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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A07-124**

Jeffery Scott Sather and Anne Valerie Moon Sather,  
for themselves and on behalf of their minor children,  
Margaret A. Moon Sather, Preston J. Sather and Lowell J. Moon Sather,  
Appellants,

vs.

Vincent W. King, et al.,  
Respondents.

**Filed January 22, 2008  
Affirmed  
Ross, Judge**

Hennepin County District Court  
File No. 27-CV-06-11227

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Considered and decided by Lansing, Presiding Judge; Dietzen, Judge; and Ross,  
Judge.

**UNPUBLISHED OPINION**

**ROSS, Judge**

This appeal concerns the district court's summary judgment decision dismissing a  
legal malpractice claim that arises from Respondent Vincent King's representation of

appellants Jeffrey and Anne Sather. King represented the Sathers in their claims against State Farm Insurance Company for coverage of mold damage. The Sathers contend that King was negligent by failing to discover a State Farm operations manual, which the Sathers argue would have established coverage for their claims, and by failing to argue that a “resulting loss exception” in their homeowners’ policy provided for coverage of the claims. Because we conclude that the policy unambiguously did not provide coverage of the Sathers’ mold claims, we hold that King was not negligent in failing to discover the manual for use as extrinsic evidence of the policy’s interpretation. Because King did argue that the policy’s resulting loss exception applied, we hold that King cannot be found negligent for failing to raise the argument. Finally, because the Sathers do not show that but for King’s actions they would have prevailed in their claims against State Farm, they do not meet the elements of proof for their legal malpractice claim, and we affirm.

## **FACTS**

Jeffrey and Anne Sather were remodeling their home when heavy rainstorms struck the home during the summer of 1998. Water caused mold and other damage. In the fall of 2000, the Sathers retained attorney Vincent King to represent them in two lawsuits related to the damage. One lawsuit included a personal injury claim against Foam Products Company, which is not at issue in this appeal. Their second lawsuit was against State Farm Insurance Company to enforce the Sathers’ homeowners’ policy because State Farm denied some of the Sathers’ mold claims. State Farm had paid to have mold-inhibiting chemicals applied to portions of the home, to have the home tested

for mold contamination, and to have the Sathers' personal belongings cleaned of mold and mildew. State Farm also paid the Sathers \$398,914.71, of which \$230,055.27 was for building damage, \$120,156.46 was for contents damage, and \$48,702.98 was for additional living expenses. State Farm moved for summary judgment in January 2001, and the district court granted that motion. We affirmed the dismissal in March 2002. *Sather v. State Farm Fire Cas. Ins. Co.*, 2002 WL 378111 (Minn. App. Mar. 12, 2002).

The Sathers filed a legal malpractice lawsuit against King in November 2005. Their complaint alleges that King conducted no discovery during the lawsuit against State Farm and that had King done so, he would have discovered a relevant State Farm operations manual. They claim that the manual confirms that their homeowners' policy should be interpreted to provide coverage for mold damage arising out of the storms. They assert also that King failed to argue that the "resulting loss exception" in the policy applied. The resulting loss exception in the policy provides that if a loss that is specifically excluded from coverage results in a loss that is covered, the policy covers that resulting loss. The Sathers contend that had King discovered this manual and made the "resulting loss exception" argument, the district court would not have issued summary judgment in favor of State Farm. The Sathers maintain that King was therefore negligent under the applicable standard of care.

King moved for summary judgment in October 2006. The district court granted King's motion, although it rejected King's argument that collateral estoppel barred the Sathers' legal malpractice claims. In rejecting the collateral-estoppel argument, the district court concluded that the underlying claim against State Farm had been dismissed

based on State Farm's mold-exclusion provision. It determined that because neither court in the underlying action considered the application of the resulting loss exception, that issue was not actually litigated between the parties and collateral estoppel did not apply. The district court therefore evaluated whether the resulting loss exception in the State Farm insurance policy required State Farm to cover the Sathers' mold claims in order to determine whether, as a matter of law, King's alleged failure to raise that provision amounted to legal malpractice. The court found that the resulting loss exception did not provide coverage of the Sathers' mold-related claims and that the Sathers had not submitted their mold-related claims in the time required by their policy. It found that King therefore had no basis or duty to invoke the resulting loss exception and that any failure to do so was not legal malpractice, a breach of contract, or negligence. The Sathers appeal from the order dismissing their claims of legal malpractice against King, contending that summary judgment was unwarranted because King was negligent in failing to discover the operations manual and to raise the resulting loss exception. King filed a notice of review, arguing that collateral estoppel bars the Sathers' legal malpractice claims.

## **DECISION**

Because the district court granted King's motion for summary judgment and dismissed the legal malpractice claim, this court evaluates whether there was a genuine issue of material fact and whether either party is entitled to judgment as a matter of law. *Offerdahl v. Univ. of Minn. Hosp. & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988). We view the evidence in the light most favorable to the party against whom the motion was

granted when reviewing summary judgment. *Id.* To prevail on their legal malpractice claim, the Sathers must show: (1) the existence of an attorney-client relationship; (2) that King committed acts constituting negligence or breach of contract; (3) that these acts were the proximate cause of the Sathers' damages; and (4) that but for King's conduct, the Sathers would have been successful in the prosecution of the action. *Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 816 (Minn. 2006). If the Sathers do not provide sufficient evidence of each element, the malpractice claim fails. *Noske v. Friedberg*, 670 N.W.2d 740, 743 (Minn. 2003).

It is uncontested that an attorney-client relationship existed between the Sathers and King. To prove negligence in a malpractice case, the plaintiff must establish the standard of care and show that the attorney, through negligent acts, breached that standard. *Jerry's*, 711 N.W.2d at 816–17. Expert testimony is generally required to establish both the standard of care and its breach. *Id.* at 817. The Sathers offered no expert testimony or expert affidavits to establish what the standard of care was that King allegedly failed to meet. They assert only that King failed to conduct discovery, resultantly failed to discover extrinsic evidence that demonstrated the State Farm policy actually covered mold damage, and failed to argue the resulting loss exception.

King's alleged failure to discover and offer the extrinsic evidence here could constitute negligence if the insurance policy language was ambiguous and the undiscovered evidence resolved that ambiguity in the Sathers' favor. *See Pederson v. United Servs. Auto. Ass'n*, 383 N.W.2d 427, 430 (Minn. App. 1986) (noting that extrinsic evidence is admissible to resolve ambiguity). Whether the terms of an insurance policy

are ambiguous is a question of law. *Reinsurance Ass'n of Minn. v. Johannessen*, 516 N.W.2d 562, 564 (Minn. App. 1994). We conclude that the policy language in the contract here is plain and unambiguous. Under its “Losses Not Insured” section, the policy expressly states that mold is not a covered loss. In the same section, the resulting loss exception reads, “However, we do insure for any resulting loss from items a. through m. unless the resulting loss is itself a Loss Not Insured by this Section.” So the provision allows coverage for certain kinds of loss caused by mold, as long as the loss caused by mold is not otherwise excluded. Mold damage is itself a “Loss Not Insured by this Section,” and therefore it is never covered by the resulting loss provision. We hold that the district court correctly found that there is only one reasonable interpretation of the State Farm policy, and under that interpretation there is no coverage for mold damage. The policy unambiguously excludes mold damage both as a covered loss and as a resulting loss. King therefore was not negligent by failing to discover and introduce extrinsic evidence that would be admissible only to resolve an ambiguity.

There is also a practical basis to reject the Sathers’ claim that King was negligent because he did not argue that the resulting loss exception in the policy provided coverage for the Sathers’ mold claims. In fact, King did make that argument. In his response to State Farm’s motion for summary judgment, King argued that the policy did not exclude mold damage because the damage resulted from storms, a covered loss. He made the same argument on appeal in 2001, presenting this court with the policy excerpt that included the mold exclusion language and the resulting loss exception language. Although King did not expressly reference the provision as a “resulting loss exception” in

his arguments, the import of his argument was the same. In his appeal brief, he had contended, “In this case, there is no dispute that the original storm damage in 1998 was a covered occurrence; and State Farm admits that the mold in the residence and on Appellants’ personal property is *the result of* the 1998 storm damage. . . . Accordingly, storm damage was the proximate cause of the mold and remediation of the mold should be covered by the policy.” (Emphasis added.) Because King made the argument that the Sathers assert he overlooked, he cannot be found negligent for that alleged failure.

Finally, the Sathers did not meet the causation elements of their legal malpractice claim. The district court and this court held that the State Farm policy unambiguously stated that there is no coverage for mold damage. Although King did not produce the State Farm operations manual to argue this point, that failure could amount to legal malpractice only if the Sathers proved that but for that failure, the Sathers would have prevailed on their claim against State Farm. *See Ross v. Briggs & Morgan*, 540 N.W.2d 843, 847–48 (Minn. 1995) (holding that the plaintiff did not prove legal malpractice because the plaintiff could not show that defendant law firm’s failure to tender the plaintiff’s claim to his insurance company proximately caused his loss). The Sathers did not show that King’s alleged negligence was the proximate cause of their damages, and their malpractice claim fails for that additional reason as well. Because we conclude that the Sathers’ legal malpractice claim fails, we do not reach King’s collateral estoppel argument.

**Affirmed.**