with a smaller profit margin, A.U.S.'s accountant did not offer any estimate as to A.U.S.'s value if it continued to operate by accepting smaller profit margins. And the undisputed evidence establishes that, shortly before the sale to Parsons, two key employees of A.U.S. gave notice of their intention to quit, which was not considered in any estimate of A.U.S.'s future value or profitability.

Without any evidence as to whether or how A.U.S. would have been able to address the financial, personnel, and market circumstances facing A.U.S. had Wayne Mosman declined to sell to Parsons, there is no genuine issue of material fact as to whether Wayne Mosman would have been in a "more favorable" position operating A.U.S. independently than he was with the $1.155 million he received.

Viewing the evidence in the light most favorable to appellants, there is no genuine issue of material fact as to "but for" causation under any scenario. Absent evidence of "but for" causation, appellants' transactional-legal-malpractice claim fails as a matter of law. *Jerry's Enters.*, 711 N.W.2d at 816. Accordingly, the district court properly granted summary judgment in favor of respondents.

II.

Although in light of our decision affirming summary judgment we need not address appellants' argument that the district court abused its discretion by denying Wayne Mosman and A.U.S.'s motion for an expedited trial, we do so briefly. Generally, the district court has broad discretion in controlling the trial schedule. *See State v. Sanders*, 598 N.W.2d 650, 654 (Minn. 1999) (noting that grant or denial of request for continuance is within district court's discretion and will not be reversed absent abuse of discretion). The district court may amend a scheduling order on a showing of good cause. Minn. R. Civ. P. 16.02. We review the district court's decision whether to amend its scheduling order for an abuse of discretion. *Mercer v. Andersen*, 715 N.W.2d 114, 123 (Minn. App. 2006).

Here, the district court denied Wayne Mosman's motion for an expedited trial based on nine relevant considerations: (1) the complexity of the case; (2) the district court's contemporaneous extension of the discovery deadline to the end of January 2005, approximately one and one-half months after the motion hearing on this issue; (3) the preexisting April 1, 2005 deadline for motions; (4) the scheduled January 10, 2005 summary-judgment-motion hearing; (5) the 90-day period following the summary-judgment-motion hearing for the district court to rule on the motion; (6) the lack of space in the district court's calendar for its February/March 2005 civil trial block; (7) the unfairness to respondents that would result from compressing their trial preparation; (8) the unpredictability of Wayne Mosman's health, making it uncertain whether expedition would secure for him the opportunity to offer live testimony; and (9) the

existence of Wayne Mosman's video deposition, preserving his testimony for trial. Collectively these reasons amply justify the district court's denial of Wayne Mosman's request for an expedited trial. Accordingly, the district court's denial of Wayne Mosman's motion was within its sound discretion.

III.

Appellants also challenge the district court's award of costs and disbursements to respondents. Appellants maintain that the district court abused its discretion by finding that respondents are the prevailing parties, unreasonably awarding additional costs, and assessing costs against Kimberly Mosman.

The district court has discretion to determine which party, if any, qualifies as a prevailing party for the purposes of awarding costs and disbursements. *Benigni v. County of St. Louis*, 585 N.W.2d 51, 54-55 (Minn. 1998). This discretion also extends to evaluating whether a prevailing party's expenditures are reasonable. *Jonsson v. Ames Constr., Inc.*, 409 N.W.2d 560, 563 (Minn. App. 1987), *review denied* (Minn. Sept. 30, 1987). Such findings will not be disturbed absent an abuse of that discretion. *Id.*

The district court must award "reasonable disbursements paid or incurred" and allow costs to the prevailing party. Minn. Stat. §§ 549.02, subd. 1, 549.04, subd. 1 (2006); *Jonsson*, 409 N.W.2d at 563 (holding that "absent a specific finding that the costs were unreasonable, the court *shall* approve recovery of disbursements"). A "prevailing party" under section 549.04 is one "who has, in the view of the law, succeeded in the action." *Borchert v. Maloney*, 581 N.W.2d 838, 840 (Minn. 1998) (quotation omitted).

This definition includes a party in whose favor the decision is rendered and judgment is entered. *Id.*

Here, the district court concluded that respondents were entitled to "costs and disbursements" as prevailing parties. Disputing this characterization, appellants maintain that, because most of the costs were incurred in preparation for trial and neither party prevailed at trial, those costs should not be awarded. But the district court's award of summary judgment to respondents disposed of appellants' claim on the merits. *See DLH*, 566 N.W.2d at 69 (stating that summary judgment disposes of action on merits). Thus, respondents ultimately "succeeded in the action." *Borchert*, 581 N.W.2d at 840. Therefore, the district court's determination that respondents were the prevailing parties is not an abuse of discretion.

After respondents appealed from the district court administrator's award of $7,212.15 in costs and disbursements, the district court increased the award to $36,710.08 and assessed appellants equally. In doing so, the district court addressed each claim individually and thoroughly evaluated the evidence that respondents submitted in support of the claimed amounts. The district court's conclusion that respondents were entitled to the additional costs is supported by the evidence and consistent with Minnesota law. *See* Minn. Stat. §§ 357.25 (permitting assessment of expert witness fees), 357.315 (trial exhibits), 357.32 (witness payment) (2006); *Stinson v. Clark Equip. Co.*, 473 N.W.2d 333, 337-38 (Minn. App. 1991) (awarding expert-witness fees, deposition costs, miscellaneous costs), *review denied* (Minn. Sept. 13, 1991). *But see Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 483 (Minn. App. 2006)

(affirming denial of costs for partial trial transcripts), *review denied* (Minn. Aug. 23, 2006). Accordingly, the district court's finding that the additional costs were reasonable was within its sound discretion.

Finally, we reject appellants' argument that the district court's assessment of costs against Kimberly Mosman was improper because she was a party "only as a successor in interest to her deceased husband." A successor party who accepts the opportunity under Minn. R. Civ. P. 25.01 to continue a claim beyond the life of the original party assumes the same risks and obligations of litigation, including fees and costs, as the original party.[2] Thus, the assessment of costs and disbursements against Kimberly Mosman as a successor in interest to Wayne Mosman was not erroneous.

Affirmed.

[2] For example, a prevailing party may enforce a judgment against a successor party. *Johns v. Harborage I, Ltd.*, 664 N.W.2d 291, 295 (Minn. 2003).