STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0654

Scott Ronald Schmidt,
Appellant,

vs.

Thomas P. Harlan, et al.,
Respondents,

Steven B. Nosek, et al.,
Defendants.

Filed January 21, 2014
Reversed and remanded
Hudson, Judge

Hennepin County District Court
File No. 27-CV-12-2105

Scott A. Wilson, Minneapolis, Minnesota (for appellant)

Mark R. Bradford, Jeffrey R. Mulder, Michael A. Klutho, Bassford Remele, P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Johnson, Presiding Judge; Hudson, Judge; and Smith, Judge.

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

HUDSON, Judge

On appeal from summary judgment in a legal-malpractice suit, appellant argues that the district court erred in granting summary judgment to respondents because issues

of material fact exist as to whether respondent attorney gave him negligent advice and whether appellant's expert affidavit was sufficient to establish causation. Because we agree, we reverse and remand to the district court for trial.

FACTS

Underlying Litigation

Appellant Scott Ronald Schmidt was an officer of Tech Electric of Minnesota, Inc., which served as a subcontractor to Jorgenson Construction, Inc. on a large school construction project. As the project developed, Tech Electric was unable to pay its own subcontractor, Viking Electric Supply, Inc., and a check exchange between all three companies was orchestrated to prevent Viking from filing a claim against Jorgenson's payment bond. Jorgenson was to bring a check for $168,000 made payable to Tech Electric, and Tech Electric in turn was to provide a $168,000 check to Viking. Tech Electric deposited its check from Jorgenson, but when Viking presented Tech Electric's check at a bank it was dishonored at appellant's request. Jorgenson then filed suit against appellant personally in Hennepin County District Court alleging fraud, negligent misrepresentation, and unjust enrichment in connection with the check exchange.

Respondents Thomas Harlan and Madigan, Dahl, and Harlan, P.A., represented appellant in the *Jorgenson* case. On November 2, 2007, the judge granted partial summary judgment to appellant in that case, dismissing Jorgenson's claims of fraud and negligent misrepresentation with prejudice. But the district court denied summary judgment with respect to the unjust-enrichment claim. At some point when that case was pending, Harlan referred appellant to a bankruptcy attorney. Appellant claims that

Harlan advised him that filing for bankruptcy would protect him financially, and that the partial summary-judgment order would preclude the bankruptcy court from re-litigating the fraud issue. Appellant filed for personal bankruptcy as well as bankruptcy for Tech Electric while the *Jorgenson* case was still pending. The unjust-enrichment claim was stayed after appellant filed for personal bankruptcy and never reached trial; therefore, pursuant to Minn. R. Civ. P. 54.02, the court's partial summary-judgment order absolving appellant of fraud did not become final.

Jorgenson filed an adversary proceeding against appellant in the personal bankruptcy matter, making essentially the same claims made in the *Jorgenson* case in district court. The bankruptcy judge found that the partial summary-judgment order from the *Jorgenson* case was not a final judgment; thus, Jorgenson's claims were not barred by collateral estoppel. The judge went on to conclude that appellant committed fraud with respect to the check exchange and excepted a $168,150 debt to Jorgenson from appellant's bankruptcy discharge.

Malpractice Suit

Following the bankruptcy order, appellant filed this legal-malpractice lawsuit against respondents, alleging that he filed for bankruptcy because Harlan assured him the partial summary-judgment order in the *Jorgenson* case would be binding upon the bankruptcy court, and that when the bankruptcy judge determined that the partial order did not bind him, appellant was "held to owe a nondischargeable debt of $168,150.00 to Jorgenson."

Respondents moved for summary judgment and sanctions. The district court granted summary judgment for respondents on the legal-malpractice claim and denied their motion for sanctions. In doing so, the district court reasoned that appellant did not show the existence of credible evidence that Harlan provided advice about the effect of filing for bankruptcy, and, in any event, that appellant's expert affidavit was speculative and thus insufficient to establish that Harlan's alleged advice was the cause of the bankruptcy-court outcome. This appeal follows.

D E C I S I O N

Appellant argues that the district court erred in granting summary judgment to respondents because a genuine issue of material fact exists as to whether Harlan negligently advised appellant that the favorable partial summary-judgment order in the *Jorgenson* case would bind the bankruptcy court. Appellant also argues that his expert affidavit was sufficient to establish both proximate and but-for causation.

This court reviews a district court's summary judgment order de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). "In doing so, we determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Id*. The evidence is viewed in the light most favorable to the party against whom summary judgment was granted. *State Farm Fire & Cas. v. Aquila, Inc.*, 718 N.W.2d 879, 883 (Minn. 2006).

When a legal malpractice claim does not involve the loss of an underlying claim, the plaintiff must show: (1) an attorney-client relationship; (2) acts constituting

negligence or breach of contract; (3) that such acts were the proximate cause of the plaintiff's damages; and (4) that but for the defendant's conduct, the plaintiff would have obtained a more favorable result in the underlying action. *Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 816, 819 (Minn. 2006). Sufficient evidence must be provided to support all four elements or the claim fails. *Id*. at 816. The first element, existence of an attorney-client relationship, is not in dispute here.

Acts Constituting Negligence

On this element, appellant argues the district court erred by ignoring certain evidence in the record, making impermissible credibility determinations, and by finding his affidavit to be self-serving. Specifically, appellant argues his deposition testimony that Harlan gave him the advice in question was "simply not believed."

To prove negligence in a legal malpractice case, the plaintiff must demonstrate a standard of care and show that the attorney did not meet it. *Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 112 (Minn. 1992). "Attorneys have a duty to exercise that degree of care and skill that is reasonable under the circumstances, considering the nature of the undertaking." *Jerry's Enters., Inc.*, 711 N.W.2d at 817 (quotation omitted). Generally, expert testimony is required "to establish the standard of care applicable to an attorney whose conduct is alleged to have been negligent, and further to establish whether the conduct deviated from that standard." *Id*. (quotation omitted). A genuine issue of material fact exists "[w]hen qualified expert opinion with adequate foundation is laid on an element of a claim." *Admiral Merchants Motor Freight, Inc. v. O'Connor & Hannan*, 494 N.W.2d 261, 266 (Minn. 1992).

The district court concluded that appellant did not provide evidence tending to prove that Harlan was the attorney who gave him the advice about the partial summary-judgment order. The district court reasoned that appellant stated in his deposition that it was his bankruptcy attorney, not Harlan, who advised him that the partial order would be a "slam dunk" in bankruptcy court. But appellant states in his deposition that Harlan gave him the advice independently as well as in conjunction with his bankruptcy attorney. Accordingly, the only proffered evidence regarding whether Harlan gave appellant the advice is conflicting deposition testimony from appellant and Harlan. The district court stated that "[appellant] made numerous conclusory statements that Mr. Harlan gave him the advice at issue" and that "[appellant had] not offered credible evidence or indicated the existence" of evidence to survive summary judgment on this element.

It is error for a district court to weigh evidence or assess credibility on summary judgment. *Hoyt Props., Inc. v. Prod. Res. Grp., L.L.C.*, 736 N.W.2d 313, 320 (Minn. 2007) (concluding that when the record consisted solely of the parties' assertions, the only way for the district court to resolve a question of fact "was to have weighed the evidence and assessed the credibility of the parties"). A defendant is not entitled to summary judgment when the evidence provided, "if fully believed, would support a claim" for relief." *Geist-Miller v. Mitchell*, 783 N.W.2d 197, 202 (Minn. App. 2010). Appellant's deposition testimony, if fully believed, creates a genuine issue of material fact as to whether Harlan independently gave appellant advice about the partial summary-judgment order.

The district court also noted that appellant claimed Harlan gave him the advice in question in October 2007, even though the partial summary-judgment order was not issued until November 2, 2007. Appellant submitted a later affidavit which stated he was mistaken about when Harlan gave him the advice and that the conversation must have occurred in November, not in October as he originally asserted. The district court found that appellant's affidavit was self-serving and did not create a factual issue sufficient to withstand summary judgment. "A self-serving affidavit that contradicts earlier damaging deposition testimony is not sufficient to create a genuine issue of material fact." *Banbury v. Omnitron Int'l, Inc.*, 533 N.W.2d 876, 881 (Minn. App. 1995). "A subsequent affidavit may, however, raise a factual issue where the deposition itself reveals confusion or mistake; such an affidavit is not inherently inconsistent with the deposition, but rather seeks to explain it." *Id*. Here, the important content—appellant's claim that Harlan rendered the advice—did not change between appellant's answers to interrogatories, deposition testimony, and the subsequent affidavit. Rather, the affidavit clarified the dates the advice was allegedly given. Therefore, we conclude that the affidavit was explanatory rather than contradictory.

Because the district court concluded appellant did not create a genuine issue of material fact as to whether Harlan gave him the advice, it did not reach the issue of whether that advice was negligent. Appellant's expert affidavit claimed the advice was negligent because Harlan had a duty to research the law and properly advise appellant regarding whether the partial summary-judgment order would have preclusive effect. Respondents claim that their expert would have testified that Harlan did not breach the

standard of care because he informed appellant that he was not a bankruptcy attorney and referred appellant to a bankruptcy attorney. But appellant claims Harlan independently discussed the benefits of filing for bankruptcy with him. Furthermore, at any time leading to appellant's personal bankruptcy filing Harlan could have researched the possible binding effect of the partial order in the *Jorgenson* case, for which he was solely responsible. Thus, appellant has established a genuine issue of material fact as to whether Harlan gave the advice, and as to whether the advice fell below the applicable standard of care.

Proximate Cause

Proximate cause in legal malpractice claims is analyzed in the same way as in ordinary negligence cases. *Raske v. Gavin*, 438 N.W.2d 704, 706 (Minn. App. 1989), *review denied* (Minn. June 21, 1989). "[I]f the act is one which the party ought, in the exercise of ordinary care, to have anticipated was likely to result in injuries to others, then he is liable for any injury proximately resulting from it, even though he could not have anticipated the particular injury which did happen." *Wartnick*, 490 N.W.2d at 113 (quotation omitted). Proximate cause is generally a question of fact for the jury, but "where reasonable minds can arrive at only one conclusion, proximate cause is a question of law." *Lubbers v. Anderson*, 539 N.W.2d 398, 402 (Minn. 1995).

As to causation, appellant's expert affidavit stated that, as a result of the negligent advice to proceed with bankruptcy before the *Jorgenson* case was resolved, the partial summary-judgment order never became final and thus did not have preclusive effect in bankruptcy court. The affidavit went on to claim that, as a result of Harlan's failure to

advise appellant to wait to file bankruptcy until the order became final, appellant was held to owe a nondischargeable debt to Jorgenson of $168,150. Appellant admitted during his deposition that Harlan was essentially "out of the picture" at the time of the personal bankruptcy filing. But appellant also stated that, when Harlan raised the issue of bankruptcy, appellant did not distinguish between the bankruptcy for Tech Electric and his own personal bankruptcy, and he claims that he would not have filed for bankruptcy if Harlan had not told him the partial summary-judgment order would be binding. In addition, Harlan's billing records show he was in contact with appellant's personal bankruptcy attorney up to the date of filing. Accordingly, at all relevant times leading to the personal bankruptcy, Harlan had the ability to research and correctly advise appellant regarding the effect of the partial summary-judgment order. The subsequent fraud finding in bankruptcy court was a foreseeable consequence of the advice appellant allegedly received from Harlan. Thus, there is a genuine issue of material fact as to whether the advice proximately caused appellant's harm.

But-For Causation

On this element, the district court concluded that appellant's expert affidavit was too speculative because it does not address the possibility that the partial summary judgment order could have been reconsidered by the district court, or, had the matter gone to trial, what would have happened on appeal. But in opposition to respondent's summary-judgment motion, appellant's expert submitted a second affidavit in which he addresses the possibility that the partial summary-judgment order could have been reconsidered. The affidavit stated it was "speculative at best" that the partial summary

judgment order would have been reconsidered because reconsideration motions pursuant to Minn. R. Civ. P. 60.02 are "highly suspect," and Jorgenson had not made such a motion following the order. The expert also considers what would likely have happened on appeal had the *Jorgenson* case reached a final resolution at trial. According to the expert, if the jury had returned a favorable verdict for appellant on the remaining unjust-enrichment claim, it was more likely than not that the case would be affirmed in favor of appellant on appeal because jury fact-finding is rarely overturned, and without findings to support unjust enrichment, there would be no factual basis to overturn the fraud determination. The affidavit also stated that if the jury had entered a verdict in favor of Jorgenson, it is unlikely that Jorgenson would have appealed the prior partial summary-judgment order.

Appellant argues that the district court imposed an "impossible" standard of proof, requiring appellant to provide "concrete evidence" of causation. This court has stated that to survive summary judgment, a plaintiff "must introduce concrete evidence of what [the plaintiff] would have done but for [the defendant's] negligence." *Schmitz v. Rinke, Noonan, Smoley, Deter, Colombo, Wiant, Von Korff & Hobbs, Ltd.*, 783 N.W.2d 733, 741 (Minn. App. 2010) (quotation omitted), *review denied* (Sept. 21, 2010). But, as appellant argues, that phrase does not create a heightened standard of proof. Rather it reinforces the concept that an expert's opinion as to causation cannot rely solely on "broad and conclusory statements" but must be "based on an adequate factual foundation showing that the complained-of act caused the harm at issue." *Id*. at 746. Here, appellant's expert presented a well-reasoned opinion as to what would have occurred had appellant delayed

filing for bankruptcy and had the *Jorgenson* case continued to trial. Thus, a jury would not have to "impermissibly speculate" as to causation. *Cf. id*. at 743. Viewed in the light most favorable to appellant, a genuine issue of material fact exists as to whether respondents were the but-for cause of appellant's damages.[1]

Accordingly, appellants have established a genuine issue of material fact as to each element of their legal malpractice claim, and the summary-judgment order in favor of respondents must be reversed.

Reversed and remanded.

[1] Respondents also argue that this court should apply the "fraudfeasor doctrine" as an alternative means to affirm the district court's order. Respondents mentioned the theory in a footnote in their motion for summary judgment, but it was not discussed by the district court in its summary-judgment order, nor was it raised at the summary-judgment hearing. Thus, the argument is not properly before this court, and we decline to address it. *Thiele v. Stitch*, 425 N.W.2d 580, 582 (Minn. 1988).