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STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0703

Hayley Elizabeth Kytta,
Appellant,

vs.

Corey Strecker,
Respondent.

Filed December 9, 2019
Affirmed in part and reversed in part
Hooten, Judge

Hennepin County District Court
File No. 27-CV-17-12116

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Considered and decided by Hooten, Presiding Judge; Cleary, Chief Judge; and Worke, Judge.

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

HOOTEN, Judge

Appellant challenges the district court's affirmance of the district court administrator's award to respondent for disbursements incurred on his behalf by his automobile liability insurer as part of respondent's defense and the district court's

additional award for costs and attorney fees incurred by the insurer during the appeal of the district court administrator's award. Appellant argues that the district court erred when it affirmed the award of disbursements paid by the insurer as the statute authorizing disbursements paid or incurred by the prevailing party, Minn. Stat. § 549.04, subd. 1 (2018), must be narrowly construed to limit the recovery of disbursements to those personally paid or incurred by the prevailing party. We affirm in part and reverse in part.

FACTS

In March of 2013, appellant Hayley Elizabeth Kytta and respondent Corey Strecker were involved in a car accident. Shortly after, Kytta sued Strecker, alleging that the car accident left her with a permanent injury. In July 2018, a jury returned a verdict finding that Strecker was not responsible for Kytta's injury. One week later, Strecker, as the prevailing party, filed a notice and application for taxation of costs and disbursements as permitted under Minn. Stat. §§ 549.02, subd. 1, .04, subd. 1 (2018), with the district court administrator. Strecker requested the amount of the disbursements paid and incurred by his automobile liability insurer, State Farm, on his behalf. The district court filed an order for judgment on the merits from the jury trial on October 1, 2018, and found Strecker was entitled to reasonable costs and disbursements without indicating the amount of the award.

One week later, Kytta filed an objection to the award of costs and disbursements requested by Strecker, claiming that only prevailing parties are entitled to reasonable disbursements under Minn. Stat. § 549.04, subd. 1, and that there was no evidence to suggest that Strecker personally incurred any disbursements during the proceeding as State Farm funded his entire defense. Nevertheless, on October 16, 2018, the district court

administrator awarded the requested amount of $5,440.37 to Strecker. Kytta timely appealed the court administrator's award of fees and costs to the district court.

On January 24, 2019, the district court affirmed the court administrator's award of $5,440.37[1] to Strecker and awarded Strecker an additional $80 in costs, as well as $900 in attorney fees associated with the appeal of the administrator's award to the district court. On March 21, 2019, the district court entered judgment on the January 24, 2019 order that ordered Kytta to pay Strecker a total of $6,420.37. This appeal followed.

D E C I S I O N

I. Kytta's appeal of the district court's judgment on the award of disbursements is timely.

Strecker argues that this appeal is untimely and therefore Kytta has waived her right to contest Strecker's disbursements. This court reviews matters of jurisdiction and statutory interpretation de novo. *In re Comm'r of Pub. Safety*, 735 N.W.2d 706, 710 (Minn. 2007) (providing jurisdiction is a question of law that appellate courts review de novo).

An appeal may be taken by this court from a final judgment. Minn. R. Civ. App. P. 103.03(a). Unless a different statutory deadline applies, an appeal must be "from a judgment within 60 days after its entry." Minn. R. Civ. App. P. 104.01, subd. 1.

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[1] The award of $5,440.37 is based on the award of $5,234.87 in disbursements authorized under Minn. Stat. § 549.04, subd. 1, and $205.50 in statutory costs authorized under Minn. Stat. § 549.02, subd. 1. Kytta's appeal is limited to the language of Minn. Stat. § 549.04, subd. 1, and therefore only relates to the disbursements authorized thereunder. As Kytta fails to raise any arguments regarding Strecker's entitlement to the $205.50 in statutory costs, we decline to consider it. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate courts generally will not consider matters not argued to and considered by the district court).

On January 24, 2019, the district court issued an order awarding the disbursements paid or incurred on behalf of Strecker by State Farm. On March 21, 2019, the district court entered a final judgment on this order. Kytta filed her appeal of the district court's judgment on May 7, 2019—47 days after the judgment was entered.

As the district court's cost and disbursement judgment is independently appealable as a final judgment under Minn. R. Civ. App. P. 103.03(a), and Kytta's appeal to this court was filed within the 60-day window allowed by Minn. R. Civ. App. P. 104.01, subd. 1, her appeal is timely.

II. The district court did not err when it construed Minn. Stat. § 549.04, subd. 1, to allow the prevailing party to collect reasonable disbursements paid or incurred, even when the disbursements were paid or incurred by the prevailing party's insurer.

Kytta argues that the district court erred when it affirmed the court administrator's award of disbursements to Strecker because Minn. Stat. § 549.04, subd. 1, authorizes only a prevailing party to collect reasonable disbursements *personally* paid or incurred during litigation. Although State Farm paid and incurred reasonable disbursements associated with Strecker's defense—disbursements for which Strecker would be otherwise liable—Kytta contends that Strecker is not statutorily authorized to recover any disbursements as he did not personally incur them over the course of the litigation.

A. Minn. Stat. § 549.04, subd. 1, should be narrowly construed.

"[L]egislation abrogating the common law must be narrowly construed." *Renswick v. Wenzel*, 819 N.W.2d 198, 210 (Minn. App. 2012), *review denied* (Minn. Oct. 16, 2012). We do not presume that the "Legislature intends to abrogate or modify a common law rule

except to the extent expressly declared or clearly indicated in the statute." *Staab v. Diocese of St. Cloud*, 813 N.W.2d 68, 73 (Minn. 2012). Instead, a court "must carefully examine the express wording of the statute to determine the nature and extent to which the statute modifies the common law." *Id.*

The ability of a prevailing party to recover reasonable disbursements paid or incurred by the prevailing party is a right not recognized at common law. *State ex rel. Wrabek v. Tifft*, 240 N.W. 354, 354 (Minn. 1931). This form of recovery is authorized by Minn. Stat. § 549.04, subd. 1, which reads in relevant part, "In every action in a district court, the prevailing party . . . shall be allowed reasonable disbursements paid or incurred . . . ."

"The first step in interpreting a statute is to examine the language to determine whether it is clear and unambiguous." *A.A.A. v. Minn. Dep't of Human Servs.*, 832 N.W.2d 816, 819 (Minn. 2013). Statutory words and phrases are ambiguous if they are susceptible to more than one reasonable interpretation. *State v. Peck*, 773 N.W.2d 768, 772 (Minn. 2009). If more than one reasonable interpretation exists, a court must apply the canons of construction to ascertain the legislative intent. *State v. Thonesavanh*, 904 N.W.2d 432, 435 (Minn. 2017). When a statute is unambiguous, appellate courts give the words and phrases their plain and ordinary meaning. *A.A.A.*, 832 N.W.2d at 819. Where ambiguity exists between the plain meaning of a word and words that have acquired a special meaning, those terms "are construed according to such special meaning." Minn. Stat. § 645.08(1) (2018). Therefore, narrowly construing a statute does not prohibit a court from

interpreting words and phrases that have acquired special meanings in accordance with those meanings. *Staab*, 813 N.W.2d at 73–74.

Kytta argues that a narrow construction of Minn. Stat. § 549.04, subd. 1, requires us to recognize an unspoken restriction that allows for the recovery of reasonable disbursements paid or incurred *only* by those who: (1) were a party in the litigation, and (2) personally paid or incurred an expense associated with their role as a party. And yet, a narrow construction of a statute is not always synonymous with simply determining the plain meaning of the words.

In *Staab*, the Minnesota Supreme Court noted that where words or phrases are not defined in a statute that abrogates the common law, a court must determine if the words have acquired a special meaning under the common law and then interpret the words in light of those determinations. 813 N.W.2d at 74. Absent clearly expressed legislative intent, definitions crafted by the common law should be preserved. *Id*. at 73.

As Minn. Stat. § 549.04, subd. 1, is in abrogation of the common law, Kytta is correct that we must narrowly construe it. However, we are not free to end our analysis with the plain meanings of the words in the statute. Instead, we must determine whether any words or phrases have acquired a special meaning or definition under the common law and then interpret the statute in light of those meanings. *See Staab*, 813 N.W.2d at 74; Minn. Stat. § 645.08(1).

B. The insurer of a prevailing party is not a prevailing party under Minn. Stat. § 549.04, subd. 1.

Kytta argues that State Farm cannot recover reasonable disbursements paid or incurred in defense of Strecker because a third-party insurer is not a prevailing party under Minn. Stat. § 549.04, subd. 1.

Minn. Stat. § 549.04, subd. 1, reads, "[i]n every action in a district court, the *prevailing party* . . . shall be allowed reasonable disbursements paid or incurred . . . ." (Emphasis added.) The Minnesota Supreme Court recognizes that the phrase "prevailing party" has acquired a special meaning as one "who has, in the view of the law, succeeded in the action," in that he or she is the party ''in whose favor the decision or verdict is rendered and judgment entered." *Borchert v. Maloney*, 581 N.W.2d 838, 840 (Minn. 1998) (quotation omitted). Additionally, Minnesota does not recognize a direct cause of action whereby a plaintiff can sue an insurer. *Miller v. Market Men's Mut. Ins. Co*., 115 N.W.2d 266, 268 (Minn. 1962).

By narrowly construing Minn. Stat. § 549.04, subd. 1, in accordance with the supreme court's definition of "prevailing party" as a party in whose favor the decision or verdict is rendered and judgment entered, a third-party insurer of a prevailing party is not a prevailing party. Here, Strecker, and not State Farm, was the prevailing party awarded reasonable disbursements by the district court.

C. Reasonable disbursements paid or incurred include those paid or incurred by a third-party contractually obligated to fund a party's defense.

Where a prevailing party becomes liable for, or subject to, litigation expenses, they incur those disbursements. *Staffing Specifix, Inc. v. TempWorks Mgmt. Servs., Inc.*, 896

N.W.2d 115, 128 (Minn. App. 2017), *aff'd on other grounds*, 913 N.W.2d 687 (Minn. 2018). This is true even though an insurer commonly pays all sums for which the insured becomes legally obliged in accordance with the terms of the insurance contract. *See*, *e.g.*, *Minn. Mining & Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175, 181 (Minn. 1990) (providing that insurers agree to pay, on behalf of the insured, any damages to another party arising from the policy's coverage).

Kytta contends that by allowing a prevailing party to recover disbursements paid or incurred by a third-party insurer in the defense of the prevailing party, a court impermissibly reads the words "paid or incurred *on behalf of the prevailing party*" into the statute where they do not exist.

The Minnesota Supreme Court has expressly concluded "[t]he definition of incur is '*to become liable for*.'" *Collins v. Farmers Ins. Exch.*, 135 N.W.2d 503, 507 (Minn. 1965) (emphasis added); *see also Staffing Specifix*, 896 N.W.2d at 128 (interpreting "incurred" as an unambiguous term meaning to become liable or subject to expenses). We therefore apply the special meaning of "incur" to the statute. Under this definition of "incurred," Minn. Stat. § 549.04, subd. 1, authorizes a prevailing party to recover disbursements paid or incurred by a contractually-obligated third party in the defense of a prevailing party—including through an insurance policy.

An insurer's "duty to defend an insured on a claim arises when any part of the claim is arguably within the scope of the policy's coverage." *Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161, 165 (Minn. 1986) (quotation omitted). This is a duty based on a

contractual relationship between the insured and the insurer. *Meadowbrook, Inc. v. Tower Ins. Co., Inc.*, 559 N.W.2d 411, 415 (Minn. 1997).

Strecker and State Farm entered into a contract for automobile insurance that was in effect on the date of the accident with Kytta. In exchange for a monthly premium, the terms of the policy gave State Farm the right and obligation to "defend an insured in any claim or lawsuit, with attorneys chosen by [State Farm]; and appeal any award or legal decision for damages payable under this policy." The policy also provided that State Farm "will pay . . . [a]ttorney fees for attorneys chosen by [State Farm] to defend an insured . . . and [c]ourt costs awarded by the court against an insured."

As the car accident fell within the scope of coverage under Strecker's policy, State Farm was contractually obligated to provide for Strecker's defense—paying and incurring reasonable disbursements for which Strecker would be otherwise personally obligated. But for this contractual relationship between Strecker and State Farm, Strecker would be personally and solely liable for his defense. Applying the Minnesota Supreme Court's definition of incur as "to become liable for," State Farm became liable to Strecker to pay for Strecker's defense by the very nature of the insurance contract into which they both entered.

Nevertheless, Kytta argues that the Minnesota Supreme Court's decision in *Dukowitz v. Hannon Security Services*, 841 N.W.2d 147 (Minn. 2014), requires us to interpret Minn. Stat. § 549.04, subd. 1, to only authorize disbursements paid or incurred personally by the prevailing party. In *Dukowitz*, the supreme court held that the district court was not allowed to consider a non-prevailing party's financial status when it assessed

what disbursements were reasonable under Minn. Stat. § 549.04, subd. 1. *Dukowitz v. Hannon Sec. Servs.*, 841 N.W.2d 147 (Minn. 2014). In its discussion, the supreme court construed the statute to make it clearer that the "reasonableness" provision applies to the disbursements "'paid or incurred' *by* the prevailing party." *Id.* at 155 (emphasis added). Kytta claims that the supreme court's use of the word "by" in *Dukowitz*, a word not in the statute itself, supports the proposition that only disbursements paid or incurred by the prevailing party are authorized. Yet, this interpretation would also require us to read the word "by" into the statute. Furthermore, *Dukowitz* simply does not address the supreme court's broad definition of "incurred."

Agreements between parties and non-parties that implicate the funding of legal proceedings are exceptionally common. Indeed, contingency fee agreements in personal injury cases may create a contractual relationship between an attorney and a client whereby an attorney agrees to pay or incur disbursements that would otherwise be the responsibility of the client. *See* Minn. R. Prof. Conduct 1.5(c) (providing for contingency fee agreements). Under Kytta's interpretation, a client would be prohibited from taxing disbursements paid or incurred by an attorney working under a contingency fee agreement. The consequence of this prohibition could render a prevailing client whose attorney paid the disbursements associated with the litigation unable to recover those disbursements and, at the same time, spare the non-prevailing party from any such debt. This burden shifting is contrary to the intent of the statute, which allows a prevailing party to tax reasonable disbursements from the non-prevailing party. As limiting the statute in such a way would lead to an absurd result in light of the exceptionally common practice of contingency fee

agreements, we must determine that the legislature did not intend to reshape taxation of costs absent explicit instructions to the contrary. *See* Minn. Stat. § 645.17(1) (2018) (stating that when construing a statute, we must presume that "the legislature does not intend a result that is absurd, impossible of execution, or unreasonable").

Because "incurred" has been interpreted by the Minnesota Supreme Court to mean "become liable for," a narrow construction of Minn. Stat. § 549.04, subd. 1, authorizes a prevailing party to tax reasonable disbursements paid or incurred by a third party who agrees to pay for the expenses of a prevailing party. Therefore, the district court did not err when it affirmed the disbursements award to Strecker.

As the prevailing party is allowed to recover reasonable costs and disbursements paid or incurred under Minn. Stat. § 549.04, subd. 1, even if such costs and disbursements were paid or incurred by an automobile liability insurer, the district court did not abuse its discretion when it affirmed the district court administrator's October 16, 2018 disbursements award.

III. The district court abused its discretion by awarding attorney fees in conjunction with Kytta's appeal of the administrator's award to the district court.

Kytta argues that the district court abused its discretion when it awarded attorney fees to Strecker associated with Kytta's appeal of the district court administrator's disbursements award to the district court.

"Costs and disbursements shall be allowed as provided by law." Minn. R. Civ. P. 54.04(a). An award of costs and disbursements is a matter within the district court's sound discretion and will not be disturbed absent an abuse of that discretion. *Lake Superior Ctr.*

Auth. v. Hammel, Green & Abrahamson, Inc., 715 N.W.2d 458, 482 (Minn. App. 2006), *review denied* (Minn. Aug. 23, 2006). "A court abuses its discretion when its decision is based on an erroneous view of the law . . . ." *Riley v. State*, 792 N.W.2d 831, 833 (Minn. 2011).

"An award of attorney fees must be authorized by statute or contract." *Swenson v. Bender*, 764 N.W.2d 596, 604 (Minn. App. 2009), *review denied* (Minn. July 22, 2009). Although a district court may award attorney fees sua sponte as a sanction, the district court must describe the party's conduct so as to merit the sanction. *Id.* at 605; *see also* Minn. Stat. § 549.211, subd. 3 (2018) (authorizing sanctions in civil actions); Minn. R. Civ. P. 11.03(a)(2) (requiring a court to describe the specific conduct that warrants the sua sponte award of sanctions).

At the January 24, 2019 hearing, the district court awarded Strecker an additional $900 in attorney fees[2] incurred by Strecker for Kytta's appeal of the district court administrator's award. This request was made in a responsive memorandum submitted by Strecker to the district court. The district court did not indicate the authority upon which it relied for its award of $900 in attorney fees to Strecker. There is also no evidence in the record describing any conduct by Kytta that would merit the sua sponte award of sanction-based attorney fees under Minn. R. Civ. P. 11.03(a)(2). As attorney fees are not specifically

[2] Kytta did not address whether or not Strecker was entitled to the award of $80 in costs associated with the appeal of the district court administrator's award. Accordingly, Kytta waived this argument. *See McKenzie v. State*, 583 N.W.2d 744, 746 n.1 (Minn. 1998) (applying the rule that arguments not briefed are waived in an appeal in which the appellant "allude[d] to" an issue but "fail[ed] to address [it] in the argument portion of his brief").

authorized under Minn. Stat. § 549.04, subd. 1, and the district court did not describe the requisite conduct for a sanction-based award, the district court erred when it awarded $900 in unauthorized attorney fees to Strecker. This error constitutes an abuse of discretion.

Because we conclude that Minn. Stat. § 549.04, subd. 1, authorizes a prevailing party to tax reasonable disbursements paid or incurred in his or her proceeding, even if the disbursements are paid or incurred on behalf of the prevailing party by a third-party automobile liability insurer, we affirm the district court's affirmance of the district court administrator's disbursements award to Strecker. However, because the district court's award of attorney fees was not authorized by statute, we reverse the district court's award of $900 in attorney fees to Strecker.

Affirmed in part and reversed in part.