

Docket No. 100668.

**IN THE
SUPREME COURT
OF
THE STATE OF ILLINOIS**

GOVERNMENTAL INTERINSURANCE EXCHANGE *et al.*,
Appellants, v. JAY S. JUDGE *et al.*, Appellees.

Opinion filed May 18, 2006.

JUSTICE FREEMAN delivered the judgment of the court, with opinion.

Justices McMorrow, Fitzgerald, Kilbride, Garman, and Karmeier concurred in the judgment and opinion.

Chief Justice Thomas took no part in the decision.

OPINION

Plaintiffs, Governmental Interinsurance Exchange (GIE) and Kendall County (County), brought a legal malpractice action in the circuit court of McLean County against attorney Jay S. Judge and the law firms of Judge, James & Dutton, Ltd., and Judge & James, Ltd. (Judge defendants); and attorney Mary E. Dickson and the law firm of Bond, Mork & Dickson, P.C. (Dickson defendants). Plaintiffs claimed that defendants were negligent by failing to timely file an appeal from an adverse judgment in prior litigation in which defendants represented GIE's insured, the County. The circuit court entered partial summary judgment in favor of plaintiffs on the issues of duty and breach of duty. However, the circuit court subsequently

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entered summary judgment in favor of defendants on the issue of proximate cause.

Plaintiffs appealed the summary judgment in favor of defendants on the issue of proximate cause. A divided panel of the appellate court affirmed the judgment. 356 Ill. App. 3d 264. We allowed plaintiffs' petition for leave to appeal (177 Ill. 2d R. 315(a)), and now affirm the judgment of the appellate court.

I. BACKGROUND

The proceedings below were conducted in the context of the following legal principles. In an action for legal malpractice the plaintiff must plead and prove that: the defendant attorney owed the plaintiff a duty of due care arising from the attorney-client relationship; that the defendant breached that duty; and that as a proximate result, the plaintiff suffered injury (*Sexton v. Smith*, 112 Ill. 2d 187, 193 (1986)) in the form of actual damages (*Eastman v. Messner*, 188 Ill. 2d 404, 411 (1999)). "Even if negligence on the part of the attorney is established, no action will lie against the attorney unless that negligence proximately caused damage to the client." *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 306-07 (2005).

In cases involving litigation, no legal malpractice exists unless the attorney's negligence resulted in the loss of an underlying cause of action. Accordingly, the burden of pleading and proving actual damages requires establishing that "but for" the attorney's negligence, the client would have been successful in the underlying suit. See *Sheppard v. Krol*, 218 Ill. App. 3d 254, 256-57 (1991); *Claire Associates v. Pontikes*, 151 Ill. App. 3d 116, 122 (1986); *Bartholomew v. Crockett*, 131 Ill. App. 3d 456, 465 (1985). In a legal malpractice action alleging that an attorney failed to perfect an appeal, the client must prove that he or she would have been successful on appeal if the appeal had properly been perfected. See *Environmental Control Systems, Inc. v. Long*, 301 Ill. App. 3d 612, 621 (1998); *Gillion v. Tieman*, 86 Ill. App. 3d 147, 150 (1980) ("To succeed in her malpractice claim, [plaintiff] would have been required to prove damages caused by the defendant's failure to file a timely notice of appeal. To prove damages, she would have to show that an appeal

would have been successful”); accord *Jones v. Psimos*, 882 F.2d 1277 (7th Cir. 1989) (same; applying Indiana law). Thus, a legal malpractice plaintiff must litigate a “case within a case.” See *Eastman*, 188 Ill. 2d at 411 (collecting authorities). These principles provide the lens through which we view the following pertinent facts.

A. Underlying Case: The Automobile Accident

The trial of the underlying case adduced the following pertinent facts. Galena Road has two lanes and runs generally east-west. In 1978, the County assumed authority over Galena Road, commissioned a preconstruction profile of the road, and developed an improvement plan. The County resurfaced the road and striped the center of the road with a skip-dash, or broken yellow line, indicating that passing vehicles is permissible.

Expert testimony established that the 1978 placement of the broken yellow line conformed with guidelines on adequate sight distances mandated by the Illinois Manual on Uniform Traffic Control Devices (Illinois Manual) (formerly codified at 92 Ill. Adm. Code §546.100 *et seq.* (1985), now published as Illinois Department of Transportation, Illinois Manual on Uniform Traffic Control Devices (2003)). Pursuant to these guidelines, passing vehicles is permissible only where sight distances are adequate. If an engineering study concludes that sight distances are inadequate, a no-passing zone must be installed. In 1984, the Illinois Manual lowered the minimal sight distance. This reduction rendered inadequate the sight distance on that portion of Galena Road where the accident subsequently occurred. In 1993, the County resurfaced Galena Road and restriped the center of the road with the same broken yellow line that it had placed in 1978.

On a November evening in 1994, Sandra Wittenmyer was driving westbound on Galena Road. Aaron Gesell was driving eastbound. As Gesell was passing another eastbound vehicle, he collided head-on with Wittenmyer in the westbound lane. Gesell’s and Wittenmyer’s automobiles collided at the apex of a rise in Galena Road. Gesell was traveling at a speed significantly higher than the posted 55-miles-per-hour speed limit. Gesell stated that he passed the eastbound vehicle ahead of him because he knew that a broken yellow line indicated that passing vehicles was permissible. Also, according to Gesell, he was

not aware that the rise in Galena Road would have obstructed his view of oncoming traffic. As a result of the collision, Wittenmyer suffered severe and permanent injuries.

In January 1995, Sandra and her husband filed a lawsuit against Gesell. In October 1995, the Wittenmyers added the County as a defendant and Gesell brought a third-party contribution action against the County. Between November 1995 and June 1997, GIE, the County's insurer, retained the Dickson defendants and the Judge defendants to represent the County.

Through its attorneys, the County moved for summary judgment, contending that section 3-104 of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/3-104 (West 1994)) immunized the County from liability. The trial court denied the County's motion for summary judgment, and the case proceeded to a jury trial. On October 30, 1998, the jury returned a verdict in favor of the Wittenmyers. The jury awarded \$4.5 million in damages to Sandra against Gesell and the County, apportioning 20% of the fault to Gesell and 80% of the fault to the County. The jury also awarded \$500,000 in damages to Sandra's husband. On Gesell's counterclaim against the County, the jury found the County 50% at fault.

On November 25, 1998, the County filed a posttrial motion. The County also moved to file a supplemental posttrial motion, alleging that its attorneys had only very recently received the report of proceedings. On December 3, 1998, the trial court denied both of the County's motions.

On December 31, 1998, the County filed a notice of appeal from the judgment entered on the jury verdict and from the trial court's denial of its posttrial motions. On the same day, the County also presented to the trial court an emergency motion for leave to file a supplemental posttrial motion. The emergency motion was premised on the impending appeal deadline of January 4, 1999, *i.e.*, 30 days after the trial court's December 3, 1998, denial of the County's posttrial motions. The County alleged that, based on this deadline, it was necessary for the County to seek leave to file a supplemental posttrial motion, which contained five additional grounds for reversal based upon trial errors. The trial court granted the motion in an order stating: "Final orders not having been entered in this cause, the time

for filing notice of appeal in this matter is hereby extended until a final order is entered.”

On January 12, 1999, the County filed an amended supplemental posttrial motion. On February 16, 1999, the trial court denied the motion, ruling that the court lacked jurisdiction to hear the motion and, alternatively, that the motion was denied “as a matter of substance.” On March 15, 1999, the County filed a motion with the appellate court, Second District, seeking leave to amend its notice of appeal to include the trial court’s February 16 order denying the County’s supplemental posttrial motion. The appellate court initially granted the motion, but on May 7, 1999, the appellate court vacated that order and struck the County’s March 15 amended notice of appeal. The appellate court also denied Wittenmyer’s and Gesell’s motions to dismiss the appeal, finding that the County’s December 31, 1998, notice of appeal preserved the grounds raised in the County’s first posttrial motion.

On July 16, 1999, Gesell filed a motion in the appellate court, contending that the County’s December 31, 1998, notice of appeal was prematurely filed and the County never filed a new notice of appeal. On December 14, 1999, the appellate court, in an unpublished order, reversed its prior ruling that the December 31, 1998, notice of appeal was timely. *Wittenmyer v. Gesell*, No. 2-99-0041 (December 14, 1999) (unpublished order under Supreme Court Rule 23). In its order, the appellate court stated that the County was required to withdraw its December 31, 1998, notice of appeal when it simultaneously filed its supplemental posttrial motion. The appellate court observed that, after the trial court denied the County’s amended supplemental posttrial motion on February 16, 1998, the County failed to file a timely notice of appeal. Therefore, the appellate court held that the County’s original notice of appeal was premature and ineffectual. Consequently, according to the appellate court, the County’s March 15, 1999, motion to amend its notice of appeal was also without effect. The appellate court denied the County’s request for reconsideration, and this court denied the County’s petition for leave to appeal. *Wittenmyer v. Gesell*, 189 Ill. 2d 683 (2000) (table).

B. Malpractice Action

GIE and the County brought this legal malpractice action against Judge individually and his law firm and successor law firm, and Dickson individually and her law firm. In their ultimate complaint, plaintiffs pled the requisite elements. Plaintiffs pled the element of duty. Plaintiffs alleged that they had an attorney-client relationship with defendants regarding the underlying case, whereby defendants "had a duty to represent Plaintiffs with the reasonable care, skill and diligence possessed by attorneys" who, in the case of defendants, held themselves "out to the public as having specialized experience in the handling of trial, post-trial matters and appeal of civil cases" such as the underlying case. Plaintiffs also alleged that defendants "agreed to continue representing the interests of Plaintiffs including, but not limited to, taking the steps necessary to overturn the adverse judgment in *** *Wittenmyer* *** including, but not limited to, pursuing an appeal on the merits."

Plaintiffs pled breach of the duty. Plaintiffs alleged that, for the reasons expressed by the appellate court in its December 14, 1999, Rule 23 order, defendants breached their duties owed to plaintiffs and failed to properly preserve Kendall County's appellate rights concerning the adverse judgment in the underlying case. Further, defendants' conduct constituted "a breach of [defendants'] duty to exercise reasonable care, skill and diligence on behalf of Plaintiffs."

Plaintiffs pled the elements of proximate cause and damages. Plaintiffs alleged: "But for the negligence of [defendants], the appeal in *** *Wittenmyer* *** would have been successful, and the judgment against Kendall County would have been overturned." Plaintiffs also alleged that as a result of defendants' negligence, plaintiffs sustained damages including: payment of the judgment and accrued interest entered against the County, the lost time and value of the monies paid by plaintiffs in satisfaction of the judgment, and plaintiffs' legal expenses for preparation of an appeal that the County was denied the opportunity to pursue. According to plaintiffs, the damages they had sustained "were proximately caused by the breach of duties by [defendants], as set forth above."

Discovery ensued. In an interrogatory, defendants asked plaintiffs to state the legal grounds plaintiffs were alleging that the appellate court would have reversed the judgment against the County in the

underlying case. Plaintiffs answered that, had the underlying appeal been perfected, the meritorious ground for reversal would have been what defendant Judge had advised plaintiffs, *i.e.*, governmental tort immunity pursuant to several sections of the Tort Immunity Act.

Plaintiffs moved for partial summary judgment on the issues of duty and breach of duty. Plaintiffs contended that the circuit court could determine defendants' breach of duty as a matter of law based solely on the appellate court's order in *Wittenmyer v. Gesell*, No. 2-99-0041 (December 14, 1999) (unpublished order under Supreme Court Rule 23). Defendants responded and filed a joint cross-motion for summary judgment, contending that the issue of breach of duty was one of fact for the jury, which must generally be established through expert testimony. At the close of a hearing on March 20, 2003, the circuit court found that the record in the underlying case, including the appellate court's dismissal of the underlying appeal in *Wittenmyer v. Gesell*, No. 2-99-0041 (December 14, 1999) (unpublished order under Supreme Court Rule 23), established the factual record upon which the court could rule. The circuit court granted plaintiffs' motion for partial summary judgment and denied defendants' cross-motion for summary judgment. The court found that defendants owed plaintiffs a duty to perfect the appeal and that defendants' failure to do so constituted a breach of that duty. The court then scheduled further proceedings on the issues of proximate cause and damages.

Defendants subsequently filed a joint motion for summary judgment on the issues of proximate cause and damages. Defendants contended that, regardless of whether they had perfected the appeal in the underlying case, the appeal would not have been successful. Defendants argued that, had the appellate court in the underlying case reviewed the County's appeal on the merits, the court would not have reversed the judgment in the underlying case. Defendants also contended that the circuit court, and not a jury, should decide the question of whether the appeal of the underlying case would have been successful. Opposing the motion for summary judgment, plaintiffs contended that the tort immunity arguments defendants asserted on behalf of the County in the underlying case were correct and, had defendants competently perfected the underlying appeal, the appellate court would have reversed the judgment entered against the