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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-2048**

CorVascular Diagnostics, LLC,
Respondent,
vs.

Michael Talcott, et al.,
Appellants,

Viasonix, Ltd., et al.,
Defendants.

**Filed August 28, 2017
Reversed and remanded
Connolly, Judge**

Hennepin County District Court
File No. 27-CV-16-2380

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Considered and decided by Ross, Presiding Judge; Connolly, Judge; and Toussaint,
Judge.*

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

UNPUBLISHED OPINION

CONNOLLY, Judge

In this appeal from a district court order denying appellants' motion for advancement of attorney fees pursuant to Minn. Stat. § 322B.699 (2016), appellants argue that the district court applied the wrong legal standard in determining that appellants had not met their burden to establish such entitlement. Because the district court erred, we reverse and remand.

FACTS

Spencer Lien and appellant Michael Talcott formed respondent CorVascular Diagnostics, LLC, a healthcare technology supplier, in December 2013. At that time, Lien held a 60% membership interest and Talcott held a 40% membership interest through appellant CorVascular MI, LLC, of which Talcott is the sole member.¹ Talcott, as the vice president of sales, recruited independent sales representatives in 2014. Among them were appellant William Beymer and defendant Carl Tisdal, who were each granted a 2.5% membership interest, reducing Lien's holdings to 55%.²

From 2014 into 2015, Talcott began requesting commissions on his sales, which respondent could not pay due to insufficient funds. Talcott allegedly threatened to quit, to work for a competitor, and to take certain sales representatives with him. Lien alleged, in part, that appellants had taken steps to divert business from respondent to Talcott's own

¹ We refer to CorVascular MI, LLC and Talcott collectively as Talcott.

² We refer to Talcott and Beymer as appellants. Tisdal joined in the motion for advancement but does not appeal.

future business, that they misled respondent's customers with regard to respondent's future, and that they instructed sales representatives to refrain from selling new products. Lien communicated these allegations to appellants through a letter from his attorney in August 2015. This letter identified numerous such breaches of the recipients' fiduciary duties and demanded that the recipients buy Lien's membership share in settlement or risk a lawsuit. Talcott left respondent on February 3, 2016, without agreeing to the settlement offer.

Two weeks later, respondent served Talcott with a complaint alleging numerous breaches of fiduciary duty. In May, Talcott requested advancement of attorney fees from respondent pursuant to Minn. Stat. § 322B.699 and did not receive a response within 60 days. Respondent amended its complaint to name additional defendants, including Beymer and Tisdal, in July. In August, appellants moved the district court for advancement of attorney fees in light of respondent's failure to timely respond to the request. Respondent opposed the motion, arguing that the membership-control agreement signed by appellants gave Lien discretion to indemnify and that appellants failed to "meet their burden of establishing that they are entitled to advancement." Respondent also filed an affidavit from Lien, indicating his determination that appellants were not entitled to indemnification pursuant to the discretion vested in him by the membership control agreement.

In October 2016, the district court denied the motion for advancement. The district court did not rely on the membership-control agreement for its ruling, noting its uncertainty whether the agreement conformed to statutory language allowing a company to deny or impose conditions on advancement and indemnification. *See* Minn. Stat. § 322B.699, subd. 4. Rather, the district court considered whether appellants had met the procedural

and substantive requirements of the statute governing advancement. *See id.*, subd. 3. Despite noting that appellants had indisputably met the procedural requirements for advancement, the district court found they had failed to meet the substantive requirements and concluded that it could not independently determine eligibility for advancement.

Appellants filed a notice of appeal.³

D E C I S I O N

Appellants argue that the district court applied a standard requiring a party seeking advancement to demonstrate that “he or she necessarily *will* be entitled to indemnification.” They suggest that “the district court must assess only whether there are *undisputed* facts that preclude indemnification.” This is a difficult case because the relevant statutory provisions are not a model of clarity. Nevertheless, we agree with appellants that the district court erred.

Whether the district court applied the correct legal standard in determining that appellants had not met their burden to show eligibility for advancement involves statutory interpretation and is therefore a question of law subject to de novo review. *Asian Women United of Minn. v. Leindecker*, 789 N.W.2d 688, 690 (Minn. App. 2010). “When interpreting a statute, we first look to see whether the statute’s language, on its face, is clear or ambiguous.” *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000). “If

³ Respondent did not file a notice of related appeal to challenge the district court’s determination that the membership control agreement may not conform to the relevant statute.

the language of a statute is clear and unambiguous, we apply its plain meaning.”
Leiendecker, 789 N.W.2d at 691.

The relevant subdivision of the statute regarding indemnification in the context of limited liability companies notes that such companies *shall* indemnify a person “made . . . a party to a proceeding by reason of the former or present official capacity of the person” against judgments, penalties, and reasonable expenses incurred in connection with the proceeding if he or she (1) has not already been indemnified by another source; (2) acted in good faith; (3) received no improper benefit; and (4) reasonably believed that he or she acted in accordance with the best interests of the company. Minn. Stat. § 322B.699, subd. 2(a). Advancement of reasonable expenses including attorney fees in such circumstances is required:

(1) upon receipt by the limited liability company of a written affirmation by the person of a good faith belief that the criteria for indemnification set forth in subdivision 2 have been satisfied and a written undertaking by the person to repay all amounts so paid or reimbursed by the limited liability company, if it is ultimately determined that the criteria for indemnification have not been satisfied; and

(2) after a determination that *the facts then known* to those making the determination *would not preclude* indemnification under this section.

Id., subd. 3 (emphasis added).

In *Leiendecker*, this court considered nearly identical statutes concerning nonprofit organizations and held that, “unless otherwise specified in a corporation’s articles of incorporation or bylaws, indemnification and advancement are *mandatory* when the statutory requirements are met.” 789 N.W.2d at 692 (emphasis added). We concluded that

this was true even in an action by an organization against the individual seeking advancement. *Id.* at 693. Here, respondent similarly must advance appellants' defense costs if the statutory criteria are met.

The district court determined that "there is no dispute that [appellants] met the procedural criteria," referring to the written affirmation and undertaking required by Minn. Stat. § 322B.699, subd. 3(1). This conclusion is not challenged on appeal. But appellants do challenge the district court's analysis under Minn. Stat. § 322B.699, subd. 3(2), which reads as follows:

However, there is a raging dispute regarding whether [appellants] are entitled to indemnification: specifically, if they acted in good faith, if they received no improper benefit, and, when acting in their official capacity, if they reasonably believed that their conduct was in the best interests of the company. [Respondent] present[s] detailed affidavit testimony to support [its] claim of bad faith; conversely, [appellants] present detailed affidavit testimony attesting to their good faith. And the allegations presented to support or challenge advancing fees go to the very heart of the litigated issues in this case which are still the subject of discovery.

... This court cannot reach an "independent determination" of eligibility for an advance on this record. The affidavit testimony creates fact issues that would require credibility determinations to resolve. In the absence of any way for this Court to assess credibility at this stage of the case, the moving party has failed to meet its burden.

(Citation omitted).

Importantly, the statute does not require weighing of allegations or contested facts. The statute uses the clear and unambiguous language of "facts *then known*." *See* Minn. Stat. § 322B.699, subd. 3(2) (emphasis added). Undetermined or disputed factual issues are plainly not a part of "facts then known." And neither party alleges that the statute is

unclear or ambiguous in requiring consideration of known facts. The district court applied the incorrect legal standard in attempting to consider disputed factual issues rather than considering only known facts as required by the plain language of the statute.

Likewise, the statute clearly does not require a determination that those facts necessarily qualify the requesting party for indemnification; instead, it requires a determination that those facts do not *certainly disqualify* the requesting party. *See id.* (requiring that the known facts “would not preclude” ultimate indemnification). And the supreme court has held that, even when a requesting party pleaded guilty to a violation of federal law, it did not necessarily follow that the party had not acted in good faith for purposes of indemnification. *Augustine v. Arizant Inc.*, 751 N.W.2d 95, 100 (Minn. 2008). Here, appellants have not admitted or been charged with criminal wrongdoing. And the district court neither identifies known facts that would preclude appellants from receiving relief nor asserts that such facts exist; instead, it says that it cannot make an independent determination based on the conflicting affidavit testimony. We disagree, because the purpose of the law is to advance expenses, including attorney fees, precisely in factual situations like the one presented here.

While few facts may be known in lawsuits such as this, where bad faith is a central issue in the surrounding litigation, the district court must still evaluate those few known facts to determine whether any of them precludes indemnification. If the district court determines that the party seeking advancement has satisfied the procedural requirements, that the corporation did not prohibit or impose conditions on advancements or indemnification, and that no known facts *preclude* indemnification, the district court must

order the corporation to advance fees accordingly, under both *Leiendecker* and the indemnification statute.

The only known facts here, pursuant to the district court's uncontested findings of fact, describe the founding of the company and the existence of the allegations made in respondent's complaint. Respondent does not dispute that appellants held positions that would enable them to seek advancement, and the membership control agreement does not provide conditions limiting advancement in circumstances where respondent sues its members or former members.⁴ Certainly, respondent's allegations, if true, would call into question the good faith of appellants' actions. But at this stage of the proceedings, they are no more than allegations and do not constitute known facts sufficient to preclude indemnification. Moreover, if it turns out that appellants are not entitled to ultimate indemnification, the statute provides for reimbursement to respondent. *See* Minn. Stat. § 322B.699, subd. 3(1) (requiring a written promise to repay the LLC "if it is ultimately determined that the criteria for indemnification have not been satisfied").

In sum, the district court erroneously attempted to consider disputed facts that were not known at the time of the motion when it concluded that it could not determine appellants' eligibility for advancement because of outstanding issues of fact. Based on the caselaw and the uncontested facts in the district court's order, there are no known facts that preclude indemnification, and the district court erred by concluding otherwise. We reverse the district court's order denying advancement of expenses including attorney fees, and

⁴ Indeed, neither the bylaws nor the membership control agreement limits the right to indemnification at all.

remand for the sole purpose of determining the amount of expenses and fees to be advanced. The lawsuit may proceed in the normal course following that determination.

Reversed and remanded.