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STATE OF MINNESOTA  
IN COURT OF APPEALS  
A08-1154

Laurie & Laurie, P. A.,  
Respondent,

vs.

BondPro Corporation,  
Appellant.

Filed May 19, 2009  
Affirmed  
Toussaint, Chief Judge

Hennepin County District Court  
File No. 27-CV-06-9357

Lewis A. Remele, Jr., Kevin P. Hickey, Bassford Remele, P.A., 33 South Sixth Street,  
Suite 3800, Minneapolis, MN 55402-3707 (for respondent)

Paul A. Sortland, Sortland Law Office, 120 South Sixth Street, Suite 1510, Minneapolis,  
MN 55402-1817 (for appellant)

Considered and decided by Ross, Presiding Judge; Toussaint, Chief Judge; and  
Lansing, Judge.

**UNPUBLISHED OPINION**

**TOUSSAINT, Chief Judge**

Appellant BondPro Corporation, formerly a client of respondent law firm Laurie  
& Laurie, P.A., alleged legal malpractice in a counterclaim in respondent's action to

recover attorney fees. The trial court granted respondent's summary-judgment motion to dismiss the counterclaim for failure to state a prima-facie case of legal malpractice. Appellant challenges the summary judgment. Because appellant failed to establish a genuine issue of material fact on one element of its legal-malpractice claim, we affirm the summary judgment and dismissal of its counterclaim.<sup>1</sup>

## FACTS

### 1. The Underlying Litigation

Appellant alleged that Siemens Westinghouse Power Corporation (Siemens) had disclosed appellant's trade secret by filing a patent application. Appellant retained respondent to represent it in a trade-secret lawsuit against Siemens that was tried to a jury in federal court in Wisconsin in June 2005. Appellant agreed to pay for respondent's services on an hourly rate basis; respondent agreed to reduce its hourly rate by 30% in exchange for 10% of any recovery appellant obtained from Siemens, including 10% of any attorney fees recovered.

After the liability phase of the bifurcated trial, the jury returned a verdict in favor of appellant. *See BondPro Corp. v. Siemens Westinghouse Power Corp.*, 2005 WL 1427710, \*1 (W.D. Wis. June 15, 2005). But Siemens moved for judgment as a matter of law as to its liability, and the trial court granted the motion. *Id.* The trial court found that appellant produced no evidence that its alleged trade secret was not generally known or

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<sup>1</sup> Respondent by notice of review challenges the denial of its prior motion to dismiss the legal-malpractice counterclaim for appellant's failure to comply with the expert-review affidavit provisions of Minn. Stat. § 544.42 (2006). Because we conclude that the trial court did not err in dismissing the counterclaim on summary-judgment grounds, this issue is moot, and we do not address it.

readily ascertainable in the relevant industry before Siemens applied for its patent, stating that appellant's "only expert was . . . a patent lawyer, who did not hold himself out as being knowledgeable about the industry, but only about patent law." *Id.* at 2. The trial court also concluded that appellant failed to prove that Siemens disclosed its process.

Appellant fired respondent and hired another attorney to appeal the decision to the Seventh Circuit, which later affirmed the trial court's finding that appellant's process was not a trade secret because it was not specific and therefore already generally known in the industry. *BondPro Corp. v. Siemens Power Generation, Inc.*, 463 F.3d 702, 710 (7th Cir. 2006). The Seventh Circuit also found that, because Siemens's patent application was rejected and because Siemens did not use appellant's process for profit, "there is no evidence of the value of such use." *Id.* at 706.

## **2. The Parties' Litigation**

After the Seventh Circuit's decision, respondent filed a complaint alleging that appellant breached its retainer agreement by failing to pay respondent's attorney fees. Appellant filed an answer alleging erroneous or false billing practices and a counterclaim alleging legal malpractice, arguing specifically that respondent had been negligent in failing to obtain a technical expert to testify about appellant's alleged trade secrets.

Respondent moved for summary judgment on the counterclaim. The trial court granted respondent's motion and dismissed appellant's legal-malpractice counterclaim with prejudice. Appellant challenges the summary judgment.

## DECISION

On appeal from summary judgment, this court asks whether there are any genuine issues of material fact and whether the trial court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). “We review legal issues de novo.” *Pollock-Halvarson v. McGuire*, 576 N.W.2d 451, 454 (Minn. App. 1998). We view the 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). Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [the moving] party is entitled to a judgment as a matter of law.” Minn. R. Civ. P. 56.03.

To recover in a legal-malpractice case, a plaintiff must establish four elements: (1) the attorney-client relationship; (2) the attorney’s negligence or breach of contract; (3) the client’s success in the underlying action but for the attorney’s conduct; and (4) the attorney’s negligence or breach as proximate cause of the client’s damages. *Jerry’s Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 816 (Minn. 2006). If the plaintiff does not prove each element, the malpractice claim fails. *Id.*

As to the first element, it is undisputed that the parties entered into an attorney-client relationship. A genuine issue of material fact was established as to the second element, respondent’s negligence. Arguably, a genuine issue of material fact also exists as to the third element, that, but for respondent’s alleged negligence, appellant would have prevailed in the underlying case and would have withstood Siemens’s motion for a

directed verdict.<sup>2</sup>

But as to the fourth element, whether respondent's alleged negligence caused appellant harm and damages, the trial court concluded that appellant failed to prove that it suffered any damages as a result of the alleged misappropriation of its trade secret. This conclusion mirrored the Seventh Circuit's finding that appellant "presented no evidence that would have enabled the market value of its process to be estimated on any basis other than wild conjecture," and that "a damages remedy is thus out of the question." *BondPro Corp.*, 463 F.3d at 708. The Seventh Circuit also found that, because Siemens's patent application was rejected, "neither [appellant] nor Siemens has used the process commercially . . . [and] Siemens . . . ha[d] no plans to use the process." *Id.* at 707-08.

Nothing in the record describes actual harm and damages suffered by appellant in the underlying action. Appellant claims that one of its experts established damages when he stated in his affidavit: "I have reviewed the analysis of [appellant's] damages expert. . . . This shows that damages sustained by [appellant], as a result of Siemens' infringement was substantial. Had the jury verdict been upheld, it is my opinion that [appellant], more likely than not, would have prevailed on its claim for damages."

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<sup>2</sup> The federal trial court found that appellant's alleged trade secret relied on an autoclave and that, because Siemens's patent application did not mention the term "autoclave," the application did not disclose appellant's trade secret. *BondPro Corp.*, 2005 WL 1427710 at \*3. Appellant claims that the trial court finding was due to respondent's negligence in failing to call as trial witnesses two of appellant's experts who, it claims, had concluded that, although Siemens's patent application did not use the word "autoclave," it described a process that could be accomplished only by means of an autoclave and therefore disclosed appellant's alleged trade secret. The trial court here relied only on *BondPro Corp.*, and did not conduct an independent analysis of possible disclosure. Therefore, viewing the evidence in the light most favorable to appellant, a fact issue may exist.

Appellant, in an answer to interrogatories, stated that its damages expert's report "shows damages as a result of the actions of Siemens to be in excess of \$49,000,000.00." But the damages expert's report is not part of the record on summary judgment. The trial court did not err in agreeing with the Seventh Circuit that, regardless of Siemens's acts, appellant could not prove actual harm in the underlying action, or in concluding that, "[s]ince [appellant] would not have received damages had it prevailed on liability, it did not suffer an injury due to any alleged negligence on the part of [respondent]."

Appellant argues that damages were irrelevant to the liability phase of the trial and should not be considered here. But, while the amount of damages was not relevant in the liability trial, appellant was required to prove the existence of actual harm as part of its legal-malpractice claim. *See Jerry's Enters.*, 711 N.W.2d at 816 (setting out as one element of legal-malpractice claim that attorney's act must be proximate cause of plaintiff's damages). Because appellant did not prove that, but for respondent's negligence, its claim would have withstood respondent's motion for judgment as a matter of law, the trial court did not err in granting summary judgment.

Appellant also contends that the trial court should not have relied on the actual-harm issue in granting summary judgment because that issue was not raised in the moving papers. For this argument, appellant relies on *Rediske v. Johnson*, 415 N.W.2d 692, 694 (Minn. App. 1987) (holding that summary judgment was improperly granted on issue that was not raised in moving party's summary-judgment motion or argued). But here, damages are part of a legal-malpractice claim. *See Jerry's Enters.*, 711 N.W.2d at 816. Moreover, the Seventh Circuit's decision in *BondPro* was part of the record and

directly addressed actual harm. Appellant was on notice that the issue would be relevant to the summary-judgment proceeding. Appellant's argument that the trial court was barred from discussing the actual-harm issue is without merit.

**Affirmed.**