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STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1392

Ronald Hagle, et al.,
Appellants,

vs

Erickson, Bell, Beckman & Quinn, P.A., et al.,
Respondents.

Filed July 6, 2020
Affirmed in part, reversed in part, and remanded
Rodenberg, Judge

Chisago County District Court
File No. 13-CV-18-489

Bradley Kirscher, Kirscher Law Firm, PA, Roseville, Minnesota (for appellants)

Patrick J. Sauter, Mark R. Bradford, Colin S. Seaborg, Bassford Remele, P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Johnson, Presiding Judge; Rodenberg, Judge; and Smith, John, Judge.[*]

UNPUBLISHED OPINION

RODENBERG, Judge

Appellants Ronald and Tara Hagle challenge the district court's summary-judgment dismissal of their legal-malpractice claims against respondents Erickson, Bell, Beckman &

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[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

Quinn, P.A., James Erickson Sr., and James Erickson Jr. They argue that the district court erred by determining that (1) appellants failed to comply with the expert-affidavit requirements of Minn. Stat. § 544.42 (2018) with respect to causation, or to produce evidence sufficient to create a factual issue on causation in the absence of an expert affidavit; (2) appellants' claims for fee forfeiture are barred by res judicata; (3) appellants' claims for deceit are based on statutes that do not create a cause of action; and (4) certain documents were attorney work product. We affirm in part, reverse in part, and remand to the district court for further proceedings consistent with this opinion.

FACTS

In December 2012, appellants commenced a wrongful-eviction action (the underlying case) against The Bank of New York Mellon as Trustee of the Benefit of CWMBS Inc. CHL Mortgage Pass-Though Trust 2007 (BNYM); Ryan S. Luscombe; Ryan Financial Corp.; Luscombe Inc.; Mortgage Electronic Registration Systems Inc. (MERS); ABC Corporation; and all other persons unknown claiming any right, title, estate, interest, or lien in the real estate described in appellant's complaint in the underlying case. Appellants alleged that BNYM and its agents wrongfully retained possession and control of appellants' personal property located in and around their home after appellants were evicted from that home.

On November 27, 2016, appellants hired respondents to represent them in the underlying case. The retainer agreement provided that Erickson Sr. would represent appellants at a December 20, 2016 mediation between appellants and BNYM in that case.

On December 1, 2016, Ronald Hagle and Benjamin Houge,[1] who Erickson Sr. later testified was working with the law firm as a paralegal at the suggestion of appellants, exchanged a series of emails.[2] In one email, Houge identified numerous potential additional lawsuits in which he envisioned that appellants could recover money damages. However, respondents declined to represent appellants on these additional potential claims, because respondents "kn[e]w nothing about them."

At the December 20, 2016 mediation, BNYM offered appellants $207,000 to settle all of appellants' claims. Appellants rejected this offer. Erickson Sr. informed appellants that they needed to enter into a new agreement for respondents to continue their representation of them.

On January 14, 2017, appellants signed a "Post Mediation Retainer Agreement," in which they hired respondents to represent them through the trial in the underlying case. That agreement stated that, for a one-third contingency fee, appellants retained respondents' firm "solely to represent [appellants] up to and including trial to recover damages for [appellants'] personal property claims."

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[1] Houge is a former attorney whose license was suspended indefinitely in 2009 for testifying falsely, submitting false evidence, failing to correct false testimony, making other false statements, assisting in the violation of court orders, and failing to supervise a nonlawyer assistant. *See In re Disciplinary Action Against Houge*, 764 N.W.2d 328 (Minn. 2009).

[2] Houge's status with the law firm is not entirely clear from the record. In one email to appellants, Erickson Sr. stated that Houge "is doing paralegal for us." But in his deposition, Erickson Sr. disagreed with the characterization of Houge by appellants' lawyer in this action as "doing paralegal for your law firm." Erickson Sr. then went on to testify that appellants "expected [Houge] to be involved" and that Houge was "providing evaluation of the value of" appellants' claims directly to appellants.

On June 6, 2017, the parties in the underlying case participated in a second mediation. At that mediation, BNYM offered appellants $450,000 to settle all claims. Appellants rejected the offer. Appellants then wrote directly to the mediator saying that they would not accept the mediator's suggestion (apparently made in the course of discussions at the mediation) of a $1 million settlement. Instead, appellants indicated that they would accept $6.5 million and stated that "if BNYM does not agree by [about a week], our offer goes to $12.5M."

After learning that appellants directly contacted the mediator, Erickson Sr. emailed appellants, stating that "it seems you have fired me." Appellants responded, "We absolutely want you to continue as our attorney." Respondents agreed to continue their representation.

On August 7, 2017, the morning of trial in the underlying case, appellants and BNYM entered into a settlement agreement, the amount of money being paid in the settlement to remain confidential. At the district court's request, the parties reduced the agreement to a one-page, hand-written agreement that was signed by appellants, Erickson Jr., Erickson Sr., and BNYM attorney Mark Schroeder. That agreement stated:

> A. The plaintiffs Ron and Tara Hagle & Defendants Bank of New York Mellon, as Trustee and MERS hereby agree to this term sheet for settlement of the above matter reached Aug. 7, 2017.
>
> 1. BNYM will pay the Hagles $[redacted].
>
> 2. The Hagles will release any and all claims against BNYM, MERS & their subsidiaries, affiliates, servicers, agents, attorneys, etc.

> 3. The Agreement will be confidential & the parties will not discuss its terms with anyone.
>
> 4. To the extent permitted by law, the Hagles agree not to disparage BNYM, MERS & their subsidiaries, affiliates, servicers, agents, attorneys, etc.
>
> 5. A final, definitive settlement agreement reflecting these basic terms and others typical in settlement agreements of this nature will be executed by the parties as soon as practicable.

The district court also had the parties put their agreement on the record, and explained that the handwritten agreement "will be a final contract today once [appellants] sign that paper." Appellants stated their understanding and agreement.

The very next day, appellants expressed a desire to exclude Bank of America (BOA), BNYM's mortgage servicer, from the release. Appellants sent respondents an email stating, "we will not sign the settlement papers until: It is completely clear we are not releasing [BOA]." Appellants further stated that respondents were not entitled to the agreed-upon contingency fee because Houge "ha[d] done at least 80% of the work."

In a letter dated that same day, respondents wrote appellants that they had "repeatedly" discussed that the defendants in the underlying case "are entitled to a general release" and that the BNYM's proposed release language is "appropriate and common." Respondents later withdrew from representing appellants because appellants and Houge "have taken an adversarial position towards [respondents'] firm," but continued to work on the file for some time.

On August 22, 2017, appellants, without consulting respondents, wrote directly to BNYM's counsel, repudiating the settlement agreement and stating that they would only

agree to "settle the case against BNYM under one of the three options enclosed." The first option was that BNYM pay appellants more money than the parties had originally agreed upon in exchange for a full release. The second option was to allow appellants to reserve claims against BNYM's servicer, BOA. The third option was to "set aside" the handwritten settlement agreement and dismiss the underlying case without prejudice and negotiate the settlement of a "new lawsuit to be filed in Washington County." BNYM rejected all of these options.

Respondents engaged new counsel, Patrick Sauter. In an August 22, 2017 email, Erickson Jr. wrote to Sauter about appellants' three "alternative" settlement proposals. Erickson Jr. stated that he had spoken with BNYM's Boston attorney, who was "looking at two options: filing a motion to compel this settlement or asking the judge to set aside and demanding an immediate trial date. I think he sees a path to zero out [appellants] with the latter option and seems to favor that. . . . [T]hat is more problematic to our interests." Respondents thereafter informed appellants that appellants' refusal to honor the prior settlement agreement created a conflict of interest that required respondents' firm to withdraw from representation. Respondents formally withdrew as appellants' counsel on September 18, 2017, and stopped all work on appellants' file.

Appellants moved to set aside the settlement in the underlying case, and BNYM moved to enforce the settlement. On January 24, 2018, the district court issued an order concluding that the parties' settlement agreement was enforceable because appellants had understood that release of BNYM's "servicers" included BOA.

After the district court issued its order enforcing the settlement agreement, respondents moved to establish an attorney lien on the settlement proceeds in the underlying case. Appellants opposed that motion, arguing that respondents forfeited their fee by withdrawing. The district court rejected appellants' argument. It determined that respondents were "forced to withdraw because of [appellants]' actions after a full settlement was reached" and that respondents were entitled to compensation under the terms of the post-mediation retainer agreement. On August 6, 2018, judgment was entered in the attorney-lien proceedings. That judgment expressly disclaimed resolving "the amount of attorney fees [that will] satisfy [the] lien," noting that the amount of fees owed to respondents "is subject to litigation and determination in a separate action between [appellants] and [respondents]."

Appellants then sued respondents in this action alleging legal malpractice. Appellants claim that respondents were negligent in negotiating a settlement that released claims against BOA. Appellants maintain that they intended to preserve unspecified claims against BOA, despite the language contained in the handwritten settlement agreement that released BNYM's "servicers." Appellants also sought a judicial determination that respondents were entitled to no attorney fees for their services in the underlying action.

At the time appellants served the summons and complaint in this case, they identified an expert witness who would testify at trial supporting appellants' malpractice claims. In his affidavit, the expert witness opined that respondents "breached their duty by failing to advise [appellants] that the settlement released [BOA]," that respondents "breached their duty to [appellants] by failing to advise them that signing the handwritten

settlement agreement would release [BOA]," and that respondents represented appellants despite an unspecified conflict of interest. The affidavit contained no opinion concerning whether or how respondents' negligence caused injury to appellants.

On cross-motions for summary judgment, the district court determined that appellants failed to comply with the expert-affidavit requirements of Minn. Stat. § 544.42 with respect to causation, and determined that the evidence of record was insufficient to support a finding of causation in the absence of an expert opinion. It further determined that, with respect to appellants' fee-forfeiture claim, the attorney-lien judgment in the underlying case had res judicata effect, and that appellants' claims for deceit were based on statutes that do not create a cause of action in the absence of another identified tort. The district court concluded that, although certain identified documents qualified as attorney work product, appellants met the undue-burden requirement and it therefore compelled respondents to produce the documents. The parties seem to agree on appeal that the documents were produced, as ordered.

This appeal followed.

D E C I S I O N

I. Summary judgment was proper concerning appellants' legal-malpractice claims.

Appellants argue that the district court erred when it dismissed all of appellants' legal-malpractice claims for failure to comply with Minn. Stat. § 544.42, subd. 4(a). Appellants argue that "[n]o expert opinion was required to establish causation, so a failure to provide expert opinion should not have resulted in dismissal."

Pursuant to Minnesota's expert-review statute, a claimant in an action for professional malpractice must "serve upon the opponent within 180 days of commencement of discovery . . . the substance of the facts and opinions to which the expert is expected to testify" and "a summary of the grounds for each opinion." Minn. Stat. § 544.42, subds. 2(2), 4(a). The statute applies to "action[s] against a professional alleging negligence or malpractice in rendering a professional service where expert testimony is to be used by a party to establish a prima facie case." *Id.*, subd. 2. The definition of "professional" includes "a licensed attorney." *Id.*, subd. 1(1). The statute provides that failure to timely serve the affidavit of expert disclosure results "in [the] mandatory dismissal of each action with prejudice as to which expert testimony is necessary to establish a prima facie case." *Id.*, subd. 6(c).

We review a district court's dismissal for failure to comply with Minn. Stat. § 544.42 for abuse of discretion. *Guzick v. Kimball*, 869 N.W.2d 42, 46 (Minn. 2015). But whether expert testimony is required to establish a prima facie case so as to trigger the expert-disclosure requirement is "a question of law that we review de novo." *Id.* at 46-47.

We first consider the district court's determination that appellants' action is one that required expert testimony to establish a prima facie case of legal malpractice.

To succeed on a claim for legal malpractice, a plaintiff must prove: "(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) but for the defendant's conduct, the plaintiff would have been successful in the prosecution or defense of the action." *Id.* at 47.

Concerning proximate cause, the supreme court has held that:

> 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.

Ponticas v. K.M.S. Invs., 331 N.W.2d 907, 915 (Minn. 1983).

Regarding but-for causation, courts "must envision what would have occurred but for the negligent conduct." *Christians v. Grant Thornton, LLP*, 733 N.W.2d 803, 812 (Minn. App. 2007), *review denied* (Minn. Sept. 18, 2007). "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. 2007) (quotations omitted).

In determining whether expert testimony is required to prove that negligence caused damage, appellate courts analyze whether the facts needed to establish causation "are within an area of common knowledge and lay comprehensions such that they can be adequately evaluated by a jury in the absence of an expert." *Guzick*, 869 N.W.2d at 50. Most malpractice claims require expert testimony to establish breach and causation. *See Fontaine v. Steen*, 759 N.W.2d 672, 677 (Minn. App. 2009) (providing that "[e]xpert testimony also must demonstrate that the attorney's negligence was the proximate cause of damages"). However, expert testimony is not required if evaluation of the facts would be

obvious to a lay juror without further explanation. *See Guzick*, 869 N.W.2d at 50-51 (holding that expert testimony was not necessary to evaluate whether a power of attorney of a decedent was overbroad, because the jury could examine the decedent's estate planning documents). We have held that "[this] exception is for the rare and exceptional case." *Fontaine*, 759 N.W.2d at 677 (quotation omitted).

Appellants cite the supreme court's decision in *Guzick* in support of their argument that no expert affidavit addressing causation was required here. The supreme court in *Guzick* determined that expert testimony was not required to prove but-for causation because the chain of causation in that case was obvious without expert testimony. 869 N.W.2d at 50-51. In *Guzick*, a lawyer's assistant prepared a power of attorney (POA) for a client at the request of the client's nephew. *Id*. at 44. The assistant used a POA form that included a checked box permitting the nephew to transfer the client's property to the nephew. *Id.* The assistant showed the client where to sign and notarized the signature. *Id.* The lawyer did not review the POA with the client. *Id.* Nor did the lawyer discuss with the client whether the POA was consistent with the client's wishes. *Id.* The nephew then used the POA to transfer to himself over $200,000 of the client's funds. *Id.* The client died, and the personal representative of his estate was unable to recover the money that the nephew had transferred to himself. *Id.* The personal representative then sued the attorney for legal malpractice. *Id.*

The supreme court concluded that, on those facts, expert testimony was not required to establish but-for causation because no legal expertise was necessary to understand either that, but for the lawyer's negligence, the POA would not have been overbroad or that, but

for the overbroad POA, the client's nephew would not have been able to convert the funds. These causal links were not "so complex" as to require expert explanation. *Id.* at 51.

Here, the district court concluded that, unlike *Guzick*, the facts necessary to establish causation on appellants' legal-malpractice claims are not within the common knowledge and lay comprehension of a jury. We agree.

It is not at all apparent from this record what precise claim would be available against BOA even if appellants had not agreed to release BOA. And even if appellants might have had meritorious claims against BOA, appellants would need to establish in this action for professional malpractice that, had such a claim been asserted, appellants would have obtained a combined recovery—on their claims against BNYM in the underlying case and the claims they argue should have been asserted against BOA in later litigation—that was a greater amount than the settlement they actually obtained.

To find that appellants proved that respondents' representation of appellants caused them damage, a jury would need to consider whether appellants had legally viable claims against BOA; whether BNYM would have accepted a settlement agreement that excluded BOA from the release; if BNYM would have accepted a settlement agreement that excluded BOA from the release, what the terms of the settlement with BNYM would then have been; and what appellants could have expected to recover on their claims against BOA.

Appellants' argument that they "would have retained their claims against [BOA] but for [respondents]" breach is far too simplistic. It ignores important issues of whether their contemplated claims against BOA could have succeeded, and what appellants would

have recovered through the litigation with BNYM in the underlying case had they not agreed to release BOA. We agree with the district court that a jury could not adequately resolve these questions without expert testimony. Applying the reasoning of *Guzick*, the chain of causation here is anything but obvious, and clearly required expert testimony.

Appellants additionally argue that, even if they were required to disclose an expert opinion on the causation issues, they satisfied the expert-disclosure requirements of section 544.42, and if not, they contend that the disclosure they did make qualifies for the 60-day statutory-safe-harbor protection of section 544.42, subdivision 6(c).

The provision setting out the statutory-safe-harbor protection states that "an initial motion to dismiss an action under this paragraph based upon claimed deficiencies of the affidavit . . . shall not be granted unless . . . the nonmoving party is given 60 days to satisfy the disclosure requirements in subdivision 4." Minn. Stat. § 544.42, subd. 6(c). To qualify for the 60-day cure provision, "a disclosure must provide some meaningful information, beyond conclusory statements." *Guzick*, 869 N.W.2d at 47 (quotation omitted). Additionally, the supreme court has held that an expert disclosure must meet the following minimal standards:

> (1) identify each person the attorney expects to call as an expert; (2) describe the expert's opinion on the applicable standard of care, as recognized by the professional community; (3) explain the expert's opinion that the defendant departed from that standard; and (4) summarize the expert's opinion that the defendant's departure was a direct cause of the plaintiff's injuries.

Id. at 48. "A summary requires more than an implication; rather, a sufficient summary explicitly explains the expert's opinion on how the negligent acts were the proximate cause of the injury." *Id.* at 51.

Here, appellants' expert affidavit satisfies the requirements outlined by the supreme court and by Minn. Stat. § 544.42, subd. 4(a), concerning the expert's opinion of the standard of care and the breach of that standard. But, although the affidavit articulates the standard of care in paragraph 16 and respondent's alleged breach of that standard of care in paragraphs 9 and 15, the affidavit does not mention if and how the breach of the standard of care damaged appellants. We agree with the district court's observation that "[t]he expert affidavit is entirely devoid of any mention of causation." And, as previously discussed, causation is an essential element of a legal-malpractice claim. *See Guzick*, 869 N.W.2d at 47. Because the disclosure of appellants' expert completely fails to address if and how respondents' alleged negligence caused injury to appellants, it fails to satisfy the requirements of section 544.42.

Appellants' failure to produce an affidavit containing any expert opinion on causation amounts to a "major defect" as identified in *Guzick*. This is because the safe-harbor provision presupposes that a plaintiff has produced an expert affidavit that, at a minimum, discusses the required elements of the claim. *Accord House v. Kelbel*, 105 F. Supp. 2d 1045, 1050-51 (D. Minn. 2000) (concluding that plaintiffs were not entitled to a statutory 60-day grace period for correcting "deficiencies" in an expert witness affidavit where plaintiffs failed to file any affidavit). Indeed, the few cases that have allowed for the safe-harbor protection involve circumstances where plaintiffs have provided an expert

disclosure that included a meaningful disclose of the expert's opinions but the disclosures suffered from minor defects. *See, e.g.*, *Noske v. Friedberg*, 713 N.W.2d 866, 872-73 (Minn. App. 2006) (providing that the district court correctly determined that plaintiff was entitled to the safe-harbor exception to submit a second affidavit of expert review when the initial disclosure was substantial).

Here, the district court correctly held that appellants are not entitled to the protection of the safe-harbor provision. *See Guzick*, 869 N.W.2d at 51 (determining that when there is a major defect in expert disclosure, such a defect "precludes the use of the safe harbor of Minn. Stat. § 544.42, subd. 6(c)"). Pursuant to *Guzick*, when a party does not provide a "meaningful disclosure of an expert's opinion" on an element required to be established by an expert, that party is not entitled to safe-harbor protection. *Id.* In this case, there was no "meaningful disclosure"—nor any disclosure at all—on the issue of causation.

Appellants seem to argue that they should be allowed the safe-harbor protection of section 544.42, subdivision 6(c), based on Justice Lillehaug's separate opinion in *Guzick*. However, because we are an error-correcting court, we bound by the Minnesota Supreme Court's caselaw. *See State v. Curtis*, 921 N.W.2d 342, 346 (providing that "[t]he court of appeals is bound by supreme court precedent, as it has repeatedly acknowledged"). Therefore, we decline appellants' invitation to disregard the supreme court's *Guzick* holding and adopt instead the reasoning of the separate opinion of Justice Lillehaug.

Appellants' expert affidavit was insufficient because of a major defect consisting of a complete failure to address the causation element of appellants' malpractice claims

against respondents. Appellants are therefore not entitled to statutory-safe-harbor protection. As such, the district court properly dismissed appellants' malpractice claim.

Because they failed to provide expert testimony on causation necessary to comply with section 544.42 and are not entitled to the safe-harbor protection, appellants have failed to establish a prima facie case of legal malpractice.

We have held that "a moving party is entitled to summary judgment when there are no facts in the record giving rise to a genuine issue for trial as to the existence of an essential element of the nonmoving party's case." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997) (quotation omitted); *see Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995) (holding that summary judgment is mandatory for the defendant "when the record reflects a complete lack of proof of an essential element of the plaintiff's claim"). A "nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts." *DLH*, 566 N.W.2d at 70 (quotation omitted).

As previously noted, to succeed on a claim of legal malpractice, appellants must prove: "(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) but for the defendant's conduct the plaintiff would have been successful in the prosecution or defense of the action." *Guzick*, 869 N.W.2d at 47. Failure to establish proof of any one of the four elements of a legal malpractice claim defeats the entire claim. *Noske v. Friedberg*, 713 N.W.2d 866, 873 (Minn. App. 2006). Appellants have failed to produce evidence showing a genuine issue of material fact as to but-for causation.

Importantly "we must envision what would have occurred but for the negligent conduct." *Christians*, 733 N.W.2d at 812. A plaintiff cannot merely speculate about many positive things that could have happened, but instead 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 813.

Appellants cite *Rouse v. Dunkley & Bennett, P.A.*, 520 N.W.2d 406, 410 (Minn. 1994), asserting that they need only show that they "would have survived summary judgment on the underlying, but forgone, claim." Appellants go on to contend that they *could and would* have "identified the voluminous evidence supporting their claims" against respondents for "the loss of their claim against BNYM when [respondents] refused to pursue setting aside the handwritten settlement agreement as requested by [appellants]" and for "the loss of [appellants'] claims against [BOA] based on the ultimate release having a greater scope than anticipated by [appellants]." However, we consider what evidence appellants *did* produce, not what evidence appellants *could* have produced.

Moreover, *Rouse* is distinguishable. In that case, the supreme court considered the summary-judgment standard for causation on legal-malpractice claims in the context of alleged attorney malpractice in failing to bring a defamation claim together with other claims. *Rouse*, 520 N.W.2d at 407-408. The supreme court concluded that, in order to survive a summary-judgment motion on causation, the plaintiff "must show that he would have survived summary judgment on the underlying, but foregone, claim." *Id.* at 410. But the court also noted that "this standard may not apply to cases involving transactions or where the case was tried or settled and the client now believes that he could have done

better but for his attorney's negligence." *Id.* at 410 n.6. It held that Minnesota courts "continue to disapprove of allowing a client who has become dissatisfied with a settlement to recover against an attorney solely on the ground that a jury might have awarded him more than the settlement." *Id.* As such, appellants cannot base their malpractice claims on the theory that they might have recovered more against BNYM at trial than though settlement.

Concerning appellants' "foregone" claims against BOA, appellants argue that Houge's affidavit "made it clear that [BOA] was the true 'bad actor' in the destruction of [appellants'] personal property after their eviction," which creates a genuine issue of material fact precluding summary judgment on claims they may have brought. But on this record, it is not possible to evaluate whether appellants would have been able to establish a prima facie case sufficient to survive summary judgment on the unspecified claims against BOA. Houge is no longer an attorney and his opinions concerning what might have happened are of no value in evaluating claims that were never brought, and which were instead within the claims released with appellants' agreement.

For all of these reasons, appellants have not demonstrated but-for causation on their malpractice claims against respondents. The district court correctly granted summary judgment dismissing appellants' malpractice claims with prejudice.

II. The district court erred by applying res judicata to appellants' claim for fee forfeiture.

Appellants argue that

> the doctrine of res judicata does not apply to the fee forfeiture claim because the decision identified by the district court as the

> basis for res judicata was not a final decision on the merits of the same issue, with the same parties, after a full and fair opportunity to litigate the issue.

Respondents argue that the district court properly applied res judicata.

The argument here stems from the August 6, 2018 order establishing respondents' attorney lien in the underlying case. The order clearly declares the existence of an attorney lien, but the same order expressly held that the *amount* of attorney fees owed to respondents "is subject to litigation and determination in a separate action between [appellants and respondents]." The district court in this case, although acknowledging that the August 6, 2018 order "reserved the actual amount due to [respondents]," determined that that order was "a final judgment on the merits of the issues of [respondents]' attorney lien and attorney's fees."

The doctrine of res judicata "concerns circumstances giving rise to a claim and precludes subsequent litigation—regardless of whether a particular issue or legal theory was actually litigated. Res judicata is a finality doctrine that mandates that there be an end to litigation." *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004). To determine whether an issue is barred by the doctrine of res judicata, courts consider four elements: (1) whether the prior claim involved the same factual circumstances; (2) whether that claim involved the same parties, or their privies; (3) whether the prior claim was resolved by a final judgment on the merits; and (4) whether the estopped party had a full and fair opportunity to litigate the earlier claim. *Rucker v. Schmidt*, 794 N.W.2d 114, 122 (Minn. 2011). "The application of res judicata is a question of law that [appellate courts]

review de novo." *Brown-Wilbert, Inc. v. Copeland Buhl & Co., P.L.L.P.*, 731 N.W.2d 209, 220 (Minn. 2007).

The issue here is whether the earlier determination that respondents are entitled to an attorney lien on appellants' recovery in the underlying case has preclusive effect in this litigation on the issue of whether respondents' withdrawal from representing appellants forfeited respondents' right to attorney fees in the underlying case.

In context, the first element of res judicata is met here. Both cases involve the same set of factual circumstances. The district court's August 6, 2018 order specifically addressed whether respondents were entitled to an attorney lien in the underlying case. It considered whether respondents' withdrawal as appellants' attorneys precluded the lien claim on the recovery in the underlying case.[3] This case likewise concerns appellants' claims arising from respondents' withdrawal in the underlying case.

Both actions involve the same parties. *See Rucker*, 794 N.W.2d at 122. As noted by the district court, respondents represented appellants in the underlying case until settlement and claimed an attorney lien on the settlement proceeds arising from their representation of appellants. Therefore, the second element is satisfied.

Concerning the third res judicata element, in order to have preclusive effect the prior action must have been resolved by a final judgment on the merits. *Id.* "[A] final judgment on the merits in one action bars further relief on the later claim" if the other three elements

[3] The district court refers to "13-CV-18-459" in addressing the underlying case. This appears to be a typographic error, because MNCIS record reflect that the case numbered "13-CV-18-459" involves parties unrelated to appellants in "13-CV-18-489."

are satisfied. *Kern v. Janson*, 800 N.W.2d 126, 129 n.1 (Minn. 2011). However, when a particular issue is "withheld from consideration of the court, either by stipulation of the parties or otherwise, it is not adjudicated, and a judgment entered on other issues will not act as a bar to another action on the issues so withdrawn." *Smith v. Smith*, 51 N.W.2d 276, 279-80 (Minn. 1952). Appellants assert that there was no final judgment on the merits in the earlier action concerning the amount of attorney fees that will satisfy respondents' attorney lien.

Appellants are correct. The record indicates that the district court's order in the action to establish an attorney lien resolved only *whether* respondents were entitled to establish an attorney lien on the settlement proceeds. They were so entitled. But the district court in that action expressly disclaimed resolving "the amount of attorney's fees [that will] satisfy that lien." Therefore, under the reasoning of *Smith*, the amount of attorney fees to which respondents are entitled was "withheld from consideration of the court . . . and is not adjudicated." *Id.* We conclude that the district court's order is not a bar to further proceedings on the question not decided. There was no final judgment on the merits in the earlier proceeding concerning the *amount* of fees to which respondents are entitled.

Respondents alternatively argue that appellants' forfeiture claim fails for other reasons. Although the district court did not rely on these proposed alternative reasons in granting summary judgment on this claim, an appellate court can affirm a grant of summary judgment on "alternative theories presented but not ruled on at the district court level." *Nelson v. Short-Elliot-Hendrickson, Inc.*, 716 N.W.2d 394, 402 (Minn. App. 2006). We therefore consider respondents' alternative arguments for affirming the district court.

Respondents first contend that appellants "never disclosed an expert to establish the standard of care governing an attorney's communications with the client." However, a party seeking attorney fees "ha[s] the burden of showing" the factual basis to support an award of attorney fees. *Geske v. Marcolina*, 624 N.W.2d 813, 818 (Minn. App. 2001). As such, and because entitlement to attorney fees is a claim for respondents to prove, appellants are not required to *disprove* by expert testimony that respondents are not entitled to their claimed attorney fees.

Respondents next dispute the meaning of the August 22, 2017 post-settlement email between Erickson Jr. and Sauter concerning appellants' three "alternative" settlement proposals to BNYM. Respondents assert that the email, "on its face, does not state that BNYM was willing to abandon the settlement." Appellants emphasize, however, that Erickson Jr.'s summary to Sauter that he "*think*[*s*] [BNYM's counsel] sees a path to zero out [appellants] . . . and seems to favor that" demonstrates that there was a possibility that BNYM was willing to set aside the settlement agreement. In our view, the meaning of this email seems like the very definition of a fact issue for trial. *See DLH*, 566 N.W.2d at 69 (holding that "summary judgment is inappropriate when reasonable persons might draw different conclusions from the evidence presented").

The district court erred by applying res judicata to give preclusive effect here to the earlier determination in the underlying case that respondents are entitled to an attorney lien. This case concerns the *amount* of the fees to which respondents are entitled, and whether respondents forfeited some or all of their claimed fees by their withdrawal in the underlying

case. This question was explicitly preserved for later resolution in the underlying case, and therefore the underlying litigation cannot have preclusive effect here.

III. The district court properly granted summary judgment on appellants' statutory claims.

Appellants next argue that the district court erred in denying appellants' motion for partial summary judgment "on the issue of [respondents'] deceit and breach of fiduciary duty because . . . Erickson Sr. testified that he had lied to [appellants]." Appellants' argument arises from their claim that respondents "actions and omissions described [in appellants' verified complaint] constitute violations of Minn. Stat. §§ 481.07 and 481.071."

"The interpretation of statutes is a question of law which we review de novo." *Boutin v. LaFleur*, 591 N.W.2d 711, 714 (Minn. 1999). The purpose of statutory interpretation is to "ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (Minn. 2018).

> An attorney who, with the intent to deceive a court or a party to an action or judicial proceeding, is guilty of or consents to any deceit or collusion, shall be guilty of a misdemeanor; and, in addition to the punishment prescribed therefor, the attorney shall be liable to the party injured in treble damages.

Minn. Stat. § 481.07 (2018).

> Every attorney or counselor at law who shall be guilty of any deceit or collusion . . . with intent to deceive the court or any party, or who shall delay the attorney's client's suit with a view to the attorney's own gain, shall be guilty of a misdemeanor and . . . shall forfeit to the party injured treble damages.

Minn. Stat. § 481.071 (2018).

Sections 481.07 and 481.071 do not create a cause of action. *See Baker v. Ploetz*, 616 N.W.2d 263, 272 (Minn. 2000) (holding "that section 481.071 applies only to fraud committed in the context of an action or judicial proceeding"); *Love v. Anderson*, 61 N.W.2d 419, 422 (Minn. 1953) (providing that section 481.07 "does not create a new cause of action"); *Smith v. Chaffee*, 232 N.W. 515, 517 (Minn. 1930) (concluding that section 481.71 "does not create a new cause of action," but provides treble damages where an attorney is found liable for common-law deceit or collusion). And, while appellants' verified complaint alleges "violations" of sections 481.07 and 481.071, the complaint does not plead fraud or allege that respondents committed any other tort. We therefore affirm the district court's judgment dismissing appellants' purported statutory claims.

IV. Appellants' arguments concerning the district court's ruling that communications between respondents and opposing counsel were protected by the work-product doctrine are moot.

Appellants' final argument on appeal concerns the district court's determination that "communications between [respondents] and the attorney for [BNYM]" were protected by the work-product doctrine.

"The work product doctrine is an exception to the rule that all relevant evidence is subject to discovery." *In re Disciplinary Action Against Dedefo*, 752 N.W.2d 523, 530 (Minn. 2008). Under the work-product doctrine, "an attorney's mental impressions, trial strategy, and legal theories in preparing a case for trial" are not discoverable. *Dennie v. Metro. Med. Ctr.*, 387 N.W.2d 401, 406 (Minn. 1986). A party may obtain documents protected as work product "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is

unable without undue hardship to obtain the substantial equivalent of the materials by other means." Minn. R. Civ. P. 26.02(d).

Appellants urged the district court to compel respondents to produce emails exchanged between respondents, Sauter, and Schroeder. The district court concluded that the emails in question were protected work product. However, and despite that protection, the district court ultimately determined that appellants had a substantial need for the documents and that appellants met the undue-burden test. Respondents produced the documents in question.[4] As such, we deem this issue moot.

Affirmed in part, reversed in part, and remanded.

[4] Respondents' brief asserts that the documents were produced, and appellants did not address the issue further in their reply brief. That state of the briefing leaves us with an apparent concession by appellants that the documents were produced.