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STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1108

Kimberly Russell,
Appellant,

vs.

George Roberts, Esq.,
Respondent.

Filed May 12, 2009
Affirmed
Ross, Judge

Hennepin County District Court
File No. 27-CV-07-9957

Keith D. Johnson, Law Offices of Keith D. Johnson, P.L.L.C., Barristers Trust Building, 247 Third Avenue South, Minneapolis, MN 55415 (for appellant)

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Considered and decided by Ross, Presiding Judge; Halbrooks, Judge; and Johnson, Judge.

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

ROSS, Judge

This dispute arose after a debtor trusted her attorney's mistaken opinion that the debtor's annuity, created by a structured settlement in a civil suit, would entirely survive a bankruptcy proceeding. The debtor, Kimberly Russell, filed for bankruptcy and lost to

creditors all but 20% of the value of the annuity. Russell sued George Roberts, her attorney, for legal malpractice and fraudulent misrepresentation. The district court granted Roberts summary judgment because Russell could not prove that she would have obtained a more favorable result by not filing for bankruptcy. Because Russell cited no evidence to prove that she would have received a more favorable result by disregarding her attorney's opinion and not filing for bankruptcy, we affirm.

FACTS

Kimberly Russell and her then-husband met with George Roberts in early 2002 for advice regarding filing for bankruptcy. Russell had rights to a 1994 structured settlement from a personal injury lawsuit. She did not want to pursue bankruptcy if it would jeopardize proceeds that she anticipated receiving under the structured settlement, which directed payments to Russell through an annuity. Russell asked Roberts whether the annuity would survive bankruptcy, and Roberts stated that it would; he thought that the annuity was an exempt asset based on his understanding of Minnesota Statutes section 550.37, subdivision 22 (2008).

The Russells jointly filed for Chapter 13 bankruptcy in March 2002, and they claimed the annuity as an exempt asset. The Chapter 13 trustee, however, objected and presented Roberts with a United States Court of Appeals opinion, *Christians v. Dulas*, 95 F.3d 703 (8th Cir. 1996), which held that an annuity established by a structured settlement is not an exempt asset. Until then, Roberts was unaware of that case or its holding.

Russell's husband became unemployed, and the Russells then qualified for Chapter 7 bankruptcy and converted their proceeding from Chapter 13 to Chapter 7. This time, they did not claim the annuity as an exempt asset.

In September 2002, the bankruptcy court discharged the Russells' debts under Chapter 7. But the bankruptcy trustee sued Russell seeking to apply the structured settlement to satisfy creditors. Russell, no longer represented by Roberts, contended that the annuity was unavailable to creditors. The contention was unavailing, and she eventually settled with the trustee, agreeing to retain only 20% of the payments remaining from the annuity. The rest would go to the bankruptcy estate to pay creditors.

Russell sued Roberts for his erroneous advice. Both parties sought summary judgment. The district court granted Roberts summary judgment on all claims because Russell presented no evidence that she would have obtained a more favorable result if she had not followed Roberts's advice and not filed for bankruptcy. Russell appeals.

D E C I S I O N

We approach appeals from summary judgment by asking whether any genuine issues of material fact exist and whether the district court applied the law in error. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). In doing so, we evaluate any conflicting 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). We first apply this standard to Russell's malpractice claim and then to her fraudulent-misrepresentation claim.

I

Russell contends that she can prove legal malpractice against Roberts and overcome his summary judgment motion if we properly apply the collateral-source rule to the discharge of her debt. Under the common law, the collateral-source rule allows for double recovery by permitting an injured party to be compensated by a third party without reducing the injured party's recovery against the tortfeasor for the same injury. *Hueper v. Goodrich*, 314 N.W.2d 828, 830 (Minn. 1982). Minnesota has abrogated the collateral-source rule regarding claims arising from physical injury. *See* Minn. Stat. § 548.251 (2008) (abrogating collateral-source rule); *Duluth Stream Co-op Ass'n v. Ringsred*, 519 N.W.2d 215, 217 (Minn. App. 1994) (determining that Minnesota Statutes section 548.36 (1992)—currently renumbered as section 548.251—applies only to personal-injury cases). But the traditional collateral-source rule still applies in other situations, *Duluth*, 519 N.W.2d at 217, and Russell urges that it applies to save her legal-malpractice claim from otherwise failing for lack of proof of damages.

The issue of damages is essential to two of the four elements that Russell must prove to avoid summary judgment on her legal-malpractice claim. A party must prove four elements for legal malpractice: (1) an attorney-client relationship exists, (2) negligent acts or breaches of contract occurred, (3) these acts or breaches proximately caused damages, and (4) "but for" the lawyer's conduct, the party would have successfully prosecuted or defended the action. *Jerry's Enterps., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 816 (Minn. 2006). In transactional cases, such as this, the fourth element is modified to require a showing that "but for" the lawyer's

conduct, the party "would have obtained a more favorable result in the underlying transaction than the result obtained." *Id.* at 819. If the party does not produce sufficient evidence of all elements, the legal-malpractice claim fails. *Id.* at 816.

We are not persuaded by Russell's contention that applying the collateral-source rule would provide another source of damages and thereby save her legal-malpractice claim; the collateral-source rule has no bearing on her claims. Russell is correct that because her malpractice claim does not involve a physical injury, the common-law collateral-source rule, rather than the statutory rule, would apply. But there must be an actual injury suffered and covered by a third party for the claimant to be eligible for additional recovery from the tortfeasor under the rule. *See* Restatement (Second) of Torts § 920A(2) (1979) ("Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of *the harm for which the tortfeasor is liable*.") (emphasis added). Russell identifies no injury caused by her attorney's alleged malpractice that was covered by the discharge of debt. Whether or not the discharge of debt is counted as a value to Russell, the discharge had no causal relation to and was not intended to remedy Roberts's faulty opinion. The double recovery that Russell relies on is therefore illusory. Because Russell's discharge of debt cannot be characterized as a third-party payment for her injury, her collateral-source argument fails at the threshold. We hold that the collateral-source rule does not apply because Russell has made no recovery from any third party for any injury caused by her attorney's advice.

We therefore consider whether Russell has sustained any compensable damages with the discharge properly characterized—as a valuable asset against which to balance her claimed loss. Although Russell contends that we should consider only her debts and not those incurred by her ex-husband, we will consider them jointly, just as she presented them in bankruptcy; she voluntarily filed for bankruptcy jointly with her husband and sought to treat the debts as shared. *See* 11 U.S.C. §§ 301 (discussing how to file voluntary bankruptcy cases), 302 (2006) (discussing how to file joint bankruptcy cases). Russell provides no basis for separate legal treatment of debts that she presented jointly when exercising her rights in bankruptcy.

Russell has cited no evidence that she would have been in a more favorable situation had she not filed for bankruptcy based on her attorney's opinion. And the record demonstrates the opposite. Before bankruptcy, Russell was burdened under $91,912 in unsecured debts. Bankruptcy lifted at least $79,012 of this burden from her. After bankruptcy, although she suffered an 80% loss of her annuity payments from the structured settlement and incurred attorney's fees, this combined reduction of $66,043.29 is less than the value she obtained in the discharge of her debt. In other words, Russell achieved a net economic gain by following her attorney's advice and filing for bankruptcy, even considering the substantial, partial loss of her structured settlement payments.

Russell contends that we should not compare her prebankruptcy and postbankrputcy financial conditions without including possible reductions in her prebankruptcy debt. She asserts that she might have sought some option other than

continuing to carry her full debt or extinguishing her debt through bankruptcy. But she introduced no evidence that she even explored any other option. Her deposition mentions help from her parents and debt consolidation as possible options she considered to reduce her prebankruptcy debt. But she admitted that she took no steps to take either option; she never discussed the situation with her parents, and she never spoke to any debt consolidators. Although the options might have been conceivable, they were never conceived. She also provides no evidence of the financial condition either option would have left her in. Whether the options were viable and would have put her in a more favorable position than bankruptcy is therefore the subject of mere speculation. *See Christians v. Grant Thornton, LLP*, 733 N.W.2d 803, 813 (Minn. App. 2007) (determining that trustee's claims could not survive without evidence of the actions and reasonable outcome of actions that company would have taken absent defendant's negligence rather than "speculative potential outcomes"), *review denied* (Minn. Sept. 18, 2007); *cf. Raske v. Gavin*, 438 N.W.2d 704, 706 (Minn. App. 1989) (holding that summary judgment was appropriate without specific facts that plaintiff would have restructured stock sale based on attorney's advice), *review denied* (Minn. June 21, 1989).

Without proof that she would have chosen a different option more favorable than bankruptcy "but for" Roberts's advice, Russell has failed to provide a different damages paradigm for us to consider. She has failed to prove both damages and the "but for" elements of her malpractice claim. Her claim depends on these elements. *Jerry's Enterps.*, 711 N.W.2d at 816. The district court appropriately granted Roberts summary judgment on this claim.

II

Russell also contends that the district court should not have granted summary judgment on her fraudulent-misrepresentation claim. Before we turn to the merits of the claim, we first address her procedural challenge. Russell insists that Roberts sought summary judgment only for the legal-malpractice claim. When evaluating a summary-judgment motion, however, the district court examines the entire record. *Fabio*, 504 N.W.2d at 761. And the district court has the inherent authority to issue summary judgment sua sponte. *Modern Heating & Air Conditioning, Inc. v. Loop Belden Porter*, 493 N.W.2d 296, 299 (Minn. App. 1992).

The district court correctly considered whether to grant summary judgment on Russell's fraudulent-misrepresentation claim. Although its order did not directly discuss that claim, it later clarified by letter that its order for "defendant's Motion for Summary Judgment is, in all respects, granted." Roberts's motion for summary judgment had included a request to dismiss Russell's complaint in its entirety, and Russell expressly argued against dismissal of her fraudulent-misrepresentation claim in her reply brief opposing summary judgment. The fraudulent-misrepresentation claim was sufficiently at issue in the summary judgment proceeding.

The district court also correctly entered summary judgment on this claim. Russell needed to prove eleven elements to avoid summary judgment for fraudulent misrepresentation: (1) a representation occurred, (2) the representation was false, (3) the representation involved a past or present fact, (4) the fact was material, (5) the fact was susceptible of knowledge, (6) the representer knew it was false or asserted it without

knowledge of its truth or falsity, (7) the representer intended to have the other person act on that information, (8) the other person acted, (9) the person acting relied on the representation, (10) the other person suffered damage, and (11) the misrepresentation proximately caused the damage. *Davis v. Re-Trac Mfg. Corp.*, 276 Minn. 116, 117, 149 N.W.2d 37, 38–39 (1967). Among other apparent deficiencies, Russell did not prove that she suffered an injury causing damages. The district court's letter clarifying its holding recognized this, specifying that "[t]he actions of the defendant caused *no legally cognizable harm under any theory of liability*. It is for this reason that the entire complaint was dismissed." (Emphasis added.) The district court's order reasonably concluded that Russell failed to prove that she would have obtained a more favorable result by not relying on her attorney's representations and not filing for bankruptcy. Russell's fraudulent-misrepresentation claim, like her malpractice claim, fails for lack of proof of damages.

Affirmed.