STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1368

Becky Swanson, et al.,
Appellants,

vs.

Minnesota Governor Mark Dayton,
in his official capacity as the Governor of the State of Minnesota; et al.,
Respondents,

American Federation of State, County and Municipal Employees,
Council 5 (AFSCME), et al.,
Defendant Intervenors.

Filed April 22, 2013
Reversed and remanded
Worke, Judge
Dissenting, Crippen, Judge[*]

Ramsey County District Court
File No. 62-CV-11-9535

Douglas P. Seaton, Tara Craft Adams, Seaton, Peters & Revnew, P.A., Minneapolis, Minnesota (for appellants)

Lori Swanson, Attorney General, Alan I. Gilbert, Solicitor General, Kristyn Anderson, Alethea M. Huyser, Assistant Attorneys General, St. Paul, Minnesota (for respondents)

Considered and decided by Worke, Presiding Judge; Schellhas, Judge; and Crippen, Judge.

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

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

WORKE, Judge

Appellants, licensed childcare providers, challenged an executive order from the governor directing the Bureau of Mediation Services (BMS) to determine whether unions should represent licensed registered subsidized childcare providers in their dealings with the state. The district court entered summary judgment in favor of appellants but concluded that the state's position was substantially justified so as to preclude an award of attorney fees and costs under the Minnesota Equal Access to Justice Act (MEAJA). We disagree and reverse and remand for a determination of the appropriate amount of attorney fees and costs.

FACTS

On November 15, 2011, Governor Mark Dayton signed Executive Order 11-31, which directed the commissioner of the BMS to conduct mail-ballot elections to determine whether two labor unions should represent subsidized childcare providers in dealing with the state. The executive order invoked the governor's constitutional and statutory authority to issue executive orders. The executive order also stated that "a labor dispute exists concerning the right of family child care providers to organize for the purpose of representation in their dealings with the [s]tate" and cited as authority the BMS's statutory involvement in labor relations:

> **Whereas,** under Minnesota laws and [s]tatutes, including but not limited to, Section 179.02, the Commissioner of the [BMS] has broad authority to make rules, appointments, and to provide technical support in the area of labor relations, including the conduct of elections and

> the resolution of labor disputes in the [s]tate, regardless of whether there is an employer or employee relationship[.]

The executive order provided that if a majority of the voting childcare providers agree to representation, the commissioner must certify the unions as their exclusive representatives to "meet and confer" with the state regarding issues of mutual concern.

On November 28, 2011, appellants filed an action in the district court against Governor Dayton, the BMS, and the commissioner of the BMS seeking to have the court enjoin enforcement or implementation of Executive Order 11-31 and declare the executive order void and unenforceable. On December 5, the district court issued a temporary restraining order enjoining the elections.

On April 6, 2012, the district court entered summary judgment in favor of appellants, concluding that Governor Dayton exceeded his authority and violated the separation-of-powers doctrine by issuing Executive Order 11-31. The district court reasoned that the BMS has the authority to assist in settling labor disputes, which the Minnesota Supreme Court has interpreted as involving employer and employee relations. *See Minn. Council of State Emps., No. 19 v. Am. Fed'n of State, Cnty. & Mun. Emps.*, 220 Minn. 179, 192, 19 N.W.2d 414, 421 (1945). It explained, "Although the direct language of Minn. Stat. § 179.01, subd. 7 does not require an employee-employer relationship to exist between the disputants, the definition of labor dispute has not been expanded to include controversies upon which the employer-employee relationship has no bearing." It further reasoned that because "employer-employee relations are not involved in this dispute, this is not a labor dispute, and the BMS does not have authority under Chapter

179 to intervene." It concluded that the governor's order to the BMS to conduct elections was not "sanctioned by the law making body because no labor dispute exists." The district court thus permanently enjoined the elections and awarded attorney fees and costs to appellants.

Thereafter, the state moved for reconsideration solely on the issue of attorney fees and costs. The district court amended its order for judgment to remove the award of attorney fees and costs based on its conclusion that the state's position was substantially justified. This appeal follows.

D E C I S I O N

Appellants argue that the district court abused its discretion by denying their request for attorney fees and costs under the MEAJA. This court reviews the district court's award of attorney fees and costs under the MEAJA for an abuse of discretion. *Donovan Contracting of St. Cloud, Inc. v. Minn. Dep't of Transp.*, 469 N.W.2d 718, 720 (Minn. App. 1991), *review denied* (Minn. Aug. 2, 1991). A district court abuses its discretion when it exercises it "in an arbitrary or capricious manner, or base[s] its ruling on an erroneous view of the law." *State, Campaign Fin. & Pub. Disclosure Bd. v. Minn. Democratic-Farmer-Labor Party*, 671 N.W.2d 894, 899 (Minn. App. 2003).

In Minnesota, a party is not entitled to attorney fees and costs in an action against the state acting in its sovereign capacity unless the law provides an exception. *Lund v. Comm'r of Pub. Safety*, 783 N.W.2d 142, 143 (Minn. 2010). The MEAJA is one such exception, *id.* at n.1, and provides that if a prevailing party in a civil action "shows that the position of the state was not substantially justified, the court . . . shall award fees and

other expenses to the party unless special circumstances make an award unjust." Minn. Stat. § 15.472(a) (2012). It is not enough to simply show that the party prevailed on the merits; the party seeking fees has the burden of proving that the government's position was not substantially justified. *Donovan*, 469 N.W.2d at 720-21.

"'Substantially justified' means that the state's position had a reasonable basis in law and fact, based on the totality of the circumstances before and during the litigation." Minn. Stat. § 15.471, subd. 8 (2012). In further explaining the term "substantially justified," this court has looked to caselaw interpreting the federal counterpart, the Equal Access to Justice Act. *See State, Campaign Fin.*, 671 N.W.2d at 899. The United States Supreme Court has construed "substantially justified" to mean "'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S. Ct. 2541, 2550 (1988). To be substantially justified means "more than merely undeserving of sanctions for frivolousness." *Id.* at 566, 108 S. Ct. at 2550.

In *State, Campaign Fin.*, this court examined the state's justification for initiating a declaratory-judgment action against the Democratic-Farmer-Labor Party to allocate multicandidate expenditures among certain individual candidates in accordance with the state's interpretation of state campaign finance laws. 671 N.W.2d at 896. The district court awarded attorney fees and costs under the MEAJA after concluding that the state's position "was based on a misreading of the statute's clear and unambiguous prohibition against allocation of multicandidate expenditures." *Id.* at 900. We concluded that the

district court did not abuse its discretion because the state's position had no reasonable basis in law and fact and, therefore, was not substantially justified. *Id.*

Here, the district court concluded that the state's position was substantially justified based on the statutory and constitutional authority to issue executive orders, the state's "direct reading of Minnesota Statutes Chapter 179," and its "reasonable understanding of other states' actions on issues similar to this case." Appellants challenge the district court's rationale in concluding the state's position was substantially justified.

Appellants first argue that a "labor dispute" requires an employer-employee relationship, that no labor dispute existed, and that the BMS did not have the authority to intervene. The term "labor dispute" is defined by statute:

> "Labor dispute" includes any controversy concerning employment, tenure or conditions or terms of employment or concerning the association or right of representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms, tenure, or other conditions of employment, regardless of whether or not the relationship of employer and employee exists as to the disputants.

Minn. Stat. § 179.01, subd. 7 (2012). The Minnesota Supreme Court has interpreted the statute to require a labor dispute to have some bearing on employer and employee relations. *Minn. Council of State Emps.*, 220 Minn. at 192, 19 N.W.2d at 421. Despite the supreme court's interpretation and despite the state's acknowledgment that an employer-employee relationship does not exist between childcare providers and the state, Executive Order 11-31 relies on the premise that a labor dispute exists regarding whether childcare providers may organize for purposes of their dealings with the state. The

executive order further relies on the premise that the BMS has broad authority to involve itself in the area of labor relations, "including the conduct of elections and the resolution of labor disputes in the [s]tate, regardless of whether there is an employer or employee relationship[.]" These premises are inconsistent with the interpretation of "labor dispute" by the supreme court. The authority for the executive order was thus based on an incorrect interpretation of the statute. *See State, Campaign Fin.*, 671 N.W.2d at 900.

The district court apparently gave weight to the qualifying language in the statute that defines a labor dispute "regardless of whether or not the relationship of employer and employee exists." *See* Minn. Stat. § 179.01, subd. 7. The district court noted that "labor disputes in Minnesota have been characterized to involve employer-employee relationships and no such relationship existed" but that the state relied on its "direct reading of Minnesota Statutes Chapter 179." But the Minnesota Supreme Court's interpretation of a statute is binding and not simply a "characterization." *See, e.g.*, *Brayton v. Pawlenty*, 781 N.W.2d 357, 367 (Minn. 2010) (rejecting governor's proposed interpretation of statute and upholding injunction to prevent governor from exercising authority in accordance with his interpretation). Thus, the governor does not have the authority to apply an interpretation of the statute that is based on his "direct reading" of the statute when that "direct reading" conflicts with the supreme court's interpretation.

Moreover, even if the supreme court had not previously construed section 179.01, subdivision 7, to apply only to employment relationships, the provision does not cover the relationship that exists between subsidized childcare providers and the state. The definition of "labor dispute" includes four areas of controversy concerning:

(1) employment; (2) tenure; (3) conditions or terms of employment; and (4) "the association or right of representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms, tenure, or other conditions of employment." Minn. Stat. § 179.01, subd. 7. The executive order, on the other hand, defined areas of "mutual concern" that would be discussed by the unions and the state, if elected:

> quality standards and quality rating systems; the availability of training opportunities and funding; reimbursement rates; access to benefits; changes to the state system of providing early childhood education services; the monitoring and evaluating of family child care providers; and any other matters that the parties agree would improve recruitment and retention of qualified licensed registered family child care providers and the quality of the programs they provide.

The areas of "mutual concern" do not fall under any of the four employment-related circumstances found in the definition of labor dispute.

In addition, the BMS was aware that it lacked authority to intervene under state labor laws. *See Donovan*, 469 N.W.2d at 722 (finding it significant that the state was aware of different interpretations of a statute when concluding that the promulgation of one interpretation was not a substantially justified position). On September 13, 2011, the Research Department of the Minnesota House of Representatives issued a memorandum, stating that no employment relationship exists between the state and subsidized childcare providers. It also set forth the opinion of the BMS that "private, self-employed home-based child care providers would most likely not fall under their jurisdiction because the providers are neither public employees nor employees of any single employer." That the governor issued the executive order despite the BMS's awareness that it lacked authority

further undermines his position. Thus, the state's position that the BMS was authorized to intervene despite the BMS's knowledge that it had no authority and notwithstanding the plain language of Minn. Stat. § 179.01, subd. 7, did not have a reasonable basis in law and fact.

In reaching this conclusion, we recognize that a misreading of the law may not always lead to the conclusion that the state's position is not substantially justified. *See Mbong v. New Horizons Nursing*, 608 N.W.2d 890 (Minn. App. 2000) ("We cannot say the department's position, based on its misreading of a statute, was not without some justification."). But in this case, the state's position was based on a "misreading of the statute's clear and unambiguous" language requiring a statutory labor dispute to involve employment relations. *See State, Campaign Fin.*, 671 N.W.2d at 900. The district court did not appear to consider the clause requiring an employment-related situation. *See* Minn. Stat. § 179.01, subd. 7. Because of this, the district court "based its ruling on an erroneous view of the law" and abused its discretion by denying attorney fees and costs. *See State, Campaign Fin.*, 671 N.W.2d at 899.

Appellants also challenge the district court's reliance on the state's "reasonable understanding of other states' actions on issues similar to this case" in finding the state's position substantially justified. The district court cited a decision in which the Maryland Court of Special Appeals upheld a similar executive order relating to the election of bargaining representatives of childcare providers participating in a state subsidy program. *State v. Md. State Family Child Care Ass'n*, 966 A.2d 939, 941, 954 (Md. Ct. Spec. App. 2009). In relevant part, Maryland statutory law allows the governor to issue an executive

order that "adopts guidelines, rules of conduct, or rules of procedure for: (i) [s]tate employees; (ii) units of the [s]tate government; or (iii) persons who are under the jurisdiction of those employees or units or who deal with them[.]" Md. Code Ann., State Gov't § 3-401(2) (2012). The Maryland Court of Special Appeals concluded that the executive order fell under subsection (iii) because the childcare providers "deal with" a state agency when they are paid and regulated under the subsidy program. *Md. State Family Child Care Ass'n*, 966 A.2d at 952.

Unlike Maryland law, Minnesota law does not provide the governor with broad authority to issue executive orders adopting procedures for those who deal with state employees. In Minnesota, the governor has the power to issue executive orders pursuant to "constitutional or statutory authority." Minn. Stat. § 4.035, subd. 1 (2012). The state argues that Governor Dayton derived his constitutional authority to issue Executive Order 11-31 from article V, section 3 of the Minnesota Constitution, which allows the governor to appoint commissioners and to take care that the laws are faithfully executed. *See* Minn. Const. art. V, § 3. The state argues that it "reasonably believed that Executive Order 11-31 constituted a permissible directive by the Governor to his appointees." This argument is undermined, however, by the fact that the BMS knew that it lacked jurisdiction over the relationship between subsidized childcare providers and the state. Thus, the governor was directing his appointees to do something that they had no statutory authority to do.

The district court recognized the distinctions between the laws in Minnesota and Maryland but explained that the state's reliance on other states played a role in

understanding the basis for its position. Yet, although the state's reliance on other states may play a role in understanding the position, it does not necessarily make the state's position reasonable or substantially justified. This is particularly true when, as here, the governor's authority to issue executive orders is clearly distinct from and more limited than the authority afforded to the governor of Maryland. Thus, because the governor exceeded his constitutional authority to issue executive orders and premised the executive order on a misreading of the plain language of Minn. Stat. § 179.01, subd. 7, the state's position was not substantially justified, and the district court abused its discretion by declining to award attorney fees and costs.

The state alternatively argues that this court should uphold the district court's denial of attorney fees and costs because appellants failed to comply with the procedural requirements for requesting attorney fees from the district court. The MEAJA provides for the manner in which a party may request attorney fees and costs:

> A party seeking an award of fees and other expenses shall, within 30 days of final judgment in the action, submit to the court or administrative law judge an application of fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed.

Minn. Stat. § 15.472(b) (2012). The state argues that appellants "woefully failed to meet" the requirements to receive fees and costs, emphasizing that appellants "only made a motion, for the first time, *after* the hearing on Respondents' motion to reconsider." But the MEAJA does not require a prevailing party to bring a motion before any post-trial

motions; it requires the party to bring a motion within 30 days of a final judgment. *Id.* Appellants moved for attorney fees under the MEAJA on May 4, 2012, which was within 30 days of the district court's April 6, 2012 order for judgment.

The state also argues that appellants failed to sufficiently itemize its request as required by the Minnesota General Rules of Practice. Rule 119.02 requires that a motion be accompanied by an attorney affidavit establishing a description of the work performed, the hourly rate for each attorney, a detailed itemization of amounts sought for disbursements or expenses, and that the affiant has reviewed the appropriateness of the work performed. "[R]ule 119 is not intended to limit the court's discretion, but is intended to encourage streamlined handling of fee applications." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 776 N.W.2d 172, 180 (Minn. App. 2009) (quotation omitted).

The district court awarded attorney fees in its initial summary-judgment order. The state subsequently moved for reconsideration. The district court held a hearing, where it explained:

> My intent here is to determine first of all whether or not any attorneys fees are—whether the law allows an award of attorneys fees under these circumstances because frankly the substantial justification may well exist here. I have not made that decision yet because I realize it's an important decision to be made. The first issue to be addressed will be is it appropriate to award attorneys fees. If I determine that it isn't, we will dismiss it and that will be the end of the matter. If I find it is then you folks have got a lot more things to do in terms of discovery and justification of attorneys fees—of what individual fees are and that sort of thing.

Appellants subsequently moved for attorney fees and costs pursuant to the MEAJA. Appellants' attorney provided an affidavit stating the names of the attorneys who worked on the case, the hours worked, the hourly rate, and the total fees. The motion also stated that more detailed documents would be provided pending the district court's decision on the state's motion to reconsider. Given that the district court created a two-step process, i.e. first, a determination of whether attorney fees and costs were warranted and, second, a determination of the amount, we decline to dismiss the fee request for lack of itemization. Because we conclude that appellants are entitled to attorney fees and costs under the MEAJA, we reverse and remand for a determination of the appropriate amount.

Reversed and remanded.

CRIPPEN, Judge (dissenting)

Because I am convinced that reversing the district court's decision on fees oversteps the standard of our review, I respectfully dissent. Despite its judgment on the merits, the district court re-examined the premises for its decision and determined that the respondents' contrary position was substantially justified—in effect, that it could satisfy reasonable persons. There is notably little room to determine that the district court, which was wholly familiar with the issues, was arbitrary in its judgment on the passable degree of merit in respondents' position. Under the circumstances, I would affirm.