

NO. A11-1539

State of Minnesota
In Court of Appeals

George E. Effrem, et al.,

Appellants,

v.

Paul C. Effrem,

Defendant,

Saliterman & Siefferman, P.C., interested observer,

Respondent.

**APPELLANTS' REPLY BRIEF AND
SUPPLEMENTAL APPENDIX**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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ARGUMENT

I. A de novo Standard of Review applies to statutory interpretation of Minn. Stat. § 481.13.

The issue before this Court is one of statutory interpretation: whether the attorney-lien statute, Minn. Stat. § 481.13 (2010), provides for an award of collection costs and attorney's fees incurred in establishing an attorney's lien. "Interpretation of the attorney-lien statute presents a question of law, which [this Court] review[s] de novo." *Dorsey & Whitney LLP, v. Grossman*, 749 N.W.2d 409, 420 (Minn. App. 2008). That a de novo standard of review applies to the interpretation and application of the attorney-lien statute is well settled and beyond debate. *See Thomas A. Foster & Associates, LTD v. Paulson*, 699 N.W.2d 1, 4 (Minn. App. 2005) ("Application of the attorney-lien statute is a question of law, which we review de novo."); *see, e.g., Brodsky v. Brodsky*, 733 N.W.2d 471, 477 (Minn. App. 2007) ("Questions of statutory interpretation and of the application of a statute to undisputed facts are questions of law this court reviews de novo."). Similarly, although "[q]uestions as to the validity of an attorney's lien are issues of fact," "[t]he issue of what method to use to calculate the amount of an attorney's lien is a question of law subject to de novo review." *Ashford v. Interstate Trucking Corp. of Am., Inc.*, 524 N.W.2d 500, 502 (Minn. App. 1994) (citing *In re L-tryptophan Cases*, 518 N.W.2d 616, 619 (Minn. App. 1994)); *see Foster*, 699 N.W.2d at 4 ("Although the reasonable value of attorney fees is a question of fact, when considering whether the district court employed the proper method to calculate the amount of an attorney lien, we undertake a de novo review.") (citation omitted).

A. The Saliterman Firm’s argument regarding the standard of review is misplaced and not supported by the controlling cases.

The Saliterman Firm argues, however, that the standard of review in this case should be clear error. In attempting to articulate why this Court should employ a clearly erroneous standard, the Saliterman Firm relies primarily on an unpublished decision, which merely states that the existence and amount of an attorney lien is a fact question (Respondent’s br. at 7). But the issue here is whether the attorney-lien statute provides for an award of collection costs. The Saliterman Firm also attempts to distinguish *Foster* and *L-tryptophan Cases*, asserting that “those cases [cited by the Effrems] state that the determination of a reasonable value of an attorney’s lien is a question of fact which should be upheld unless clearly erroneous.” (Respondent’s Brief at 7.) *Foster*, however, makes no mention of a clearly erroneous the standard. And in *In re L-tryptophan Cases*, the Court specifically rejected the argument that a clearly erroneous standard applied, stating that “[s]ince, however, the question on appeal in this case is the legal standard to apply to calculate RKMC’s attorney fees, our review is de novo.”

Here, the Effrems challenge the district court’s interpretation of Minn. Stat. § 481.13 and the district court’s method of calculating the Saliterman Firm’s attorney’s lien—particularly the inclusion of collection costs, attorney’s fees and interest in the lien amount. Because these are the issues squarely before this Court, a de novo standard of review applies.

Indeed, the Saliterman Firm acknowledges that one of the questions in front of this Court is “whether the district court was wrong to include collection costs in the Lien.”

(Respondent’s Brief at 8.) The Saliterman Firm’s concern is unfounded. The fact that matters of interpretation and application of the attorney-lien statute, or disputes as to the method of calculation, are questions of law reviewed de novo, does not deprive the district court of discretion over matters such as the dollar amount of an attorney’s lien, or whether an attorney lien is proper to begin with.¹

In sum, the question before this Court is one of statutory interpretation and the method for calculating an attorney’s lien, both of which, time and again, this Court has made clear is reviewed de novo.

B. The Saliterman Firm’s discussion regarding the abandoned *Boline* distinction between establishment versus enforcement of a lien is a red herring.

The Saliterman Firm argues that the Effrems’ reliance on *Boline v. Doty*, 345 N.W.2d 285 (Minn. App. 1984) is misplaced because it was “superseded.” (Respondent’s br. at 9). The Saliterman Firm goes to great lengths to discuss the old statute and the framework it had for establishing and enforcing an attorney’s lien. But the Effrems have not challenged on appeal any issues regarding the establishment or enforcement of the Lien. Moreover, *Foster* specifically cites to *Boline*, which remains “good law” for the proposition that the application of the statute is reviewed de novo, notwithstanding the statutory change that the Saliterman Firm allege suspended *Boline*. Thus, the Saliterman Firm’s argument with respect to *Boline* is misplaced and without merit.

¹ If the statute were to expressly provide for the inclusion of the attorney’s fees and collection costs incurred in establishing a lien—and it is the Effrems’ position that it does not—then the district court might have discretion to allow or disallow such recovery.

II. The Saliterman Firm's assertion that the district court has discretion to include a law firm's collection costs in an attorney's lien under Minn. Stat. 481.13 is not supported by the statute or case law.

The Saliterman Firm asserts that “[a]s a general rule, the district court has the discretion to include a law firm’s collection costs in an attorney’s lien under Minn. Stat. 481.13.” (Respondent’s Brief at p. 10.) The Saliterman Firm then cites to the unpublished decisions *In the Matter of M. Arnold Lyons Family Trust*, 2009 WL 1311912 (Minn. App. May 12, 2009) and *1010 Metrodome Square, LLC v. U.S. Bank, N.A.*, 2007 WL 6336440 (Minn. Dist. Ct. Nov. 30, 2007) as support for its alleged “general rule.” However, district court opinions are not controlling precedent, and this Court’s unpublished decisions are not precedential, are non-binding, and persuasive at best. *See Vlahos v. R & I Constr. of Bloomington, Inc.*, 676 N.W.2d 672, 676 n.3 (Minn. 2004) (“[U]npublished opinions of the court of appeals are not precedential. The danger of miscitation is great because unpublished decisions rarely contain a full recitation of the facts. Unpublished decisions should not be cited by the district courts as binding precedent.”) (citations omitted). The district court recognized in its June 24, 2011 Order that “Section 481.13 does not authorize this Court to provide for the recovery of attorney’s fees,” but it too relied on the two unpublished decisions cited above to justify the inclusion of collection costs and attorney’s fees in the Lien. (ADD.12) This not only contradicts its conclusion that Section 481.13 did not allow for the recovery of attorney’s fees, it ignores the fact that these cases are distinguishable, as discussed in the Effrems’ opening brief. Even though this is a case of first impression to this Court, instead of making an argument in favor of allowing the inclusion of these collection costs and

attorney's fees, the Saliterman Firm would rather this Court take as binding a default judgment issued by the Hennepin County District Court and an unpublished Court of Appeals decision that did not specifically address this issue in any form or fashion.

Yet the fact remains that a plain reading of the statute shows that collection costs and attorney's fees incurred in establishing an attorney's lien are not expressly authorized as recoverable under Minn. Stat. § 481.13. Therefore, the district court's decision must be reversed.

The Saliterman Firm attempts to manufacture an argument that the Effrems did not make. The Saliterman Firm asserts that the Effrems argue that "Section 481.13 provides for recovery only in 'summary proceedings,' and these are not summary proceedings because they have taken too long, so compensation cannot include collection costs." (Respondent's br. at 12). This mischaracterized argument is nowhere in the Effrems initial brief. The Effrems have never conceded that Section 481.13 provides for recovery of collection costs and attorney's fees under any circumstance, summary proceeding or not. Rather, the Effrems argue that by allowing an attorney a summary proceeding to establish their lien, the legislature intended to provide attorneys the right to a quick and inexpensive summary proceeding in order to avoid incurring additional and significant attorney's fees in establishing an attorney's lien and determining its amount, thus eliminating the need to provide for recovery of attorney's fees and collection costs in Section 481.13. This is evident in the statute's plain language, which makes no reference to the recovery of collection or attorney's fees on its face.

While the Saliterman Firm alleges that “Petitioners’ statutory construction argument that collection costs are not compensation under Section 481.13 is contrary to law,” the Saliterman Firm fails to cite any binding authority for their assertion, or even case law that specifically addresses this issue. Instead, the Saliterman Firm cites to *Barr/Nelson v. Tonto’s, Inc.*, 336 N.W.2d 46, 53 (Minn. 1983) for the proposition that “inclusion of collections costs need not be expressly authorized by statute if they are permitted by a retainer agreement.” This is a curious argument given the fact that *Barr/Nelson* was a breach-of-contract case, not an attorney’s lien case and in no way addressed attorney retainer agreements. After reiterating the law that “attorney’s fees are not recoverable in litigation unless there is a specific contract permitting or a statute authorizing such recovery,” the *Barr/Nelson* Court specifically looked to the contract *under which the parties sued* to determine if the contract allowed for recovery of fees in that litigation. (See generally *Id.*) Here, regardless of the fact that there is a retainer agreement between the parties², the Saliterman Firm did not sue the Effrems under the retainer agreement, and thus the retainer agreement is not controlling, which means that in order for the Saliterman Firm to recover its attorney’s fees and collection costs incurred in establishing its lien, Section 481.13 must expressly provide for it. And because Section 481.13 does not expressly provide for such recovery, the district court improperly included those amounts in the Saliterman Firm’s Lien.

² Section 481.13 provides that a lien exists whether the agreement between the parties for compensation is “express or implied.”

III. Contrary to the Saliterman Firm's assertion, the Effrems raised the argument that "compensation" under the statute does not include collection costs in the district court.

The Saliterman Firm asserts that the Effrems' argument that the lien statute's term "compensation" does not include collection costs, is not properly before this Court. The Saliterman Firm concedes that the Effrems' theory has always been that the lien statute does not authorize recovery in the district court collection costs, and as part of this theory, the Effrems have always argued that the statutory term "compensation" does not include collection costs. (See Respondent's br. at 14-15). But the Saliterman Firm asserts that the Effrems are barred on appeal from making their argument on the construction of "compensation," because they "did not raise this statutory interpretation [of the word "compensation"] argument before the District Court in its papers that the Court considered in issuing the Fifth Order." (Respondent's br. at 13). According to the Saliterman Firm, this Court "will not review an issue raised generally before the District Court, but argued under a new theory on appeal." (Id. at 14) (emphasis added) (citing *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (citing *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988)). In other words, the Saliterman Firm asserts that even though the Effrems specifically raised this argument concerning the meaning of "compensation" earlier in the district court proceedings, and they failed to re-argue this on the motion leading to the June 24, 2011 order (the so-called "Fifth Order"). Instead, the Effrems only argued generally that the statute does not allow for recovery of collection costs. (Respondent's br. at 13-15). Thus the Effrems' argument that the

compensation does not include collection costs is a new theory on appeal that the Court may not consider. (*Id.*).

But the Effrems' Memorandum of Law in Opposition to the Saliterman Firm's Rule 119 Motion (S.A. 5-9) that alluded to this argument made previously (*see* S.A. 11), and the transcript from the May 5, 2011 hearing on the motion that gave rise to the June 24 order, show that the Saliterman Firm's assertion is not true. (S.A. 1-9).³ In arguing at the May 5, 2011 motion that that the lien statute does not authorize an award of collection costs, the Effrems expressly raised the point that "compensation," on its face, does not include collection costs:

I'll start by -- my first argument with the fact that we're here pursuant to the statute. We're not here pursuant to a breach of contract claim. And the statute itself, as I pointed out in my memo previously, doesn't provide for any collection cost.

* * *

So that's -- I would just ask Your Honor to interpret the statute as it reads, you know, because there is no case law to give us really any guidance here. And it's not expressed. There's nothing in the statute that says -- *it just says ["compensation.["]* And, you know, if Your Honor can interpret that to include collection costs, you know, that's -- *I'm just asking you to interpret it on its face that that [i.e., "compensation"] doesn't include collection costs*, because it has to be expressed.

(T. 9-10) (May 5, 2011 hearing)); (S.A. 3-4) (emphasis added). And in the June 24 order currently on review, the district court considered and rejected (again) the Effrems' argument on this very point by referring to and incorporating its previous analysis from the April 12, 2011 Amended Order:

³ "S.A. #" refers to the Effrems' attached supplemental appendix.

Using this analysis, the Court awarded Saliterman an attorney's lien in the amount of \$46,277.73. (*See Amended Order, at 8-13.*) Following the guidance of previous courts which included collection costs in the amount of the attorney's lien, this Court also included collection costs in the amount of Saliterman's attorney's lien. (*See id., 12-13.*)

Pursuant to this reasoning, the Court finds that additional collection costs based on Saliterman's most recent additional billing statements may also be included in the amount of Saliterman's attorney's lien.

(ADD.14) (emphasis added). As stated immediately above, "this analysis" and "this reasoning" refers to that contained on pages 12-13 of the district court's April 12 "Amended Order." (*See id.*) On page 12 of the Amended Order, the district court described the argument raised by the Effrems: "Plaintiffs also argue that Saliterman may not recover collection costs under Minnesota Statutes Section 481.13, because *collection costs are not compensation.*" (ADD.42) (emphasis added); (*see also* ADD.59 (April 1 Order) (same).

Therefore, contrary to the Saliterman Firm's assertion, the Effrems expressly reargued the meaning of "compensation," on the record and in open court, in the proceedings specific to the June 24 order on review by this Court. And the district court considered and addressed it in the June 24 order adopting and by incorporating its earlier analysis and reasoning on their argument from the April 12 Amended Order. As a result, the Saliterman Firm's objections to appellate review are without merit.

And the Saliterman Firm cannot avoid this through its made-up rule that the Effrems had to expressly reargue this in their most recent motion papers. (Respondent's br. at 13). The Saliterman Firm cites no authority for this proposition, and the Effrems are aware of none. Yet even if such a rule as imagined by the Saliterman Firm existed,

nothing prohibits this Court from considering the Effrems' argument on the statutory meaning of "compensation," because it was undisputedly raised in the district court, and it is not a new theory raised for the first time on appeal.

Under the seminal case of *Thiele v. Stich*, 425 N.W.2d 580 (Minn. 1988), this Court "generally consider[s] only those issues that the record shows were presented and considered by the trial court in deciding the matter before it." *Id.* at 582. Likewise, "a party [may not] obtain review by raising the same general issue litigated below but under a different theory." *Id.*; see *Minnesota Mut. Fire & Cas. Co. v. Retrum*, 456 N.W.2d 719, 723 (Minn. App. 1990) ("Minnesota Mutual may not raise a new theory for the first time on appeal.") (citing *id.*).

Here, the Saliterman Firm concedes (Respondent's br. at 14-15) and the record substantiates that the Effrems' theory has always been that the statute does not provide for an award of collection costs, and that at the core of this theory, the Effrems argued that "compensation" does not include collection costs. (See, e.g., ADD.14, 42, 59; S.A.11). The Saliterman Firm cites no authority holding that even though a party undisputedly raised the argument before the district court, and the district court undisputedly considered it, it is deemed not raised in the district court unless expressly repeated in the most recent iteration of the underlying proceeding. See *Minnesota Mut.*, 456 N.W.2d at 723 (declining review where "this argument was *never* raised below") (emphasis added) (citing *Thiele*, 425 N.W.2d at 582). Indeed, the question of whether the statute provides for collection costs necessarily implicates the meaning and scope of the term compensation, because this Court fully reviews the construction of a statute,

beginning with the plain language. See *Grimm v. Comm'n of Pub. Safety*, 469 N.W.2d 746, 747 (Minn. App. 1991) (“The interpretation of a statute is at issue here. An appellate court may fully review the construction of a statute, which is a question of law. When the words of a statute are unambiguous, the court must give effect to the plain meaning of the statute.”). So there is no merit to the Saliterman Firm’s claim that the Effrems failed to raise this argument in the district court.

Moreover, this is not a novel or different theory on appeal. See *Genung v. Comm'r of Pub. Safety*, 589 N.W.2d 311, 313 (Minn. App. 1999) (“To argue a *different* theory on appeal typically precludes review.”) (emphasis added). To the contrary, the Effrems’ theory has always been that the statute does not authorize collection costs because they are not included in “compensation.” See, e.g., *Paglarini v. Owners Ins. Co.*, No. C6-00-1996, 2001 WL 826862, at *3 (Minn. App. July 24, 2001) (S.A.15) (rejecting respondent’s assertion that “even if [appellant]’s argument to the court raises the same general issue litigated below, it constitutes a ‘new theory,’” because the appellant’s “theory is the same as always * * * .”). The rationale behind the prohibition is in part to prevent parties from shifting theories on appeal or reviving an abandoned theory. *Mattson v. Underwriters at Lloyds of London*, 414 N.W.2d 717, 721-22 (Minn. 1987). Neither is the case here. The Effrems have never changed or abandoned their theory that collection costs are not recoverable under the statute, as evidenced by their consistent argument that compensation does not include collection costs.

In sum, contrary to the Saliterman Firm’s assertions, the Effrems’ argument that “compensation” does not include collection costs was raised in and considered by the

district court, and thus it does not constitute a new theory raised for the first time on appeal. Therefore, nothing prevents review by this Court.

IV. Public policy argument further supports the notion that the statute does not provide recovery of collection costs.

As discussed in their opening brief, the Effrems argue that the statute does not provide for an award of collection costs, including attorney's fees, as a matter of public policy. Otherwise, an attorney who charged excessive and unreasonable fees, which the Saliterman Firm acknowledges doing⁴, should not be rewarded by being allowed to recover their own attorney's fees and collection costs incurred post-representation when a client challenges those unreasonable fees and is successful in having almost half of those fees deemed unreasonable.

Instead of directly addressing this argument, the Saliterman Firm criticize the Effrems for not providing case support. (Respondent's br. 15). But case support is unnecessary for this straightforward point. The Saliterman Firm also accuses the Effrems of mischaracterizing the procedural history by ignoring the fact that the district court previously reduced the Saliterman Firm's lien based on unreasonable fees on three occasions. (Id.). But this does not address the Effrems' argument, above. Moreover, the fact remains that the district court originally awarded the Saliterman Firm a Lien in the amount of \$46,708.98, which included collection costs of \$9,655.20 of collection costs. (ADD.49). This means that \$37,053.78 of the Lien was for services that the Saliterman

⁴ The Saliterman Firm even reduced its own fees in its last motion in an attempt to show the judge they were not attempting to collect unreasonable fees that should not have been includable in the Lien anyway.

Firm performed for the Effrems. Thus, when the district court added an additional \$37,062.45 to the previous \$9,655.20, the Saliterman Firm was awarded a total of \$46,717.65 in attorney's fees, collection costs, and interest that it incurred in the summary proceeding to establish its Lien. Allowing the Saliterman Firm to recover collection costs and attorney's fees in the amount of \$46,717.65 is anathema to public policy because the Saliterman Firm was awarded more in collection costs and attorney's fees than it was awarded for actual services it billed in the representation of the Effrems in the underlying litigation. The interest of the public is not served by allowing an attorney to charge an unreasonable fee,⁵ and when the client challenges that unreasonable, the client is then required to pay for the attorney's collection costs and attorney's fees even if they successfully challenge the attorney's fees as unreasonable.

In sum, by the plain language of the attorney-lien statute, collection costs, including attorney's fees, incurred in pursuing a lien, are not recoverable as part of the attorney lien pursued under Minn. Stat. § 481.13. Additionally, public policy concerns weigh heavily against awarding collections costs incurred in connection with establishing an attorney's lien. Therefore, the Effrems respectfully ask this Court to reverse the district court's award of collection costs as part of the Saliterman Firm's attorney lien and exclude those collection costs, including attorney's fees, from the lien amount.

⁵ Minnesota Rules of Professional Conduct Rule 1.5 specifically prohibits attorneys from charging an unreasonable fee.

V. Alternatively, the Effrems argue that the Saliterman Firm's award of collection costs should be reduced consistent with other lien actions.

If this Court is inclined to find that Section 481.13 provides the district court with authority to include collection costs and attorney's fees incurred in establishing an attorney's lien in the lien amount, the Effrems argue in the alternative that this Court should remand to the district court with instructions that the Saliterman Firm's award of collection costs be reduced consistent with other lien actions.⁶

The Saliterman Firm asserts that "the policy behind these [mechanics-lien cases cited by the Effrems] cases is to encourage people to pursue their valid liens. When the claimant is the attorney, it makes no sense to reduce the amount of the attorney's fees." It is well settled that the mechanic's lien statute is in place to protect contractors and subcontractors from providing services and not getting paid for it. On its face the attorney's lien statute would appear to provide that same protection for attorneys. But the policy cited for not discouraging the award of attorney's fees in mechanic's lien cases is different because attorneys typically have the knowledge and ability to pursue a lien on their own behalf. This has to be balanced with the overwhelming weight of authorities that protect the attorneys' clients. Just as the courts go to great lengths not to discourage lien claimants from pursuing a lien, the courts also acknowledge that a lien claimant

⁶ The Saliterman Firm takes this "alternative" argument and twists it into support for the standard of review being "clearly erroneous" by stating that "because this argument is not even disguised as a statutory construction challenge - it [the alternative argument] is flatly a disagreement with the amount of the Lien, which is never reviewed de novo." But a clearly erroneous standard might only apply with regard to the Effrems' alternative argument if the Court determines under the statutory argument that Section 481.13 authorizes inclusion of collection costs and attorney's fees incurred in establishing the Lien in the Lien amount.

whose lien is reduced is not entitled to recovery of all of its collection costs and attorney's fees.

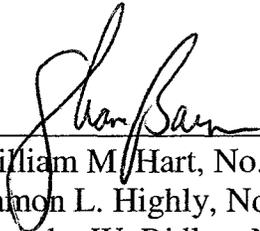
The Court here should recognize that awarding the Saliterman Firm extreme amounts of post representation attorney's fees will discourage clients from challenging unreasonable fees when they are overbilled, especially given the fact that here the district court reduced the Lien amount by over \$30,000. The Effrems respectfully request, in the alternative, that the award of collection in excess of \$40,000 be reduced by this Court, consistent with other lien actions, if it finds that Section 481.13 allows recovery of collection costs and attorney's fees incurred in connection with establishing an attorney's lien.

CONCLUSION

As the district court recognized in its June 24 Order, this is a case of first impression. The question before this Court deals specifically with the interpretation of Minn. Stat. § 481.13 and the method employed by the district court in determining the Saliterman Firm's attorney-lien amount, both of which this Court reviews de novo. And the lien statute does not provide for the recovery of attorney's fees and collection costs incurred in connection with establishing an attorney's lien.

Respectfully submitted,

Dated: January 17, 2012

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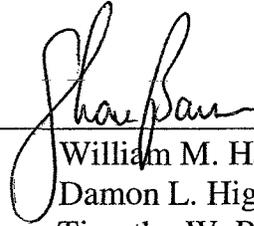
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FORM AND LENGTH CERTIFICATION

This brief was drafted using Word 2002. The font is Times New Roman, proportional 13-point font, which includes serifs. The word count of this brief is 4,240.

Dated: January 17, 2012

A handwritten signature in cursive script, appearing to read "Shane Barnes", written over a horizontal line.

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