STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0687

Galyna Anderson,
Appellant,

vs.

Melissa Houghtaling, et al.,
Respondents.

Filed December 26, 2017
Affirmed in part, reversed in part, and remanded
Schellhas, Judge

Hennepin County District Court
File No. 27-CV-16-15019

Mark E. Czuchry, Czuchry Law Firm, LLC, Victoria, Minnesota (for appellant)

Lewis A. Remele, Jr., Peter L. Gregory, Bassford Remele, P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Halbrooks, Presiding Judge; Schellhas, Judge; and Kirk, Judge.

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

SCHELLHAS, Judge

Appellant challenges the district court's summary-judgment dismissal of her claims against respondents for legal malpractice, breach of contract, negligence, and fraudulent misrepresentation. We affirm in part, reverse in part, and remand for further proceedings consistent with this decision.

FACTS

Edward Anderson (decedent) created a revocable trust in 1995. He married appellant Galyna Anderson (Anderson) in 2004. Decedent became terminally ill and, on November 3, 2008, executed a third and superseding amendment to his revocable trust. Under the third amendment, decedent devised all patents and stocks of his businesses to his son, Merritt Anderson, and he created a marital trust for Anderson that would pay her income and a lifetime interest in the parties' homestead, subject to conditions that included Anderson's death or her commission of "waste upon the [the homestead]."[1] The same day that he executed the third amendment to his revocable trust, decedent and Anderson conveyed the homestead by deed to decedent, as trustee of his revocable trust.

Unbeknownst to Anderson, decedent contacted his attorney two days later about again revising his revocable trust. On January 8, 2009, decedent executed a fourth and superseding amendment to his revocable trust. The fourth amendment provided for termination of the marital trust four years following decedent's death, at which time Anderson's right to receive net income from the marital trust and her right to live in the homestead would cease. Decedent died on March 19, 2009, and Merritt Anderson became trustee of the trust. Decedent's will disposed of a nominal amount of tangible personal property and has never been probated.

[1] Article 6.1.1 of the marital trust states: "The net income (which shall [sic] income capital gains) shall be paid to my spouse at least quarter-yearly." Article 6.1.2 states: "My wife shall be responsible for the payment of real estate taxes, utilities, insurance, and maintenance for the house. The trustee shall be responsible for capital improvements and expenses."

After learning about the fourth amendment to the trust, Anderson hired legal counsel to whom the trustee provided a marital-trust inventory as of the date of decedent's death. The inventory showed that the trust owned assets worth $209,782.36 plus the homestead worth $484,100. Anderson believed that the trustee's values attributed to decedent's business interests could be significantly higher. On November 5, 2009, Anderson's counsel made a demand for a life-estate in the homestead, and $600,000 in cash or publicly traded securities, among other things. The trustee rejected Anderson's demand, and Anderson's counsel referred her to litigation attorneys.

On December 9, 2009, Anderson met with respondents Melissa Houghtaling and Rebecca Heltzer, then of Heltzer & Burg, P.L.C.[2] Anderson claims that she asked respondents about a December 19, 2009 deadline within which to file a petition for her elective share and homestead election. Anderson also claims that respondents told her that no deadline was impending and that she had three years within which to file a petition for her statutory elections. On December 16, 2009, Anderson signed a retainer agreement with respondents and gave them a $5,000 retainer.

On December 16, 2009, Houghtaling researched the elective-shares issue and began reviewing documents. On January 5 and 6, 2010, Houghtaling corresponded with the trustee's attorney. In correspondence, the trustee's attorney opined to Houghtaling that Anderson's execution of the deed to the homestead on November 3, 2009, constituted a

[2] Respondents Houghtaling and Heltzer have practiced law at Heltzer & Burg P.L.C. and Heltzer & Houghtaling, P.A. Houghtaling subsequently opened Houghtaling Family Law Office, P.A.

written waiver of her statutory right to a life estate in the homestead. Houghtaling researched the issue and, in February 2010, she told Anderson in correspondence that "it is pivotal" to understand what exactly Anderson had consented to in relation to the third amendment to the trust and the homestead. Houghtaling also said that until she determined the nature of Anderson's consent with the deed signing, she did "not believe there [were] any probate assets" to initiate probate proceedings.

On March 30, 2010, Houghtaling proposed settlement to the trustee's attorney and requested, among other things, a life estate for Anderson in the homestead. Although the trustee primarily rejected the settlement offer, he agreed to some items, and Houghtaling continued to negotiate with the trust attorney. On June 7, Houghtaling sent the attorney a copy of a petition to reform the trust and threatened to file it unless Anderson's demands were met. In response, on June 16, the trustee offered Anderson (1) a life estate in the homestead, (2) $81,900 in cash payments, (3) an automobile, (4) household goods, and (5) termination of the trust, with distribution of the residue to the trustee. At that time, the value of the trust assets, exclusive of the homestead, allegedly was $103,169.25, and Anderson already had received trust cash assets worth $78,160.52.[3]

Anderson told Houghtaling that she would not accept the offer, and Houghtaling asked to meet with Anderson, stating "I think we are closer to each other's positions than you might have originally thought." Houghtaling continued to negotiate with the trust's attorney but, in July 2010, the attorney told Houghtaling that if Anderson would not accept

[3] This figure includes, among other things, payments made by the trustee on behalf of Anderson for real estate taxes and insurance.

the previous offer, the trustee would simply administer the trust pursuant to its terms. The trust attorney also notified Houghtaling that the trustee had received from the City of Plymouth an "encroachment notice" about rubbish and trash on the lakeshore across from the homestead. On August 2, Houghtaling informed Anderson about the trustee's position and the "encroachment notice."

On October 7, 14, and 22, 2010, Houghtaling advised Anderson by email that the terms of the trust required her to pay the homestead property and insurance. In the October 22 email, Houghtaling also advised Anderson to accept the trustee's settlement offer. In November 2010, the trustee received a delinquent-property-tax notice on the homestead, and the trustee contemplated evicting Anderson for committing waste on the homestead. By January 2011, Anderson had not yet purchased homeowner's insurance.

In late January 2011, Houghtaling sent the trustee's attorney a demand for further information regarding the value of decedent's interests in certain businesses. The attorney provided the information and stated that that decedent "always stated that he was more wealthy than he really was . . . [Anderson] is looking for assets and value where there is none." In May 2011, Anderson petitioned for construction and reformation of the trust, including an assertion of her statutory right to a life estate in the homestead, and the probate court scheduled a trial in February 2012. The trustee initiated an eviction action to remove Anderson from the homestead based on waste.

In November 2011, respondents ceased representing Anderson. Although Anderson owed respondents on an outstanding balance, the parties dispute the reasons for the cessation of representation. Anderson retained replacement counsel and, in January 2012,

Anderson received another settlement offer from the trustee for a life estate in the homestead. Anderson again rejected the offer, and her replacement counsel withdrew from representing her.

On March 21, 2012, Anderson proceeded to trial pro se. The district court found that Anderson's nonpayment of property taxes and insurance constituted waste, and that her right to occupy the homestead had ceased under the terms of the trust. Additionally, the court found that Anderson's attempt to assert her statutory rights in the homestead failed because "(1) she gave consent to the transfer; *and* (2) she failed to assert her spousal rights in a timely manner after [decedent's] death." (Emphasis added.) This court affirmed, concluding, in part, that Anderson was "deemed to have consented to the non-testamentary disposition" of the property, because she failed to petition for her homestead rights within nine months of decedent's death. *In re Edward M. Anderson Tr.*, No. A12-1701, 2013 WL 3368467, at *3, *5 (Minn. App. July 8, 2013) (*Anderson I*).

In October 2016, Anderson filed a lawsuit against respondents alleging (1) legal malpractice, (2) breach of contract, (3) negligence, (4) unjust enrichment, and (5) fraudulent misrepresentation.[4] Respondents moved for summary judgment, and the district court granted the motion and entered judgment against Anderson on all of her claims.

This appeal follows.

[4] Anderson did not prosecute the unjust-enrichment claim.

D E C I S I O N

I. Summary judgment on the legal-malpractice, breach-of-contract and negligence claims

A. Collateral estoppel

As an initial matter, respondents argue that the doctrine of collateral estoppel bars Anderson from raising her right to elect statutory rights in the homestead because the district court in *Anderson I* concluded that Anderson "consented to the previous disposition of the homestead by signing the deed that transferred the homestead to a trust." The element of collateral estoppel disputed here is whether there is an issue that is identical to one addressed in a prior adjudication.

"Whether collateral estoppel applies is a mixed question of law and fact, which we review de novo." *State Farm Mut. Auto. Ins. Co. v. Lennartson*, 872 N.W.2d 524, 534 (Minn. 2015). "Collateral estoppel bars the relitigation of issues that are both *identical* to those issues already litigated by the parties in a prior action and *necessary and essential* to the resulting judgment. *Id.* (quotation omitted) (emphasis in original).

> Specifically, collateral estoppel applies when (1) the issue to be addressed is identical to an issue in a prior adjudication; (2) there was a final judgment on the merits in the prior adjudication; (3) the estopped party was a party or in privity with a party to the prior adjudication; and (4) the estopped party received a full and fair opportunity to be heard on the adjudicated issue.

Id.

We conclude that the doctrine of collateral estoppel does not bar Anderson from raising her right to elect statutory rights in the homestead. Under the first collateral-

estoppel factor, "the issues must be the same as those involved in the prior action and must have been necessary and essential to the resulting judgment." *Hauser v. Mealey*, 263 N.W.2d 803, 808 (Minn. 1978). "If . . . the judgment might have been based upon one or more of several grounds, but does not expressly rely upon any one of them, then none of them is conclusively established under the doctrine of collateral estoppel." *Id*. This is so because, in such a case, it is impossible for another court to distinguish which issue or issues were adjudged by the rendering court. *Id*.

In *Anderson I*, the district court ruled that Anderson's attempt to elect her statutory rights in the homestead failed because "(1) she gave consent to the transfer; *and* (2) she failed to assert her spousal rights in a timely manner after [decedent's] death." (Emphasis added.) The district court's use of a conjunctive signifies that it relied upon both grounds and that without one the other might have failed. The district court did not expressly rely solely on Anderson's purported consent, i.e., waiver of her right to elect statutory rights in the homestead by signing the deed, and therefore respondents have not "conclusively established" the ground under the collateral-estoppel doctrine.

The doctrine of collateral estoppel therefore does not bar Anderson's claim.

B. Negligence or breach of contract

Anderson argues that, but for respondents' negligent delivery of legal services and breach of contract, she would have petitioned for her statutory homestead election and, alternatively, would have accepted a settlement offer that granted her a life estate in the homestead, among other things. To prevail in a legal-malpractice action a plaintiff must show: "(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." *Ryan Contracting Co. v. O'Neill & Murphy, LLP*, 883 N.W.2d 236, 242 (Minn. 2016) (quotation omitted). The alleged injury must be "damage to or loss of a cause of action belonging to the plaintiff." *Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 819 (Minn. 2006).

> When applying the 'but for' test, we must envision what would have occurred but for the negligent conduct. Showing that many positive things could have occurred but for the negligent conduct is not enough; instead, the plaintiff 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.

Schmitz v. Rinke, Noonan, Smoley, Deter, Colombo, Wiant, Von Korff & Hobbs, Ltd., 783 N.W.2d 733, 741 (Minn. App. 2010) (quotations and emphasis omitted) (citation omitted), *review denied* (Minn. Sept. 21, 2010).

"[A] professional must use reasonable care to obtain the information needed to exercise his or her professional judgment, and failure to use such reasonable care would be negligence, even if done in good faith." *Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 113 (Minn. 1992). "Whether the standard of care has been breached is a question of fact." *Schmitz*, 783 N.W.2d at 739. "If there are no factual disputes as to the standard of care and whether it was breached, if, for example the plaintiff does not provide necessary expert testimony on the issue, summary judgment is properly granted." *Wartnick*, 490 N.W.2d at 116.

Appellate courts review a district court's summary-judgment decision de novo and "determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Ryan Contracting*, 883 N.W.2d at 242. Appellate courts "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). "The moving party is entitled to summary judgment as a matter of law if the non-moving party completely fails to prove an element that is essential to the non-moving party's case." *Rouse v. Dunkley & Bennett, P.A.*, 520 N.W.2d 406, 410 (Minn. 1994). The party resisting summary judgment must do more than rest on "mere averments," or merely create a metaphysical doubt as to a factual issue. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). Expert testimony is required to establish the applicable standard of care and how a defendant attorney breached the standard. *Guzick v. Kimball*, 869 N.W.2d 42, 49 (Minn. 2015).

In this case, respondents agree that an attorney-client relationship existed, but challenge the remaining three elements. Anderson's attorney submitted an affidavit identifying an expert witness, as required by Minn. Stat. § 544.42, subd. 4 (2016). That affidavit specified how respondents allegedly breached a standard of care, explaining that the expert would testify to the applicable standard of care. The expert would opine that respondents had a duty to inform and disclose to Anderson the full context of her case so that Anderson could make proper decisions. The expert would testify that respondents deviated from the standard of care by failing to (1) meet the statutory deadline to petition for the homestead election, (2) advise Anderson that the deadline had passed on

December 19, 2009, and that her case was compromised, and (3) advise Anderson on the concept and consequences of waste.[5]

The expert affidavit also stated that respondents breached a contract with Anderson. The affidavit stated that Anderson's expert had opined that Anderson and respondents signed a retainer agreement in December 2009, that respondents accepted payment for legal services, and that respondents failed to perform their duties under the contract by failing to file a homestead-election petition before the nine-month deadline and failing to inform Anderson of the implications of that fact. We conclude that Anderson provided sufficient evidence to create fact issues about whether respondents breached an applicable standard of care or a contract.

In granting summary judgment to respondents, the district court focused primarily on causation, concluding that Anderson could not demonstrate that she would have been successful prosecuting her claim but for respondents' conduct. We recognize that even if respondents were negligent in the delivery of legal services, Anderson's claims may still be barred if respondents' advice was not the proximate cause of Anderson's damages. *See Wartnick*, 490 N.W.2d at 113 (stating that even if attorney was negligent in delivery of legal services, client's malpractice claims may still be barred if attorney's advice was not proximate cause of client's damages). "The determination of proximate cause is normally a question of fact for the jury." *Id.* at 115. But "if reasonable minds cannot disagree, proximate cause becomes a question of law." *Id.*

[5] Anderson's attorney confirmed at oral argument that Anderson's appeal does not concern her elective share of the augmented estate.

> For negligence to be the proximate cause of an injury, it must appear that if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was likely to result in injury 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.

Id. at 113.

Respondents argue that Anderson's right to a life estate in the homestead was destroyed by her commission of waste on the property[6] and that, irrespective of respondents' acts or omissions, Anderson rejected the trustee's settlement offer of a life estate in the homestead against Houghtaling's advice and that her rejection destroyed any causal links in this case. "While the general rule is that a negligent actor is responsible for all injuries which proximately result from a negligent action, there is an exception: the doctrine of superseding cause." *Wartnick*, 490 N.W.2d at 113. The doctrine of superseding cause recognizes that although an actor's negligent actions may have put the plaintiff in the position to be injured, and therefore contributed to the injury, the actual injury may have been caused by an intervening event. *Id.*

An intervening, superseding cause "prevents the original negligent actor from being liable for the final injury." *Id.*

> For an intervening cause to be considered a superseding cause, the intervening cause must satisfy four elements: (1) its harmful effects must have occurred after the original negligence; (2) it must not have been brought about by the original negligence; (3) it

[6] Respondents again contend that because the district court and this court concluded that Anderson committed waste, Anderson is collaterally estopped from relitigating this issue. But the issue here is not identical to the issue in *Anderson I*. In this case, the question presented is whether respondents' alleged conduct of failing to advise Anderson about the concept and consequences of waste was negligent and caused harm.

> must actively work to bring about a result that would not otherwise have followed from the original negligence; and (4) it must not have been reasonably foreseeable by the original wrongdoer.

Id. (quotation omitted).

We consider each of the *Wartnick* elements as it relates to this case. On the first element, we conclude that fact questions remain about whether Anderson's waste or her rejection of settlement offers occurred after the alleged "original negligence" or during it. Anderson alleges that respondents' negligent acts included missing the filing deadline, as well as the failure to advise her about the consequences of waste or that her case was compromised because the homestead-election deadline had passed.

On the second *Wartnick* element, the expert affidavit submitted by Anderson states that Anderson's expert has opined that Anderson's waste was brought upon by the alleged original negligence of her counsel missing the homestead-election filing deadline and failing to so inform Anderson because Anderson was "placed in a position in which she had access to very little financial resources." Additionally, Anderson asserts that the commission of waste and her rejection of the settlement offers were brought on by respondents' failure to advise her.

On the third *Wartnick* element, fact issues exist as to whether Anderson's conduct "actively worked to bring about a result that would not otherwise have followed" from respondents' conduct. Had Anderson not committed waste, she may have nevertheless lost her interest in the homestead by failing to petition for her homestead election within nine months of decedent's death.

On the fourth *Wartnick* element, we cannot say, after viewing the facts in Anderson's favor, that Anderson's waste and her rejection of settlement offers were not foreseeable results based on her assertion that respondents did not explicitly tell her that she could lose her interest in the homestead due to waste or as a result of the missed statutory deadline.

Under the four *Wartnick* elements, reasonable minds could disagree that the commission of waste and the rejection of the settlement offers were truly "independent" and superseding causes separate from respondents' alleged misconduct. We therefore conclude that genuine issues of material fact exist regarding proximate cause.

A plaintiff in a legal-malpractice case must show that "but for defendant's conduct the plaintiff would have been successful in the prosecution or defense of the action." *Guzick*, 869 N.W.2d at 47. Here, the district court reasoned that Anderson could not show but-for causation because, before respondents began their legal representation of Anderson, Anderson "destroyed" her claim to a life estate in the homestead and waived her statutory right to petition for the homestead election by signing the deed in 2008 to transfer the homestead to decedent's revocable trust. We address Anderson's homestead-election right and consider other relevant provisions of Minnesota's version of the Uniform Probate Code (UPC) below.

Under the UPC, if a decedent has a surviving spouse and descendants at the time of death, the homestead "descends free from *any testamentary, or other disposition*," and the surviving spouse retains a life estate in the homestead, unless the surviving spouse has consented "in writing" to that testamentary or "other disposition." Minn. Stat. § 524.2-402

(2016) (emphasis added). A surviving spouse has a statutory right to elect a life estate in his or her homestead. Minn. Stat. § 524.2-211(f) (2016) (the homestead election). If the homestead is subject to a testamentary disposition, i.e., a provision in a will, a petition for the homestead election must be filed within nine months after the decedent's death, or within six months after probate of the decedent's will, whichever limitation last expires. *Id*. (f)(1). If the homestead is subject to an "other disposition," e.g., a revocable trust, a petition for the homestead election must be filed within nine months after the decedent's death. *Id*. (f)(2).

If the surviving spouse fails to file her election for statutory rights in the homestead under section 524.2-211(f), the surviving spouse is "deemed to consent to any testamentary or other disposition of the homestead to which the spouse has not previously consented in writing." Minn. Stat. § 524.2-402(d). In this case, the homestead of decedent and Anderson was subject to an "other disposition," decedent's revocable trust. Under the UPC, Anderson therefore was required to file a petition for her homestead-election right within nine months of decedent's death—by December 19, 2009. Anderson did not do so and claims that she failed to do so in reliance on respondents' erroneous advice.

Respondents argue that Anderson could not have been harmed by any erroneous advice about the nine-month deadline within which to file a petition to exercise her homestead-election right because she waived her right to a life estate in the homestead when she signed the deed on November 3, 2008, transferring the homestead to decedent's revocable trust. The right of the surviving spouse to the homestead election may be waived after marriage by "written contract, agreement, or waiver signed by the party waiving after

fair disclosure." Minn. Stat. § 524.2-213 (2016). We reject respondents' argument that Anderson waived her statutory homestead-election rights by signing the deed on November 3, 2008. The record contains no evidence that decedent made "fair disclosure" to Anderson before she signed the deed. And Anderson did not sign an agreement waiving her statutory homestead-election rights. No record evidence shows that Anderson consented to this disposition. We conclude that by signing the deed to transfer the homestead to decedent's revocable trust, Anderson did not waive her homestead-election rights under Minn. Stat. § 524.2-213.

Respondents also argue that decedent's provision in his trust regarding the homestead did not constitute an "other disposition" within the meaning of Minn. Stat. § 524.2-402. Respondents argue that the deed to decedent's revocable trust on November 3, 2008, disposed of the homestead. We disagree. Statutory interpretation is a question of law, which we review de novo. *Am. Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001). When unambiguous, a statute's words and phrases are to be construed according to their plain and ordinary meaning. *Id*. "But if a statute is susceptible to more than one reasonable interpretation, the statute is ambiguous, and [appellate courts] will consider other factors to ascertain the legislature's intent." *Staab v. Diocese of St. Cloud*, 853 N.W.2d 713, 717 (Minn. 2014).

A "disposition" is defined as "[t]he act of transferring something to another's care or possession, esp. by deed or will; the relinquishing of property." *Black's Law Dictionary* 572 (10th ed. 2014). Decedent's trust was revocable and amendable by decedent until his death. Until then, decedent was the trustee of his revocable trust and retained the power to

revoke or amend his trust and to transfer and dispose of trust assets, and, in fact, he did so after he and Anderson signed the deed to transfer the homestead to his revocable trust. We conclude that the deed transferring the homestead to decedent's revocable trust on November 3, 2008, did not constitute an "other disposition" of the homestead because decedent retained possession and control over the homestead.

Under the plain meaning of "disposition" in Minn. Stat. § 524.2-402, read in context with the UPC provisions, a disposition of the homestead occurred at decedent's death under the terms of the fourth amended trust, when, as part of the residue of decedent's trust, "all interests in [decedent's] principal residence, [passed] to [his] trustee to constitute a Qualified Marital Trust pursuant to Section 6.1 for the primary benefit of [Anderson]." We agree with Anderson that the district court erred as a matter of law when it determined that Anderson could not show but-for causation because she waived her homestead-election rights by signing the deed to transfer the homestead to decedent's revocable trust.

Anderson has also provided sufficient evidence to create multiple fact issues as to the but-for causation element. She petitioned the district court to reform the trust and to allow her to file a petition for her homestead election. She has retained an expert who purportedly will testify that respondents' failure to timely file the homestead-election petition compromised her underlying case. And Anderson has averred that but for respondents' failure to inform her that they missed the homestead-election deadline, and but for their continued advice that she had a right to a life estate in the homestead, she would have accepted the trustee's July 2010 offer that included, among other things, a life estate in the homestead. Anderson also stated that respondents' conduct caused her to

believe that the only risk she faced in rejecting the settlement offer and taking her case to trial was a lesser amount of cash in an elective share. Respondents dispute this and emphasize that they advised Anderson multiple times to accept the settlement offer.

Anderson also asserts that, but for respondents' failure to advise her of the consequences of waste, she would have (and could have) cured the waste. Respondents dispute Anderson's claim about their advice given, claiming that they advised Anderson by telephone about the risks attendant to her waste and by email advised her to pay the homestead expenses, pointing to the applicable provisions in the trust. These factual disputes cannot be resolved on summary judgment.

We conclude that genuine issues of material fact exist about whether respondents breached an applicable standard of care or a contract and whether respondents' breach, if any, was the proximate and but-for cause of any damage to Anderson. We further conclude that sufficient evidence proffered by Anderson creates genuine issues of material fact for trial on her breach-of-contract claim.

Anderson also argues that the district court erred by not applying the transactional version of the but-for causation element for legal malpractice. In a legal-malpractice case involving a transactional matter, the but-for causation element is modified to require the 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.*, 711 N.W.2d at 819. Whether the traditional case-within-a-case but-for causation element or the transactional but-for causation element should apply in this case is a legal question, which we review de novo. *See id.* (reviewing de novo whether party

should be relieved from making a but-for causational showing between alleged negligence and injury). Here, because no "underlying transaction" exists, the transactional version of the but-for causation element for legal malpractice standard does not apply.

II. Fraudulent-misrepresentation claim

Anderson argues that the district court erred in granting respondents summary judgment on the fraudulent-misrepresentation claim after concluding that Anderson could not show that respondents intended to induce reliance. To make a prima facie claim of fraudulent misrepresentation a plaintiff must show:

> (1) there was a false representation by a party of a past or existing material fact susceptible of knowledge; (2) made with knowledge of the falsity of the representation or made as of the party's own knowledge without knowing whether it was true or false; (3) with the intention to induce another to act in reliance thereon; (4) that the representation caused the other party to act in reliance thereon; and (5) that the party suffered pecuniary damage as a result of the reliance.

Hoyt Props., Inc. v. Prod. Res. Grp., L.L.C., 736 N.W.2d 313, 318 (Minn. 2007).

On the intentional-inducement element, Anderson avers that respondents "cover[ed] up" their alleged mistakes of missing the filing deadline by misleading Anderson into thinking that her claims were valid and not compromised. But "the party resisting summary judgment must do more than rest on mere averments." *DLH, Inc.*, 566 N.W.2d at 71. After careful review of the record, and the affidavits submitted in this case, we agree with the district court that Anderson did not submit sufficient evidence to support the claim that respondents attempted to "cover up" a mistake and made misrepresentations with the intention to induce reliance.

Furthermore, the record contains insufficient facts to demonstrate the fraudulent-intent element. Fraudulent intent in a fraudulent-misrepresentation claim is, "in essence, dishonesty or bad faith. What the misrepresenter knows or believes is the key to proof of intent." *Florenzano v. Olson*, 387 N.W.2d 168, 173 (Minn. 1986). Nothing in the record demonstrates dishonesty or bad faith. The district court did not err in granting summary judgment in favor of respondents on the fraudulent-misrepresentation claim.

Viewing the facts in the light most favorable to Anderson, we conclude that fact issues preclude summary judgment on the legal-malpractice, breach-of-contract, and negligence claims and that the district court therefore erred by dismissing these claims on summary judgment. We also conclude that the district court did not err by not applying the transactional but-for standard of causation and by dismissing Anderson's fraudulent-misrepresentation claim against respondents on summary judgment.

Affirmed in part, reversed in part, and remanded.