20230279
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
05-02-2024
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2024 ND 85

Kyle Harris, Plaintiff and Appellee

v.

Oasis Petroleum, Inc., Defendant and Appellant

and

MLB Consulting, LLC, Petroleum Experience, Inc., Frac Tech Services, LTD, n/k/a FTS International Services, LLC, Weatherford International, U.S. L.P., Schlumberger Technology Corporation, Sabre Production Services, LLC, and Andrew Davison, Defendants

No. 20230279

Appeal from the District Court of Williams County, Northwest Judicial District, the Honorable Joshua B. Rustad, Judge.

AFFIRMED.

Opinion of the Court by McEvers, Justice.

Jeffrey S. Weikum, Bismarck, ND, for plaintiff and appellee.

Erik F. Hansen (argued), Elizabeth M. Cadem (on brief), and John C. Hughes (on brief), Minneapolis, MN, for defendant and appellant.

Steven J. Leibel, Bismarck, ND, for amicus curiae North Dakota Association for Justice.

Harris v. Oasis Petroleum, et al.
No. 20230279

McEvers, Justice.

[¶1] Oasis Petroleum, Inc. ("Oasis") appeals from a second amended judgment and order denying its motion to alter or amend the judgment. Oasis argues the district court erred as a matter of law in determining Kyle Harris was a prevailing party and abused its discretion in awarding Harris costs and disbursements. We affirm.

I

[¶2] In 2015, Harris filed a complaint against Oasis and other parties alleging negligence, gross negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress. Harris alleged that in November 2011 he was injured in an explosion on an oil rig operated by Oasis, while working as an employee of Frontier Pressure Testing, LLC ("Frontier"). Oasis and the other parties separately filed motions for summary judgment. The district court dismissed the other parties from this action.

[¶3] In May 2022, a jury trial was held. Frontier was not a party to the action, but was included on the special verdict form providing the potential actors at fault for Harris's injuries. The jury returned a special verdict, finding Oasis, Frontier, and Harris each at fault for and a proximate cause of Harris's injuries. The jury apportioned the fault as follows: Oasis 15%; Frontier 65%; Harris 20%. The jury found $5,012,500 in monetary damages would compensate Harris for his injuries. The jury also awarded interest at the rate of 3% per annum.

[¶4] In July 2022, the district court entered an order for judgment, concluding, as a matter of law, that: Oasis was at fault and a proximate cause of Harris's injuries, responsible for 15% of the total damages; Frontier was at fault and a proximate cause of Harris's injuries, responsible for 65% of the total damages; Harris was at fault and a proximate cause of his injuries, responsible for 20% of the total damages. The court applied N.D.C.C. § 32-03.2-02 and

deducted 85% of fault attributable to Frontier and Harris from the total damages.

[¶5] In August 2022, Harris filed a statement of costs and disbursements under N.D.C.C. § 28-26-06 and N.D.R.Civ.P. 54(e), arguing he should be awarded certain costs and disbursements because he was the prevailing party under the special verdict of the jury. Harris filed an amendment to the statement in September 2022. Oasis objected to Harris's statement of costs and disbursements, challenging the amount of expert fees and that the testimony did not lead to a successful result. Oasis also argued a trial court may award costs and disbursements based upon the percentage of fault attributable to the parties.

[¶6] In December 2022, the district court entered an order approving Harris's amended statement of costs and disbursements. In its order, the court concluded that Harris was the prevailing party and, relying on *Keller v. Vermeer Mfg. Co.*, 360 N.W.2d 502, 509 (N.D. 1984), was entitled to costs and disbursements undiminished by the percentage of negligence attributed to him. In January 2023, the court entered the second amended judgment, awarding Harris a principal balance of $751,800, plus prejudgment interest in the amount of $105,208.92, with 3% interest from the date of the verdict to entry of judgment and statutory interest until the judgment is satisfied. The court also awarded $524,213.10 in costs and disbursements. The total amount adjudged against Oasis was $1,381,297.02.

[¶7] In February 2023, Oasis timely filed a motion to alter or amend the judgment under N.D.R.Civ.P. 59(j). Oasis argued the district court erred as a matter of law when it concluded Harris was a prevailing party because the jury found Harris more liable for his injuries than Oasis. The court denied Oasis's motion to alter or amend the judgment, agreeing with Harris that he was the prevailing party. In October 2023, the court entered a final clarifying order and final amended judgment. Oasis appeals.

II

[¶8] Oasis argues the district court erred as a matter of law in determining Harris was a "prevailing party" for costs and disbursements taxed in judgment or, alternatively, that there even was a prevailing party. Oasis further contends the court abused its discretion in approving Harris's statement of costs and disbursements against Oasis when the jury found Oasis the least culpable party.

A

[¶9] Oasis contends the district court abused its discretion in denying the motion to alter or amend the judgment under N.D.R.Civ.P. 59(j) because it erred as a matter of law in concluding Harris was a prevailing party.

[¶10] A district court's decision on a motion to alter or amend a judgment under N.D.R.Civ.P. 59(j) will not be reversed on appeal unless the court abused its discretion. *Werven v. Werven*, 2016 ND 60, ¶ 24, 877 N.W.2d 9. A court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or when it misinterprets or misapplies the law, or when its decision is not the product of a rational mental process leading to a reasoned determination. *Id.* We have stated:

> A motion under N.D.R.Civ.P. 59(j) may be used to ask the court to reconsider its judgment and correct errors of law. Unlike a N.D.R.Civ.P. 59(b) motion for a new trial, a N.D.R.Civ.P. 59(j) motion to alter or amend a judgment does not usually request a reexamination of issues of fact. The district court may decline to consider an issue or argument raised for the first time on a motion for reconsideration under N.D.R.Civ.P. 59(j) if it could have been raised in earlier proceedings.

Flaten v. Couture, 2018 ND 136, ¶ 28, 912 N.W.2d 330 (cleaned up).

[¶11] The question of who is a prevailing party under N.D.C.C. § 28-26-06 is a question of law, subject to de novo review. *Dowhan v. Brockman*, 2001 ND 70, ¶ 10, 624 N.W.2d 690 (citing *Braunberger v. Interstate Eng'g, Inc.*, 2000 ND 45, ¶ 24, 607 N.W.2d 904).

> The determination of who is a prevailing party is based upon success on the merits, not damages. If opposing litigants each prevail on some issues, there may not be a single prevailing party for whom disbursements may be taxed. A prevailing party is one in whose favor a judgment is rendered, regardless of the amount of damages awarded. Generally, the prevailing party to a suit, for the purpose of determining who is entitled to costs, is the one who successfully prosecutes the action or successfully defends against it, prevailing on the merits of the main issue, in other words, the prevailing party is the one in whose favor the decision or verdict is rendered and the judgment entered.

LAWC Holdings, LLC v. Vincent Watford, L.L.C., 2024 ND 16, ¶ 13, 2 N.W.3d 672 (cleaned up).

[¶12] In denying the Rule 59(j) motion, the district court stated: "[I]n this case, Plaintiff succeeded on the merits of the primary issues of negligence of Defendant and that being the proximate cause of Plaintiff's injuries. . . . This is not a case where Plaintiff failed to prevail on any significant issues and Defendant prevailed on all significant issues." The court held that:

> [T]here is no language in § 32-03.2-02 that mentions any diminution in costs or disbursements in a case involving comparative fault. Further, that the *Keller* case is still applicable, and that a Plaintiff awarded damages is entitled to recover costs and disbursements in an amount undiminished by percent of negligence attributable to him.

[¶13] Oasis argues that a prevailing party in a tort action must at least prevail on the issues of negligence and proximate cause, but prevailing on those grounds alone does not make a plaintiff the prevailing party. Oasis also argues there may not be a single prevailing party when each party prevails on some of the issues. Oasis further argues that under N.D.C.C. § 32-03.2-02, North Dakota's comparative fault statute, negligence is included in the concept of fault and the fault of two or more parties is compared so that each party is only liable for the damages attributable to that party's fault, and that the legislature intended to replace joint and several liability with the several allocation of damages among those who commit torts in proportion to the fault

of those who contributed to the injury. Oasis further argues that because the jury found Oasis to be the least culpable, Harris is not a prevailing party.

[¶14] We agree with Oasis that a prevailing party in a tort action "must prevail at least on the issues of negligence and proximate cause." *Braunberger*, 2000 ND 45, ¶ 14 (quoting *Andrews v. O'Hearn*, 387 N.W.2d 716, 732 (N.D. 1986)). We also agree with Oasis there may not be a single prevailing party when opposing parties each prevail on some issues. *WFND, LLC v. Fargo Marc, LLC*, 2007 ND 67, ¶ 49, 730 N.W.2d 841. In *WFND*, at ¶ 50, this Court held:

> WFND prevailed on its claim against Fargo Marc for fraud, and Fargo Marc prevailed on its counterclaim against WFND for breach of the agreement to share in the proceeds from the sale of the detention pond. Because both parties prevailed on their respective claims, we conclude there is no prevailing party for purposes of N.D.C.C. § 28-26-06.

Unlike *WFND*, the jury in this case did not find Oasis prevailed on any claim. This is not a case where both parties prevailed on separate claims or a case where both parties were awarded some damages.

[¶15] We also agree with Oasis that under N.D.C.C. § 32-03.2-02 the fault of two or more parties is compared so that each party is only liable for the damages attributable to that party's fault. Oasis argues on appeal that the district court's reliance on the *Keller* case is misplaced because N.D.C.C. § 9-10-07, the comparative fault statute relied on in that case, has been repealed and replaced.

[¶16] Oasis is correct that the North Dakota Legislature repealed N.D.C.C. § 9-10-07, and enacted its replacement, N.D.C.C. § 32-03.2-02, in 1987. *See* 1987 N.D. Sess. Laws ch. 404, § 2. However, the language at issue in N.D.C.C. § 32-03.2-02 pertaining to reducing damages for contributorily negligent plaintiffs is very similar to the language of N.D.C.C. § 9-10-07, North Dakota's former comparative fault statute. Section 9-10-07, N.D.C.C., stated:

> Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for

> negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, *but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person recovering*. The court may, and when requested by either party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of negligence attributable to each party; *and the court shall then reduce the amount of such damages in proportion to the amount of negligence attributable to the person recovering*. When there are two or more persons who are jointly liable, contributions to awards shall be in proportion to the percentage of negligence attributable to each; provided, however, that each shall remain jointly and severally liable for the whole award. Upon the request of any party, this section shall be read by the court to the jury and the attorneys representing the parties may comment to the jury regarding this section.

(Emphasis added.) North Dakota's current comparative fault statute, N.D.C.C. § 32-03.2-02, states:

> Contributory fault does not bar recovery in an action by any person to recover damages for death or injury to person or property unless the fault was as great as the combined fault of all other persons who contribute to the injury, *but any damages allowed must be diminished in proportion to the amount of contributing fault attributable to the person recovering*. The court may, and when requested by any party, shall direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each person, whether or not a party, who contributed to the injury. *The court shall then reduce the amount of such damages in proportion to the amount of fault attributable to the person recovering*.

(Emphasis added.) We have previously discussed the implications of North Dakota's comparative fault statute, formerly N.D.C.C. § 9-10-07, on costs and disbursements awarded to a contributorily negligent plaintiff, stating: "[I]n the case of a contributorily negligent plaintiff, 'any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person recovering.' [Section 9-10-07, N.D.C.C.,] does not provide for any diminution in

the costs and disbursements to be allowed to a recovering plaintiff." *Keller*, 360 N.W.2d at 509 (quoting N.D.C.C. § 9-10-07). Likewise, N.D.C.C. § 32-03.2-02 does not provide for any diminution in the costs and disbursements to be allowed to a recovering plaintiff.

[¶17] In *Keller*, the jury found Vermeer, a defendant, liable for negligence. 360 N.W.2d at 503. The jury diminished Keller's, the plaintiff, damages by 37% because of the percentage of negligence attributable to him. *Id.* at 504. Regarding the reduction of damages relating to who was the "prevailing party," we stated: "Keller won the lawsuit. The fact that the jury diminished the damages by 37% because of negligence attributable to him does not make Keller any less 'the prevailing party' for purposes of application of § 28-26-06, N.D.C.C." *Id.* at 509. We concluded the district court did not err in refusing to reduce the costs and disbursements awarded to Keller, the plaintiff, by the percentage of fault attributed to Vermeer, a defendant. *Id*. at 508-09.

[¶18] The modification of the comparative fault statute did not modify the requirement for the district court to reduce the amount of damages based on negligence or the percentage fault attributable to each party; rather, it eliminated joint and several liability for the damages when one or more parties are found at fault. We are unpersuaded that Harris did not prevail because the percentage of fault attributed to Oasis was less than that attributed to Harris. The main issue in the litigation was whether Oasis was negligent and a proximate cause of Harris's injuries. Oasis failed to successfully defend the merits of the main issue because the jury found Oasis was at fault for and a proximate cause of Harris's injuries and apportioned 15% of the fault to Oasis. Harris prevailed on the merits of the main issue. The fact that the jury reduced Harris's damages by 20% because of the negligence attributable to him does not make Harris any less the "prevailing party" for the purpose of applying N.D.C.C. § 28-26-06. Because Harris was the prevailing party, the court had the discretion to award Harris costs and disbursements under N.D.C.C. § 28-26-06, without reduction by his percentage of fault. *See Keller*, 360 N.W.2d at 508-09. We conclude the court did not err as a matter of law in determining Harris is the prevailing party; therefore, the court did not abuse its discretion in denying Oasis's motion to amend the judgment.

B

[¶19] Oasis contends that even if this Court determines Harris was a prevailing party, the Court should reverse and remand with instructions to allocate costs and disbursements proportionally, requiring Oasis pay no more than 15% of the costs. Section 28-26-06, N.D.C.C., provides for payment of necessary disbursements to a prevailing party in civil actions. "[T]his Court has distinguished between the legal question of whether a party is a prevailing party entitled to necessary disbursements, and the factual question of whether the awarded costs and their amounts were proper." *Braunberger*, 2000 ND 45, ¶ 24. The trial court is better positioned to determine the reasonableness and necessity of the costs and disbursements sought by the prevailing party. *Vogel v. Pardon*, 444 N.W.2d 348, 352-53 (N.D. 1989).

> An award of costs under N.D.C.C. § 28-26-10 is discretionary, and a district court's decision on an award of disbursements under N.D.C.C. § 28-26-06 will be reversed only if the court abused its discretion. A court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, its decision is not the product of a rational mental process leading to a reasoned determination, or it misinterprets or misapplies the law.

Sterling Dev. Grp. Three, LLC v. Carlson, 2015 ND 39, ¶ 17, 859 N.W.2d 414 (internal citations omitted); *see Keller*, 360 N.W.2d at 508 ("The allowance of disbursements under § 28-26-06(2), N.D.C.C., is within the trial court's discretion.").

[¶20] In ruling on Oasis's objections to the allowance of disbursements claimed by Harris, the district court stated:

> First, it is settled North Dakota law that a plaintiff awarded damages in a negligence action is entitled to recover costs and disbursements <u>in an amount undiminished by percent of negligence attributable to him</u>. *Keller v. Vermeer Mfg. Co.*, 360 N.W.2d 502, 1984 N.D. LEXIS 433 (N.D. 1984). This is only logical as it tracks the purpose of N.D. Cent. Code, § 28-26-06 which is to

> tax the costs necessarily incurred by the prevailing party to obtain the verdict against a non-prevailing party.

(Emphasis in original.)

[¶21] Relying on *Kavadas v. Lorenzen*, 448 N.W.2d 219, 224-25, (N.D. 1989), Oasis argues a trial court may award costs and disbursements based upon the percentage of fault attributable to the parties. Oasis's reliance on *Kavadas* is misplaced. Nothing in *Kavadas* requires the district court to reduce costs awarded to the prevailing party plaintiff based on percentage of fault.

[¶22] In *Kavadas*, a defendant argued the trial court erred in awarding the plaintiff costs and disbursements from the defendants jointly and severally, and that because the defendants were *severally* liable for the plaintiff's damages, the defendants should have been taxed the costs and disbursements according to their respective percentages of fault. 448 N.W.2d at 224. This Court ultimately concluded the trial court did not abuse its discretion in declining to award the plaintiff costs and disbursements based on each defendant's percentage of fault. *Id*. at 224-25. This Court stated: "Although a trial court *may* award costs and disbursements based upon the percentage of fault attributable to the parties . . . , no unreasonable, arbitrary, or unconscionable conduct has been shown in the trial court's decision to award Kavadas costs and disbursements from the defendants jointly and severally." *Id*. at 224-25 (emphasis in original) (relying on *Craft Tool & Die Co., Inc. v. Payne*, 385 N.W.2d 24, 28 (Minn. Ct. App. 1986)). *Kavadas* relied on *Craft* to show the wide discretion of the trial court when stating costs may be awarded based on the fault attributable to the *parties*, but it is not required to do so. *Kavadas*, at 224-25. Like *Kavadas*, the *Craft* case was also considering the fault between two defendants, rather than between a defendant and a plaintiff who is the sole prevailing party, and did not include consideration of a comparative fault statute. *Craft*, at 28.

[¶23] To the extent that *Kavadas* may be interpreted to conclude costs and disbursements may be attributable to all parties when there is a sole prevailing party, it is overly broad. While a district court has considerable discretion in deciding what is reasonable in its award of costs, *Kavadas* did not overrule

Keller. *Kavadas*, 448 N.W.2d at 224 (relying in part on *Keller*, 360 N.W.2d at 509, which provided for costs and disbursements in an amount undiminished by the percent of negligence attributable to the prevailing party).

[¶24] We conclude the district court did not abuse its discretion in awarding Harris, as the prevailing party, costs and disbursements.

III

[¶25] The judgment and the order are affirmed.

[¶26] Jon J. Jensen, C.J.
Daniel J. Crothers
Lisa Fair McEvers
Jerod E. Tufte
Douglas A. Bahr