STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1182

Brandow Properties, LLC,
Appellant,

vs.

Katherine M. Melander, et al.,
Respondents.

Filed May 31, 2022
Reversed and remanded
Segal, Chief Judge

Hennepin County District Court
File No. 27-CV-20-2033

Keith D. Johnson, Law Office of Keith D. Johnson, P.L.L.C., Roseville, Minnesota (for appellant)

Richard J. Thomas, Chris Angell, Burke & Thomas, PLLP, Arden Hills, Minnesota (for respondents)

Considered and decided by Slieter, Presiding Judge; Segal, Chief Judge; and Bratvold, Judge.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

Appellant challenges the grant of summary judgment for respondents in this legal-malpractice case. Because appellant has demonstrated the existence of genuine issues of material fact, we reverse and remand.

FACTS

The facts summarized below are undisputed except as otherwise noted. Appellant Brandow Properties, LLC (the LLC) owns a commercial property at 205-207 Water Street in Excelsior, Minnesota (the building). A restaurant and gift shop had been tenants in the building. When they decided not to renew their leases, the LLC retained respondent-attorney Katherine Melander, a partner at respondent law firm Heley, Duncan & Melander, PLLP, to draft and negotiate a lease for a new tenant.

Tim Brandow, one of the owners of the LLC, secured a new tenant who wanted to operate a steakhouse in the building. The tenant decided not to open the steakhouse but paid rent to the LLC until another tenant was found. Brandow claims that several potential restaurant tenants expressed interest in leasing the building, including Compagno Hospitality, LLC. Compagno identified a number of building improvements that it wanted if it was to enter into a lease. These included improvements to the interior of the restaurant space, which the parties called "tenant improvements," and improvements to the building itself, which the parties called "landlord improvements."

Brandow alleges that he instructed Melander that the lease should be drafted so that Compagno would pay back, over time, 82% of the cost of the items identified as "landlord improvements." Brandow claims that he chose the 82% figure because Compagno would be leasing approximately 82% of the square footage in the building. The president of Compagno, however, stated in his deposition that he expected that the LLC would pay for the "landlord improvements" to the building, except for certain costs related to the building's sprinklers and insulation which were to be shared. He also stated that Compagno

would not have entered into a lease that required it to pay for the bulk of the "landlord improvements."

Melander prepared a draft lease for Compagno's proposed tenancy. As relevant here, the lease provided that Compagno would pay a "pro rata share" of the LLC's "operating expenses" as "additional rent." The phrase "operating expenses" was defined as including "any portion of any capital expenditures or improvements made to the Building." Under the heading of "pro rata share," the final version of the lease stated that Compagno "agrees to pay eighty-two percent (82%) of the operating expenses." Another provision stated that the LLC "will complete the construction of the improvements . . . outlined in *Exhibit D* attached hereto." That same provision stated that Compagno "agrees to pay its share of Landlord's improvements as identified in *Exhibit D.*"

Brandow prepared the initial draft of exhibit D, which contained a list of the "landlord improvements" to be made to the building. At some point during the lease negotiations, Melander sent Brandow a draft of the lease that contained, among other changes, a new sentence at the bottom of exhibit D. The added language, denoted by an asterisk and printed in bold, stated: "*Unless otherwise noted, the improvements described above shall be paid by Landlord." Only the costs related to the building's sprinklers and insulation were "otherwise noted" in exhibit D. For those two items, the final draft of the the exhibit stated that the LLC and Brandow were to split the costs 50-50. Other major items, such as installing an elevator, removing and rebuilding the rear 20 feet of the building to strengthen the floor and roof, and building stairways from the lower level to the

roof, were not "otherwise noted" in the exhibit. The LLC and Compagno executed the lease with the new provision (the asterisk language) included in exhibit D.

Brandow alleges that Melander added the asterisk language and that she never discussed or explained the change and its impact on cost sharing. Brandow asserted in his deposition that he would not have made the "landlord improvements" to the building without having a source of reimbursement from the tenant. He also stated in his deposition that he could have rented the building to other restaurant tenants and that the building did not need the improvements.

During and after the construction process, disputes arose between the LLC and Compagno concerning which party was responsible for paying for various improvements. The LLC sued to evict Compagno and to enforce Brandow's contention that the lease terms required Compagno to pay, over time, 82% of all "landlord improvements" aside from the sprinkler and insulation improvements. The litigation was eventually resolved after the district court determined that Compagno was correct in its interpretation of the lease that it did not bear any liability for the cost of "landlord improvements" other than the sprinkler and insulation improvements.

The LLC then filed this legal-malpractice action against Melander and the law firm. The LLC alleged in the lawsuit that Melander negligently added the asterisk language to the lease and failed to explain the impact of the change. After the close of discovery, respondents brought a motion for summary judgment asserting that, even if Melander was negligent, the alleged negligence was not the but-for cause of the LLC's damages or, in the

alternative, that the LLC did not suffer any damages. The LLC cross-moved for partial summary judgment on the issue of liability.

The district court denied the LLC's motion, granted respondents' motion for summary judgment, and dismissed the LLC's legal-malpractice claim. The district court determined that the LLC could not establish the but-for cause element of legal malpractice. The district court did not address respondents' argument that they were entitled to summary judgment because the LLC failed to demonstrate that it suffered damages. The LLC requested reconsideration, which the district court denied. The LLC appeals.

DECISION

A grant of summary judgment is appropriate "if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01. This court "review[s] the grant of summary judgment de novo to determine whether there are genuine issues of material fact and whether the district court erred in its application of the law." *Montemayor v. Sebright Prod., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017) (quotation omitted).

In determining whether a genuine issue of material fact exists, this court must "view the evidence in the light most favorable to the party against whom summary judgment was granted." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). This court "need not adopt the reasoning of the district court" and "may affirm a grant of summary judgment if it can be sustained on any grounds." *Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 163 (Minn. 2012).

I.

To succeed on a claim for legal malpractice, a plaintiff must prove four elements: "(1) the existence of 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 defendant's conduct the plaintiff would have been successful in the prosecution or defense of the action." *Blue Water Corp. v. O'Toole*, 336 N.W.2d 279, 281 (Minn. 1983). When a case—like this one—involves a transactional matter, the fourth element is "modified to require a plaintiff to show that, but for defendant's conduct, the plaintiff would have obtained a more favorable result in the underlying transaction than the result obtained." *Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 819 (Minn. 2006).

Here, the district court granted summary judgment to respondents based on the fourth element—that, but for the alleged negligence, the plaintiff would have obtained a more favorable result.[1] "When applying the 'but for' test [in a legal-malpractice case], we must envision what would have occurred but for the negligent conduct." *Schmitz v. Rinke, Noonan, Smoley, Deter, Colombo, Wiant, Von Korff & Hobbs, Ltd.*, 783 N.W.2d 733, 741 (Minn. App. 2010) (quotation omitted), *rev. denied* (Minn. Sept. 21, 2010). "As a matter of law, but-for causation is not shown by speculative potential outcomes." *Id.* at 743 (quotation omitted). To show that a more favorable result would have occurred, a plaintiff

[1] There is no dispute concerning the existence of an attorney-client relationship between the LLC and respondents, and respondents conceded, for the purposes of their motion for summary judgment, the issue of negligence. Respondents based their summary-judgment motion on the elements of but-for causation and damages.

"must introduce concrete evidence of what the plaintiff would have done but for the defendant's negligence and what those actions would have reasonably produced." *Id.* at 741 (quotation omitted).

The district court, in granting summary judgment, relied on the undisputed testimony of Compagno's president that the company would never have entered into a lease with the LLC that required Compagno to pay 82% of all "landlord improvements." The district court reasoned that the LLC thus could not have obtained the more favorable result—a lease where Compagno would pay 82% of the cost of "landlord improvements"—and that the LLC therefore could not establish that Melander's alleged negligence was the but-for cause of the LLC's alleged damages.

The LLC, however, argues that the district court erred by failing to consider that not entering into a lease with Compagno may have been a more, not a less, favorable result for the LLC. The LLC maintains that, if it had been advised by Melander about the change in cost sharing for "landlord improvements," it would have refused to enter into the lease and that no lease was a more favorable result for the LLC than entering into the lease as written. In support of its argument, the LLC points to the fact that it incurred over $1.3 million in construction costs for the "landlord improvements" without the expected source of revenue, Compagno, to reimburse those costs. Brandow testified in his deposition that the "landlord improvements" required by Compagno, such as "[p]utting all new bathrooms in, . . . [m]oving the stairway to the downstairs[,] . . . additional storage areas[, and] . . . put[ting] an elevator in . . .—those are the kinds of things that are major expenses that I

would not have done if I knew that I had to pay for that entirely by myself." Brandow further testified in his deposition that "the building was good as it was."

The LLC also put forward evidence that there were at least two other interested restaurant tenants at the time. Brandow testified in his deposition:

> I had . . . two tenants that I had pushed aside because [the president of Compagno] was so convincing that he had all of this money that he was going to invest in the building and do a wonderful job. And I got a lot of heat from one of my potential tenants . . . because I chose [Compagno] over their [restaurant].[2]

Finally, Brandow testified in his deposition that, if he had been advised of the alleged impact of the asterisk language in exhibit D, the LLC "would not have signed [the lease with Compagno]. Period." The LLC has thus provided evidence to support its claim that no lease may have been a more favorable result for the LLC than entering into the lease with Compagno.

Respondents contend that our opinion in *Schmitz* undercuts the viability of the LLC's argument that no lease would have been a more favorable result. In *Schmitz*, the plaintiff alleged that the law firm negligently failed to advise him not to send a letter to the buyer of plaintiff's interests in certain companies. *Id.* at 736. After the letter was sent, the buyer claimed that plaintiff had breached their agreement. *Id.*

We affirmed the district court's grant of judgment as a matter of law in favor of the law firm in *Schmitz* because, among other grounds, the plaintiff failed to bring forward

[2] Brandow claims the discussions with one of the potential tenants got to the point of preparing a draft lease.

sufficient evidence that, but for the law firm's alleged negligence, the plaintiff would have obtained a more favorable result. *Id.* at 741. We noted, in particular, plaintiff's failure to "introduce concrete evidence of what the plaintiff would have done but for the defendant's negligence and what those actions reasonably would have produced." *Id.* (quotation omitted). We placed weight on the fact that the plaintiff never "actually testif[ied] that he would not have sent the letter if [his lawyer] had advised him not to." *Id.* By contrast, in this case, we have Brandow's deposition testimony that the LLC would not have entered into the lease if the cost-sharing change had been explained to him by Melander. *Schmitz* is thus distinguishable and is not controlling here.

We thus conclude that the LLC submitted sufficient evidence to demonstrate a genuine issue of material fact on but-for causation and that the district court erred in granting summary judgment based on this element.

II.

Respondents, however, go on to argue that, even if the no-lease alternative may have been a "more favorable result," summary judgment was still warranted because the LLC cannot establish that it suffered any damages. While the district court did not rule on respondents' damages argument, respondents presented this argument to the district court, both parties briefed this issue to our court, and we may affirm a grant of summary judgment if it can be sustained on any grounds. *Doe*, 817 N.W.2d at 163. We thus address respondents' argument in the interests of judicial economy.

"As this court has recognized, damages are intertwined with causation." *Schmitz*, 783 N.W.2d at 743. To succeed in a legal-malpractice claim, a plaintiff must show not

only that a defendant's negligence was the but-for cause of the less favorable outcome, but that the plaintiff suffered damages as a result. *Blue Water Corp.*, 336 N.W.2d at 281 (noting that the proximate-cause element of legal malpractice requires that a defendant's negligence be "the proximate cause of the plaintiff's damages").

Respondents argue that the LLC suffered no damages because it now has a building with a value increased by the $1.3 million in capital improvements. Respondents argue that the LLC thus came out even. Respondents also assert that, even if the building's value increased by less than what the LLC spent on improvements, the LLC did not offer any evidence about the building's fair market value and thus failed to create a genuine issue of material fact.

The LLC responds that the fair market value of the building is not relevant and that it has been damaged in the amount of the $1.3 million it spent on the "landlord improvements" that it would not have spent but for Melander's alleged negligence. Respondents maintain that this is not a proper measure of damages and that it could result in a double recovery. We need not, however, resolve this issue because the LLC submitted other evidence related to its damages. The LLC submitted evidence that it incurred over $100,000 in litigation costs in the suit against Compagno concerning the interpretation of the lease. These costs are sufficient to create a genuine issue of material fact on the issue of damages.

Because of the existence of genuine issues of material fact on but-for causation and damages, we reverse the district court's grant of summary judgment for respondents.[3]

Reversed and remanded.

[3] The LLC has asked this court, in its briefing, to reverse the denial and grant its motion for partial summary judgment on the issue of liability. We note that the LLC has not demonstrated to this court the necessary grounds to support its motion, and we decline to address its request further in this appeal.