

No. 1-13-0622

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GARY FRANK and GUDRUN FRANK,)	Appeal from the
)	Circuit Court of
Plaintiffs-Appellants,)	Cook County.
)	
v.)	No. 08 L 11851
)	
MARK LOFTUS,)	Honorable
)	Thomas J. Lipscomb,
Defendant-Appellee.)	Judge Presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Hoffman and Delort concurred in the judgment.

ORDER

Held: Summary judgment in favor of the defendant attorney was proper because plaintiffs could not establish that the attorney's alleged malpractice, in failing to present and argue for recovery of lost profits, proximately caused plaintiffs' damages to be limited to the differential value of their land.

¶ 1 Plaintiffs Gary Frank and Gudrun Frank appeal the circuit court's grant of summary judgment in favor of defendant Mark Loftus on their legal malpractice claim, alleging that there were genuine issues of material fact to preclude summary judgment. While the circuit court granted summary judgment on the two counts of their legal malpractice complaint, plaintiffs confine their appeal to count I. In their opening brief on appeal, plaintiffs state "Count II of the

Complaint which alleges legal malpractice against defendant in connection with Gudrun Frank's personal injuries [is] not at issue in this appeal." Accordingly, we review count I only. For the following reasons, we affirm.

¶ 2

I. BACKGROUND

¶ 3

A. UNDERLYING SUIT

¶ 4 Plaintiffs operated an apple orchard which was allegedly damaged by spray-drift pesticides originating from neighboring lands. In January 1997, plaintiffs filed a complaint including claims for negligence, nuisance and trespass against the caretakers of the neighboring lands (Stephenson County defendants). From 1997 until 2005, plaintiffs were represented in that lawsuit by attorney John Stromstra (Stromstra). In March 2005, Stromstra withdrew and plaintiffs hired Loftus to represent them. Loftus's representation of the plaintiffs in the lawsuit against the Stephenson County defendants continued through a pre-trial conference on November 3, 2006 at which both parties presented their respective motions *in limine*.

¶ 5 The Stephenson County defendants presented a motion *in limine* to bar evidence of plaintiffs' lost profits as a result of the alleged spray-drift damage to their apple orchard. In support of their motion, the Stephenson County defendants relied on *Collins v. Illinois Central R. Co.*, 161 Ill. App. 95 (1911), in arguing that the plaintiffs' damages should be limited to the differential value of the land. In response to the motion, Loftus, on behalf of plaintiffs, cited three cases to support his argument for recovery of lost profits. *Roark v. Musgrave*, 41 Ill. App. 3d 1008 (1976), *Wheat v. Freeman*, 23 Ill. App. 3d 14 (1974), *Schatz v. Abbott Laboratories, Inc.*, 131 Ill. App. 2d 1091 (1972) *rev'd* 51 Ill. 2d 143 (1972). The court in *Roark*, Loftus argued, suggested that the differential value approach did not reflect the "preferable, less rigid, modern approach" and that a court may consider the particular purpose for which the land was

purchased. *Roark*, 41 Ill. App. 3d at 1013. Loftus also made numerous statements that veered away from the theory of lost profits of an ongoing business saying that, after the initial drifts, the orchard was "doomed" and a "nonfunctioning unit" and that any subsequent drifts were relevant to the nuisance count but "didn't have anywhere near the impact that the initial exposures did." Loftus did not mention the findings of Allan Dassow (Dassow), the plaintiffs' accountant expert, who had written a lengthy report about the plaintiffs' damages from the pesticides including a calculation of plaintiffs' lost profits.

¶ 6 After hearing these arguments on the motion *in limine*, the trial court granted the Stephenson County defendants' motion to bar evidence of lost profits. The court noted that Loftus had argued that the orchard was "doomed" after the initial drifts. The court concluded that, while the differential value measure of damages (value of the land before the injury minus the value after the injury) relied on dated cases, that measure appeared to be the law in Illinois. Shortly after the court's ruling, Loftus withdrew as plaintiffs' attorney.

¶ 7 Soon thereafter, plaintiffs hired attorney Robert Fink, who filed a timely motion to reconsider the court's order granting defendants' motion *in limine* to bar lost profits. The trial court denied the motion to reconsider, reasoning that the cases it relied on in ruling on the motion were dated but appeared to be the law in Illinois as it applied to fruit trees and orchards. Fink then filed an interlocutory appeal which we declined to address. With attorney Fink, the plaintiffs settled the underlying suit in July 2008 for \$250,000 without an admission of liability by any of the Stephenson County defendants.

¶ 8 **B. LEGAL MALPRACTICE SUIT**

¶ 9 A few months after settling the underlying suit, plaintiffs filed the instant malpractice action against Loftus. Plaintiffs complained that, in the underlying suit, Loftus argued that the

earliest incidents of pesticide drift inflicted complete and permanent damage to their land instead of arguing for damage to an ongoing business venture. Plaintiffs further contended that because of Loftus's faulty arguments of permanent damage, the trial judge granted the motion *in limine* to bar evidence of lost profits and confined plaintiffs' damages to the differential value of the land.

¶ 10 To support their malpractice allegations in the instant complaint, plaintiffs rely on the opinions of their legal expert, Duane Young. In both his expert report and deposition testimony which were part of the pleadings on summary judgment, Young opined that Loftus breached the standard of care in the way that he formulated the plaintiffs' theory of damages in the underlying suit against the Stephenson county defendants. Young's expert report stated that the "position taken (repeatedly) by Mr. Loftus that the damages 'to the land' were permanent resulted in the trial court's ruling that the only damages recoverable were to be measured by the difference between the value of the land established before the injury to it and the residual value, or value after the injury." Young's report also stated that Loftus's argument of permanent damage foreclosed the opportunity to prove damages to the orchard as a business venture and precluded the plaintiffs from presenting and relying on their accountant expert in the underlying suit, Dassow, who found that plaintiffs' lost profits amounted to \$555,630.

¶ 11 On August 15, 2012, the circuit court granted summary judgment in favor of Loftus. In its oral ruling, the court addressed both breach of duty and proximate cause, stating that: (1) Loftus's pre-trial argument of permanent damage was consistent with other experts who had opined that the orchard was a total loss after the initial drifts; (2) Loftus made an argument for recovery of lost profits under a nuisance theory; and (3) the plaintiffs – through their legal expert Young – had not shown that the trial court's ruling on the motion *in limine* would have been different but for the alleged malpractice nor had plaintiffs shown that they would have prevailed

on the issue of lost profits. The court also stated that Young's expert opinion that Loftus should have presented an alternative, ongoing business basis for lost profits was ill-advised and an alternative argument would not have changed the ruling that lost profits were not recoverable as a matter of law.

¶ 12 In denying plaintiffs' subsequent motion to reconsider, the court focused on the proximate cause element of plaintiffs' complaint:

Now, my understanding here is that Mr. Young says that Attorney Loftus should have presented the fact that -- or facts that this was an ongoing business. . . And, therefore [lost] profits should be recoverable. Now, to me, when I look at that, that's the basis for an opinion that [lost] profits should be recovered. That's the basis of an opinion. It's not a legal theory. It's a basis of that expert's opinion. . . It is consistent with my original ruling on the motion for summary judgment, the Judge [in the underlying suit] ruled as a matter of law, and whether you call it [lost] profits from an ongoing business or you call it [lost] profits from a nuisance theory or you call -- [lost] profits for whatever reasons, it's not recoverable under the law according to the [trial] Judge.

Plaintiffs now appeal.

¶ 13

II. ANALYSIS

¶ 14 On appeal, plaintiffs contend that the trial court's grant of summary judgment was improper because there were genuine issues of material fact as to whether Loftus committed legal malpractice. The standard of review for a grant of summary judgment, as well as for a motion to reconsider that only asks a court to consider again its application of the law to the case as it existed at the time of judgment, is *de novo*. *Kyles v. Maryville Acad.*, 359 Ill. App. 3d 423, 433 (2005). Plaintiffs, as in this case, who settled an underlying claim, are not automatically barred from bringing a malpractice action against the attorney who represented them in that claim. *McCarthy v. Pedersen & Houpt*, 250 Ill. App. 3d 166, 172 (1993). But, if the plaintiffs fail to establish any element of the cause of action, summary judgment for the defendant is proper. *Governmental Interinsurance Exch. v. Judge*, 221 Ill. 2d 195, 215 (2006), citing *Pyne v.*

Witmer, 129 Ill. 2d 351, 358 (1989). As the court of review, we are required to determine whether the trial court correctly entered summary judgment by reviewing the facts of this case in the light most favorable to the party opposing the motion for summary judgment. *Lindenmier v. City of Rockford*, 156 Ill. App. 3d 76, 85 (1987).

¶ 15 The elements of a legal malpractice action are: (1) the existence of an attorney-client relationship establishing a duty on the part of the attorney; (2) a negligent act or omission constituting breach of that duty; (3) proximate cause establishing “but for” the attorney's negligence, the plaintiff would have prevailed in the underlying action; and (4) damages. *First National Bank of LaGrange v. Lowrey*, 375 Ill. App. 3d 181, 196 (2007). Because there is no question as to the existence of an attorney-client relationship between Loftus and the plaintiffs, we would normally turn to the second element of plaintiffs' legal malpractice claim, whether there was a breach of duty. However, the Illinois Supreme Court has held that we may assume the existence of duty and breach in order to address the issue of proximate cause. *Abrams v. City of Chicago*, 211 Ill. 2d 251, 257 (2004). Because this case turns on the proximate cause issue, we turn to that issue.

¶ 16 To establish proximate cause, plaintiffs must essentially prove a "case within a case," meaning that the plaintiffs are required to allege facts sufficient to demonstrate that they would have prevailed in the underlying action. *Id.* We will not presume a causal link between the alleged negligence and the loss of the underlying suit. *LaGrange*, 375 Ill. App. 3d at 200; *Ignarski v. Norbut*, 271 Ill. App. 3d 522, 528 (1995). Where plaintiffs fail to allege facts that would establish success in the underlying suit, they have failed to plead a cause of action. *Mauer v. Rubin*, 401 Ill. App. 3d 630 (2010), citing *Ignarski*, 271 Ill. App. 3d at 528; *Sheppard v. Krol*, 218 Ill. App. 3d 254, 257 (1991). Finally, summary judgment is proper when plaintiffs have

failed to allege facts that would establish success in the underlying suit even when it is conceded that the defendant attorney was negligent in the handling of the underlying suit. *Mauer v. Rubin*, 401 Ill. App. 3d 630 (2010), citing *Ignarski*, 271 Ill. App. 3d at 528; *Sheppard v. Krol*, 218 Ill. App. 3d 254, 258 (1991).

¶ 17 In an effort to meet their burden to prove proximate cause or their "case within a case," plaintiffs contend that they would have been successful if Loftus had properly developed the theory of lost profits and that Loftus's conduct caused such extensive damage that they were forced to settle for several hundred thousand dollars less than the true value of their claims. The plaintiffs' malpractice complaint states "but for the negligence of the Defendant[,] the Plaintiffs would have recovered on the causes of action against the defendants in the Stephenson County case." We disagree that these allegations meet plaintiffs' burden to prove proximate cause given that there are no Illinois cases indicating lost profits to be the proper measure of damages for pesticide injuries to fruit trees.

¶ 18 Plaintiffs make no showing that they would have prevailed on the Stephenson County defendants' motion *in limine* or that they would have recovered lost profits absent Loftus's alleged malpractice. While plaintiffs complain that Loftus did not amend the complaint in the underlying suit to include the lost profit findings of the accountant expert, Dassow, plaintiffs do not provide any facts to support the conclusion that, had the complaint been amended with the findings, the trial judge would have allowed evidence of lost profits. Plaintiffs also complain that Loftus did not properly present the theory of lost profits at the pre-trial conference in the underlying suit, but plaintiffs do not provide any facts to support the conclusion that, had Loftus properly argued for lost profits, the trial judge would have allowed evidence of lost profits. In fact, plaintiffs' legal expert, Young, opined in his deposition that the trial judge should have

allowed the evidence. But Young *did not say* that the trial judge would have allowed such evidence if Loftus had argued as Young suggested. In short, the instant plaintiffs have made no showing with case law or otherwise that they would have prevailed on the motion *in limine* or that lost profits would be recoverable as a matter of law in a case like theirs.

¶ 19 Similarly, plaintiffs' legal expert does not establish facts to support the conclusion that plaintiffs would have prevailed on their lost profits argument but for Loftus's alleged negligence. Young opined in his expert report and deposition that Loftus had breached the standard of care in failing to present the plaintiffs' damages as damage to an ongoing business venture and that that failure proximately caused plaintiffs' damages to be limited to the differential value. However, in his deposition, Young conceded that if the law for spray-drift damage to apple orchards were limited to the differential value, Loftus would not have been able to admit the accountant expert's report on lost profits into evidence. In other words, Young gave his opinion as to how the case should have been handled and argued, but he did not provide any evidence showing that the outcome of the case would have been different had his expert opinion been followed.

¶ 20 Several cases support our conclusion that the instant plaintiffs have failed to establish proximate cause. In a legal malpractice action based on an attorney's failure to communicate a settlement offer in an underlying suit, we found that the plaintiff was required to prove that the settlement would have been approved by the trial court in order for the plaintiff to prevail on the legal malpractice claim. *National Bank of LaGrange v. Lowrey*, 375 Ill. App. 3d 181, 201 (2007).

¶ 21 Likewise in the case at bar, plaintiffs complain that their recovery would have included lost profits but for the negligence of Loftus. However, plaintiffs have not alleged facts showing that lost profits are recoverable in instances of spray-drift damage to orchards or that such a

recovery would have been more than their \$250,000 settlement. See *Willey v. Paulsen*, 385 Ill. App. 3d 305 (2008); *Fabricare Equipment Cred. Corp. v. Bell, Boyd & Lloyd*, 328 Ill. App. 3d 784 (2002) (finding that it is plaintiffs' burden to show that damages allegedly incurred because of an attorney's malpractice were in fact recoverable).

¶ 22 Even if Loftus had properly presented and argued lost profits, plaintiffs have not shown with any degree of certainty that the trial court would not have applied a different measure of damages, such as the replacement value, to their injured apple orchard. In *Glass v. Pitler*, 276 Ill. App. 3d 344, 352 (1995) plaintiffs sued their former attorneys alleging that, as a result of their attorneys' negligent advice discouraging plaintiffs from filing for bankruptcy, plaintiffs would not have suffered the loss of their pension funds. At the time of the malpractice suit, the Bankruptcy Code was unclear on the requirement to include or exclude plaintiffs' ERISA-qualified pension plans in their bankruptcy estate. We held that the plaintiffs could not establish with any degree of certainty that they would not have lost their pension funds had they filed for bankruptcy because, even though one bankruptcy judge held that pension funds were "includable" in a bankruptcy estate, it was impossible to predict what another judge in that district would have decided. *Glass*, 276 Ill. App. 3d at 353-54. Likewise, it is impossible to predict how the trial judge in the underlying suit would have ruled on the motion *in limine* if the judge had been presented with various theories of damages: lost profits, replacement cost, or the differential value.

¶ 23 Moreover, the record indicates that it is likely that the plaintiffs *would not* have prevailed in the recovery of lost profits. *Orzel v. Szewczyk*, 391 Ill. App. 3d 283 (2009) (finding that there was sufficient evidence in the record that the plaintiff would not have prevailed in her underlying slip and fall lawsuit to support the jury's verdict in favor of defendant attorney on plaintiff's

subsequent legal malpractice cause of action); *National Bank of LaGrange v. Lowrey*, 375 Ill. App. 3d 181 (2007). First, the trial court decided as a matter of law that lost profits did not apply citing to the old case, *Collins v. Illinois Central R. Co.*, 161 Ill. App. 95 (1911), and an article in the American Law Reports. Kristine Cordier Karnezis, J.D., Annotation, *Measure of Damages for Destruction of or Injury to Fruit, Nut, or Other Productive Trees*, 90 A.L.R.3d 800 (1979) (surveying cases in other jurisdictions which find the proper measure of damage to fruit trees by pesticides to be the differential value of the land just before and just after the injury). Second, even when a lost profits argument – in addition to a new argument of replacement cost – was presented to the trial court on a motion to reconsider, the trial judge still ruled that plaintiffs' damages were limited to the differential value. The relevant inquiry is not whether "alternate theories were available in the underlying litigation, but whether [plaintiffs] sufficiently plead that but for defendants' negligence, these theories would have been successful." *Fabricare*, 328 Ill. App. 3d at 790. Third, Loftus's arguments of permanent damage were consistent with two of the three of plaintiffs' experts' opinions in the underlying suit, who viewed the damage as permanent and complete after the initial drifts. Plaintiffs do not establish facts to show that a trial judge would have discounted these other expert opinions in favor of Dassow's opinion on ongoing damage to a business.

¶ 24 Finally, it is noteworthy that the Illinois General Assembly has passed legislation on the proper measure of damages in a similar situation. In response to Illinois courts' application of the diminution in value theory of damages to the wrongful cutting of trees, the legislature passed the Wrongful Tree Cutting Act. That Act directs courts to assess the damage to wrongfully cut trees by taking the average of three independent appraisals of "stumpage value" and award triple

the average appraisal. 740 ILCS 185/2-3. The legislature could do the same for damage to fruit trees and orchards.

¶ 25 Upon review of the record and briefs on appeal, plaintiffs cannot prove their "case within a case": namely, that they would have been successful on the motion *in limine* or that they would have been able to recover lost profits absent Loftus's alleged negligence. Thus, plaintiffs cannot establish that Loftus proximately caused their damages, and we affirm the trial court's grant of summary judgment in favor of defendant Loftus.

¶ 26 Affirmed.