STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0302

Toyota-Lift of Minnesota, Inc.,
Appellant,

vs.

American Warehouse Systems LLC, et al., Defendants and Third Party Plaintiffs,

Mark C. Juelich, et al., defendants and third party plaintiffs,
Respondents,

vs.

Les Nielsen, Third Party Defendant.

Filed December 23, 2019
Affirmed in part and reversed in part
Rodenberg, Judge

Hennepin County District Court
File No. 27-CV-12-9725

Paul W. Chamberlain, Ryan R. Kuhlmann, Chamberlain Law Firm, Wayzata, Minnesota (for appellant)

Ryan R. Dreyer, Morrison Sund PLLC, Minnetonka, Minnesota (for respondents)

Considered and decided by Ross, Presiding Judge; Rodenberg, Judge; and Jesson, Judge.

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

RODENBERG, Judge

In this appeal from a judgment awarding attorney fees against appellant Toyota-Lift of Minnesota, Inc. (TLM) under Minn. Stat. § 181.171, subd. 4 (2018), TLM argues that (1) the district court erred by granting additional fees following a decision of this court in a previous attorney-fee appeal that did not include a remand; and, alternatively (2) the district court abused its discretion in determining the amount of reasonable attorney fees. Respondents Mark Juelich and Steven Thoemke assert in their cross-appeal that the district court erred by denying their request for attorney fees incurred in litigating before this court and a United States bankruptcy court.

We affirm in part and reverse in part.

FACTS

In April 2012, TLM sued Juelich and Thoemke, its former employees, and the company they formed to purchase the assets of TLM's allied-products division, American Warehouse Systems, LLC (AWS). Among other things, TLM alleged breach of the asset-purchase agreement and unjust enrichment. Juelich and Thoemke counterclaimed for breach of their employment contracts and violation of Minn. Stat. § 181.14 (2018), arguing that TLM unlawfully withheld part of their earned commissions in 2009. They sought recovery of the unpaid commissions and, under Minn. Stat. § 181.14, subd. 2, penalties for failure to pay the commissions when demanded.

Following a week-long trial, the district court found that AWS breached the asset-purchase agreement and unjustly retained customer payments owed to TLM. It awarded

TLM judgment against AWS for approximately $815,000. The district court further found that TLM failed to pay the full commissions that Juelich and Thoemke earned in 2009. It awarded Juelich and Thoemke approximately $104,000 as a result, but determined that Juelich and Thoemke were not entitled to the statutory penalties under Minn. Stat. § 181.14, subd. 2, because TLM's judgment against AWS more than offset the unpaid commissions it owed to Juelich and Thoemke. Therefore, the district court deducted from the amounts owing to TLM the amount of the unpaid commissions owed to Juelich and Thoemke. After it declined to award Juelich and Thoemke penalties under Minn. Stat. § 181.14, the district court awarded TLM costs and disbursements as the prevailing party.

Juelich and Thoemke appealed, and TLM filed a cross-appeal. This court affirmed the district court on all issues except the district court's interpretation and application of Minn. Stat. § 181.14. *Toyota-Lift of Minn., Inc. v. Am. Warehouse Sys., LLC*, 868 N.W.2d 689, 693 (Minn. App. 2015), *aff'd*, 886 N.W.2d 208 (Minn. 2016). We concluded that Minn. Stat. § 181.14 requires a district court to determine whether an employer owes a penalty for failure to promptly pay commissions by comparing the amount that the employer tendered in good faith and the amount of wages and commissions that the employee was actually owed. *Id.* at 702. TLM owed $104,000 in wages and commissions, none of which it tendered to Juelich and Thoemke. TLM therefore owed a penalty on the unpaid commissions. We reversed in part and remanded in part, requiring the district court to "determine the proper amount of penalties that TLM owes under Minn. Stat. § 181.14., subd. 2." *Id.* The Minnesota Supreme Court granted review and affirmed. *Toyota-Lift of Minn., Inc. v. Am. Warehouse Sys., LLC*, 886 N.W.2d 208, 209-10 (Minn. 2016).

During the pendency of the first appeal, AWS filed for Chapter 11 bankruptcy protection. Juelich and Thoemke's counsel filed a proof of claim in AWS's bankruptcy case for $120,002.98 in unpaid legal fees incurred prior to the filing date of AWS's bankruptcy petition.

After this case was remanded to the district court, Juelich and Thoemke moved the district court to order TLM to pay them penalties under Minn. Stat. § 181.14, subd. 2; award them costs, disbursements, witness fees, and attorney fees under Minn. Stat. § 181.171 (2018); and award them costs under Minn. Stat. § 181.14, subd. 3. The district court granted the motions. It awarded Juelich $12,207.75 and Thoemke $8,930.10 in wage penalties. It awarded Juelich and Thoemke costs and disbursements of $20,287.12, and attorney fees of $217,209.11.

TLM again appealed to this court. It argued that the district court abused its discretion in calculating attorney fees and that it exceeded the scope of remand by awarding attorney fees, costs, and disbursements. We affirmed the district court in all respects. *Toyota-Lift of Minn. Inc. v. Am. Warehouse Sys., LLC*, No. A18-0199, 2018 WL 4201188 (Minn. App. Sept. 4, 2018).

After our second decision, Juelich and Thoemke moved the district court for an additional $100,035.50 in attorney fees. At the motion hearing, their attorney referred to a spreadsheet that reflected that $38,746.50 of their request was for attorney fees incurred on appeal, that $6,824.75 of the request was for attorney fees incurred in the bankruptcy proceeding, and that the remaining request for $54,464.25 was for attorney fees incurred in the district court. The spreadsheet was not produced or made part of the record.

The district court determined that it could not grant any attorney fees incurred on appeal, reasoning that Juelich and Thoemke "should have moved for attorneys' fees in the Minnesota Court of Appeals." The district court also determined that it could not grant fees incurred in the bankruptcy proceeding because those fees were incurred in a separate case and that "only those attorneys' fees expended on the litigation involving Defendants' wage claims are recoverable." It jointly awarded Juelich and Thoemke the remaining $54,464.25 for attorney fees incurred in district court.

TLM appeals the award of attorney fees. Juelich and Thoemke, by notice of related appeal, challenge the district court's denial of attorney fees incurred on appeal and in the bankruptcy court.

D E C I S I O N

The district court had the authority to award additional attorney fees after the court of appeals affirmed without remand in the previous appeal.

TLM argues that the district court lacked jurisdiction to award attorney fees because our 2018 decision affirming the district court without remand effectively ended the litigation.

"We review a district court's application of the law de novo." *Harlow v. State Dep't of Human Servs.*, 883 N.W.2d 561, 568 (Minn. 2016).

In *Kellar v. Von Holtum*, Kellar argued that a district court's jurisdiction to hear motions regarding attorney fees did not extend past the conclusion of an appeal. 605 N.W.2d 696, 700 (Minn. 2000), *superseded by rule on other grounds*, Minn. R. Civ. P. 11.03. The Minnesota Supreme Court rejected Kellar's argument and held that district

courts do retain jurisdiction to hear motions for attorney fees after an appeal has been completed. *Id.* The court reasoned that "[c]ollateral matters, such as motions for attorney fee sanctions . . . are independent of the underlying decision and do not seek to modify the underlying decision in any way." *Id.*; *see Spaeth v. City of Plymouth*, 344 N.W.2d 815, 825 (Minn. 1984) (providing that a claim for attorney fees should be treated as an issue independent of the merits of the litigation).

TLM asserts that it was improper for the district court to consider Juelich and Thoemke's motion for additional attorney fees because we "affirmed the final judgment [in the 2018 appeal] with no remand." But under *Kellar*, the district court retained jurisdiction to award attorney fees in the absence of a remand. *Kellar*, 605 N.W.2d at 700. Because it retained jurisdiction over the matter, the district court did not err in hearing Juelich and Thoemke's motion for additional attorney fees.

TLM also argues that the district court erred because it was barred from awarding additional attorney fees under the doctrine of res judicata. TLM contends that "a judgment on the merits constitutes an 'absolute bar' to a second suit for the same cause of action."

Res judicata applies as an absolute bar to a subsequent action when "(1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the same parties or their privies; (3) there was a final judgment on the merits; (4) the estopped party had a full and fair opportunity to litigate the matter." *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004). "Once there is an adjudication of a dispute between parties, res judicata prevents either party from relitigating claims arising from the original circumstances. . . ." *Id.* at 837.

Here, Juelich and Thoemke's request for attorney fees after resolution of the 2018 appeal arises out of a completely different set of circumstances than the earlier claim. In its 2018 appeal, TLM sought review of the district court's award of $217,209.11 incurred up until that appeal. The present issue concerns attorney fees incurred *after* the 2018 appeal was commenced.

Res judicata also requires that there be a "subsequent action." *Id.* at 840. The additional attorney fees awarded and challenged in this appeal are all part of the same action that originated in 2012. Res judicata has no application here.

We generally refuse to consider issues not raised in the district court, and a party may not "obtain review by raising the same general issue litigated below but under a different theory." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). In its brief, TLM argues that Juelich and Thoemke cannot recover additional attorney fees "because they failed to properly raise and preserve these claims." Although TLM's response to Juelich and Thoemke's motion for additional attorney fees presents a myriad of arguments, the record does not reflect that TLM argued that Juelich and Thoemke "failed to preserve their claims for other fees" to the district court. And nothing in the district court's order indicates that it addressed this issue in awarding additional attorney fees.

Although the "failure to preserve" argument is not properly before this court, it seems to dovetail with TLM's next argument—that Juelich and Thoemke's "post-appeal motion for fees is untimely under" Minn. R. Civ. App. P. 139.06.[1]

[1] The Minnesota Rules of Civil Appellate Procedure were reordered and renumbered by the Minnesota Supreme Court effective September 1, 2019, and the provisions of the

Minn. R. Civ. App. P. 139.06, subd. 1, provided that "[a] party seeking attorneys' fees on appeal shall submit such a request by motion under Rule 127." Rule 139.03 imposed a 15-day limitation for the application to be submitted to the court of appeals. Minn. R. Civ. App. P. 139.03. If a party fails to request fees, the request is deemed waived. *Id.* However, Minn. R. Gen. Prac. 119, which governs the procedure for requesting attorney fees in district court, is silent on the length of time a party has to request attorney fees.

TLM contends that, because we issued our decision on September 4, 2018, Juelich and Thoemke were required to request any and all attorney fees under Minn. R. Civ. App. P. 139 by September 19, 2018, and that they waived their right to request fees when they failed to do so. TLM argues that rule 139.06 should be strictly construed to read that "[*a*]*ll* motions for fees *must* be submitted no later than [within]" the 15 days provided. Juelich and Thoemke's fee petition was made under Minn. R. Gen. Prac. 119.02. Juelich and

---

former rule 139.06 now appear in rule 139.05. *See Order Promulgating Amendments to the Rules of Civil Appellate Procedure*, No. ADM09-8006 (Minn. May 30, 2019). As part of that same reorganization, the timing provision formerly contained in rule 139.03, requiring applications for attorney fees on appeal to be served and filed within 15 days, has been moved to rule 139.03, subdivision 1, and the period within which the application for attorney fees must be served and filed has been amended. Minn. R. Civ. App. P. 139.03, subd. 1 (requiring a party seeking costs and disbursements on appeal to "file and serve a notice of taxation of costs and disbursements within 14 days of the filing of the court's order or decision"); Minn. R. Civ. App. P. 139.05, subd. 1 (requiring that any request for attorney fees "must be submitted no later than within the time for taxation of costs, or such other period of time as the court directs"). Because this rule change became effective after the award of fees from which this appeal is taken and after the parties had fully briefed this appeal, we refer herein to the rules as they formerly existed and were numbered. Neither the alteration of the timing requirement for fee applications nor any other detail of the reorganization of the rules has any effect on the outcome of this appeal.

Thoemke moved the district court to award attorney fees and costs incurred both on appeal and in the bankruptcy and district court. As discussed below, the district court declined to award attorney fees incurred on appeal and in the bankruptcy case.

The district court properly determined that the former Minn. R. Civ. App. P. 139.06 applies only to attorney fees on appeal. It has no application to fees incurred before the district court or the bankruptcy court. Juelich and Thoemke's request for fees was not subject to the 15-day limitation under the former Minn. R. Civ. App. P. 139.06. The applicable timing rule is Minn. R. Gen. Prac. 119.02.

The district court abused its discretion by awarding Juelich and Thoemke an additional $54,464 .25 in attorney fees.

TLM argues that the district court misapplied the lodestar method because it failed to make an independent determination in computing the fee award and in awarding attorney fees of $54,464.25.

Appellate courts review an award of attorney fees for an abuse of discretion. *Kvidera v. Rotation Eng'g & Mfg. Co.*, 705 N.W.2d 416, 424 (Minn. App. 2005). "An abuse of discretion occurs when a district court errs as a matter of law in applying improper standards in an award of fees." *Green v. BMW of N. Am., LLC*, 826 N.W.2d 530, 534-35 (Minn. 2013) (quotation omitted). "We will not set aside a district court's factual findings underlying an award of attorney fees unless they are clearly erroneous." *County of Dakota v. Cameron*, 839 N.W.2d 700, 711 (Minn. 2013) (quotation omitted).

In general, Minnesota courts use the lodestar method when determining the reasonableness of statutory attorney fees. *Green*, 826 N.W.2d at 535. The lodestar method

requires a district court to "determine the number of hours reasonably expended on the litigation and multiply that number by a reasonable hourly rate." *Dakota*, 839 N.W.2d at 711 (quotations omitted). The district court must consider all relevant circumstances when evaluating the reasonableness of the hours extended by the attorneys and their hourly rates. *Green*, 826.N.W.2d at 536. Such relevant circumstances include: "the time and labor required; the nature and difficulty of the responsibility assumed; the amount involved and the results obtained; the fees customarily charged for similar legal services; the experience, reputation, and ability of counsel; and the fee arrangement existing between counsel and the client." *Id.* (quotations omitted).

At a November 15, 2018 motion hearing, Juelich and Thoemke argued to the district court that they were entitled to $100,035.50 for attorney fees incurred on appeal, in the bankruptcy court, and in the district court. Counsel for Juelich and Thoemke stated that he "created a spreadsheet" that documented the breakdown of the fees incurred in each court. Counsel indicated that he "didn't print [the spreadsheet] off," but that he could "certainly give it to the [c]ourt afterwards." The record does not contain the spreadsheet, and nothing in the record shows that the district court was actually provided with the spreadsheet or any other breakdown of attorney fees.

During the hearing, the district court asked Juelich and Thoemke's counsel which portions of the $100,035.50 request consisted of fees incurred in the bankruptcy court and fees incurred in the court of appeals. In its order, the district court provided that, "[a]t the hearing, [respondents'] counsel stated that $38,746.50 out of the $100,035.50 total accounts for attorneys' fees incurred on appeal, $6,824.75 out of the total accounts for

attorneys' fees in connection with the bankruptcy proceedings." The district court concluded that "the remaining $54,464.25 accounts for attorneys' fees incurred in district court proceedings."

On this record, it is difficult to discern how the district court could have done a proper lodestar analysis because the record does not show that the district court independently determined the attorney-fee award. It seems to have accepted counsel's unsworn and otherwise undocumented assertion that $54,464.25 of the total claimed fees were for legal services before the district court. The time log containing fee requests submitted by Juelich and Thoemke's counsel makes no distinction between the attorney fees incurred on appeal, in the bankruptcy court, or in the district court. Nearly every fee entry is labeled "Toyota-Lift Appeal/Debtor in Possession."

In the final analysis, the error is attributable to Juelich and Thoemke, who failed to provide the district court with adequate evidence to show what attorney fees they actually incurred in district court. The record shows the *total* attorney fees included in the time log between May 3, 2017, and February 2, 2018, to be approximately $31,901.50, not $54,464.25—the amount asserted by counsel for Juelich and Thoemke. In other words, the total amount of attorney fees reflected by the time log comes up some $22,000 short of the amount counsel indicated would be reflected by the undisclosed spreadsheet. The district court was never provided with admissible evidence identifying the amount of attorney fees incurred in the district court after the earlier appeal.

At oral argument, Juelich and Thoemke's counsel seemed to reference TLM's motion filed in response to Juelich and Thoemke's request for attorney fees as providing

some support for the $54,464.25 calculation. Review of the motion, however, indicates that TLM disputed the claimed attorney fees in their entirety. Moreover, TLM notes that Juelich and Thoemke were billed on one date for a 1.1-hour "telephone conference." Although labeled "telephone conference," Juelich and Thoemke's counsel conceded that the billing entry was nothing more than a voicemail. Absent the spreadsheet or other evidence, it is impossible to know on this record how the attorney-fee request was computed.

Because it did not conduct and could not have conducted a proper lodestar analysis on this record, the district court exceeded its discretion when it awarded Juelich and Thoemke $54,464.25 in additional attorney fees. The record provided to the district court is insufficient to support any award of fees, and we therefore reverse the award without remand.

The district court did not err by declining to award Juelich and Thoemke attorney fees incurred before the court of appeals and the U.S. Bankruptcy Court.

By notice of related appeal, Juelich and Thoemke challenge the district court's determination that Juelich and Thoemke may not recover attorney fees incurred in the earlier appeal because they did not move the court of appeals for attorney fees under rule 139.06.

As stated above, rule 139.06 provided that, when a party seeks attorney fees on appeal, that party "*shall* submit such a request by motion under Rule 127." Minn. R. Civ. App. P. 139.06 (emphasis added); *see* Minn. Stat. § 645.44, subd. 16 (2018) (defining "shall" is mandatory). The rule stated that motions for such fees "must include sufficient

documentation to enable the *appellate court* to determine the appropriate amount of fees." *Id.* (emphasis added).

The district court noted that the advisory committee comments from the 1998 amendments to rule 139 state that "[i]f a party seeks an award of attorneys' fees for work done on the appeal, as opposed to seeking appellate court affirmance of an award made below, the party should seek the award in the appellate court." Minn. R. Civ. App. P. 139.06 1998 advisory committee note. In its order, the district court reasoned that, "[e]ven where the Minnesota Supreme Court interpreted the attorneys' fees provision in Minnesota's eminent domain statute to include fees incurred in the appellate court, the court still noted that the petitioner 'shall comply with the requirements of Minn. R. Civ. App. P. 127 and 139.06.'" *See DeCook v. Rochester Int'l Airport Joint Zoning Bd.*, 811 N.W.2d 610, 616 (Minn. 2012).

Juelich and Thoemke argue that the district court erred in its determination because their "right to attorney fees comes from Minn. Stat. § 181.171." However, as the district court determined, the language of the former Minn. R. Civ. App. P. 139.06 is clear: "shall" is not discretionary. We agree with the district court that Juelich and Thoemke should have moved for attorney fees in the court of appeals. Because they failed to do so, the district court did not err in denying Juelich and Thoemke's motion for attorney fees incurred on appeal.

Additionally, the district court declined to award Juelich and Thoemke attorney fees for legal fees and costs incurred in the bankruptcy case. Minn. Stat. § 181.171, subd. 3, provides that "[i]n *an action* brought under" the payment of wages act, "the court shall

order an employer who is found to have committed a violation to pay the aggrieved party . . . attorney fees." "In construing the statutes of this state, . . . words and phrases are construed according to rules of grammar and according to their common and approved usage . . . ." Minn. Stat. § 645.08(1) (2018).

Based on the plain language of the statute, the district court reasoned that "[t]he dispositive word within Minn. Stat. § 181.171 is 'an.'" The district court observed that the "normal grammatical understanding of a singular article is just that, singular," and that "the most reasonable interpretation is to conclude that attorneys' fees are only recoverable in the singular action in which a litigant seeks redress for violations of the Payment of Wages Act." The attorney fees eligible for award under Minn. Stat. § 181.171 are those incurred in the action under that section.

Juelich and Thoemke nonetheless assert that the bankruptcy action and this case are "inextricably linked." They cite no caselaw or legal authority in support of this contention. Although the cases may be related, the district court's reasoning is sound. Fees in the bankruptcy court were not incurred in the state court action. The district court did not err in declining to grant attorney fees incurred in the bankruptcy case.

Affirmed in part and reversed in part.