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STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1906

Pamela Maslowski,
Respondent,

vs.

Prospect Funding Partners LLC, et al.,
Appellants,

and

Prospect Funding Holdings (NY) LLC,
defendant and third-party plaintiff,
Appellant,

vs.

James Schwebel, third-party defendant, et al.,
Respondents.

Filed July 8, 2019
Affirmed
Bjorkman, Judge

Hennepin County District Court
File No. 27-CV-15-15143

James R. Schwebel, Matthew J. Barber, James S. Ballentine, Schwebel Goetz & Sieben, P.A., Minneapolis, Minnesota (for respondents)

Daniel A. Beckman, Abigail A. Pettit, Gislason & Hunter LLP, Minneapolis, Minnesota (for appellants)

Considered and decided by Bjorkman, Presiding Judge; Rodenberg, Judge; and Reyes, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges the dismissal of its action to enforce a litigation-funding agreement, arguing that the district court erred by (1) declining to apply New York law pursuant to the agreement and (2) determining the agreement is void under Minnesota law. In their related appeal, respondents challenge the district court's denial of attorney fees under the declaratory-judgment act. We affirm.

FACTS

Respondent Pamela Maslowski was injured in a car accident in March 2012 and retained respondents James Schwebel and the law firm Schwebel Goetz & Sieben, P.A. (collectively, Schwebel) to commence a personal-injury action on her behalf. Two years later, Maslowski entered into a litigation-funding agreement (agreement) with appellants Prospect Funding Partners LLC and Prospect Funding Holdings LLC (collectively, Prospect), which do business in both New York and Minnesota.[1]

Under the terms of the agreement, Maslowski sold to Prospect an interest in her personal-injury action for $6,000. In the event Maslowski recovers damages, Prospect is entitled to receive $6,000, a $1,425 processing fee, and 60% annual interest based on a set

[1] Throughout the history of this litigation, the relationships and dealings between the various Prospect entities have been unclear. Because the precise nature of their relationships is unnecessary to our decision, we refer to them as one entity.

schedule, for a total "repurchase" amount not to exceed $25,245. The agreement contains a forum-selection clause stating that disputes arising under the agreement shall be tried in New York and a choice-of-law provision stating that the agreement "shall be governed, construed and enforced in accordance with the laws of the state of New York." And the agreement requires all payments and notices to be sent to Prospect's Minnetonka address; Prospect's manager used the same Minnesota address when signing the agreement. Schwebel signed a mandatory "Attorney Acknowledgement" and "Letter of Direction" related to the agreement.

After settling her personal-injury action in July 2015, Maslowski brought this action in Minnesota seeking a declaration that the agreement is invalid because it is champertous[2] and unconscionable. Prospect initiated a breach-of-contract action in New York. Prospect moved to dismiss the Minnesota action based on the forum-selection clause. The district court denied the motion and granted Maslowski's motion to enjoin Prospect from pursuing the New York action. This court affirmed, holding that the forum-selection clause is unenforceable because it attempts to avoid Minnesota law, which broadly defines and prohibits champertous agreements. *Maslowski*, 890 N.W.2d at 769. A New York court likewise concluded that Minnesota is the proper forum to resolve disputes arising under the agreement and dismissed the New York action. *See Prospect Funding Holdings LLC*

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[2] As more fully discussed below, Minnesota defines champerty as "[a]n agreement between a stranger to a lawsuit and a litigant by which the stranger pursues the litigant['s] claims as consideration for receiving part of any judgment proceeds." *Maslowski v. Prospect Funding Partners LLC,* 890 N.W.2d 756, 763 (Minn. App. 2017) (alterations in original) (quotation omitted), *review denied* (Minn. May 16, 2017).

v. Maslowski, 146 A.D.3d 535, 535 (N.Y. App. Div. 2017) (stating that "[e]very aspect of the transaction at issue occurred in Minnesota, the parties, documents, and witnesses are located in Minnesota, and defending this action in New York would be a substantial hardship to Ms. Maslowski"). Prospect then asserted contract and tort-related counterclaims arising out of Maslowski's failure to make payments under the agreement and third-party claims against Schwebel for advising Maslowski to breach the agreement.

The district court granted Schwebel's and Maslowski's motions to dismiss and Maslowski's motion for judgment on the pleadings. The court concluded that Prospect's third-party complaint and counterclaims failed to state claims upon which relief could be granted. The district court declined to enforce the agreement's choice-of-law provision, concluding that it was drafted to evade Minnesota law, and determined the agreement is "unenforceable and void" because it violates Minnesota's prohibition against champerty and maintenance.[3] But the district court denied Maslowski and Schwebel's joint motion for $197,836.27 in attorney fees under Minn. Stat. § 555.10 (2018).

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[3] The district court took judicial notice of adjudicative facts from (1) this court's opinion in *Maslowski*, (2) the New York appellate court decision, and (3) a Minnesota district court order in *Prospect Funding Partners LLC & Prospect Funding Holdings LLC v. Deanna Williams*, No. 27-CV-13-8745 (Minn. Dist. Ct. May 5, 2014). [Opinion not available on Westlaw.] In the *Williams* order, which was issued before Maslowski entered into the agreement with Prospect, the district court voided a "nearly identical" agreement based on Minnesota's champerty and maintenance laws. The *Williams* agreement selected Minnesota as the governing law. Here, the district court concluded that Prospect's admissions that it drafted both the forum-selection and choice-of-law provisions to avoid Minnesota champerty law, coupled with the fact Prospect drafted the agreement "so closely on the heels of the summary judgment ruling in *Williams*," demonstrated that selection of New York law was "no coincidence."

Prospect appeals. Maslowski and Schwebel filed a related appeal challenging the denial of their attorney-fee motion.

DECISION

A civil action is subject to dismissal when the pleadings fail "to state a claim upon which relief can be granted." Minn. R. Civ. P. 12.02(e). When a party includes and references a written contract in its pleading, the motion to dismiss is not converted to one for summary judgment. *In re Hennepin Cty. 1986 Bond Litig.*, 540 N.W.2d 494, 497 (Minn. 1995). We review cases dismissed for failure to state a claim de novo, accepting the facts alleged in the complaint as true and construing all reasonable inferences in the nonmoving party's favor. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003).

I. Minnesota law governs the agreement.

A. The district court did not err by declining to enforce the agreement's choice-of-law provision.

As a general rule, Minnesota courts enforce contractual choice-of-law provisions. *Hagstrom v. Am. Circuit Breaker Corp.*, 518 N.W.2d 46, 48 (Minn. App. 1994), *review denied* (Minn. Aug. 24, 1994). Such provisions are enforceable so long as the parties "act[ed] in good faith and without an intent to evade the law." *Combined Ins. Co. of Am. v. Bode*, 77 N.W.2d 533, 536 (Minn. 1956). Choice-of-law issues are questions of law, which we review de novo. *Kolberg-Pioneer, Inc. v. Belgrade Steel Tank Co.*, 823 N.W.2d 669, 672 (Minn. App. 2012), *review denied* (Minn. Jan. 15, 2013).

Prospect argues this court should effectuate the agreement's choice-of-law provision and apply New York law. Maslowski contends the provision is invalid because Prospect included it to evade application of Minnesota law.

As a practical matter, this court has already resolved this issue in Maslowski's favor. In affirming the anti-suit injunction, we noted the rule favoring forum-selection clauses, but concluded that the rule is outweighed by Minnesota's "strong local interest in applying its prohibition against champerty in this case." *Maslowski*, 890 N.W.2d at 767. In light of the agreement's choice-of-law provision and Prospect's expressed intent to enforce it, this court concluded that "enforcement of the forum-selection clause could be the first step in thwarting Minnesota's policy against champerty." *Id.* We expressly recognized Prospect's admission that it drafted the agreement in an "attempt[] to avoid Minnesota's law against champerty." *Id.* at 769. And we cited with approval the district court's finding that Prospect "acted in a calculated and systematic manner to deprive the Minnesota courts of their jurisdiction to determine whether pre-settlement funding contracts affecting Minnesota lawsuits are champertous." *Id.* Given our holding in *Maslowski*, we discern no error by the district court in declining to enforce the choice-of-law provision. Accordingly, we turn to general choice-of-law principles.

B. There is true conflict between New York law and Minnesota law.

As a threshold matter, we must decide whether a true conflict exists and whether "both states' laws can be constitutionally applied." *Kolberg-Pioneer*, 823 N.W.2d at 672. "A conflict exists if the choice of one forum's law over the other will determine the

outcome of the case." *Nodak Mut. Ins. Co. v. Am. Family Mut. Ins. Co.*, 604 N.W.2d 91, 94 (Minn. 2000). Both threshold requirements are met here.

First, a true conflict exists between Minnesota and New York champerty law. As we explained in *Maslowski*, New York has a statute that generally prohibits champerty but defines the concept much more narrowly than Minnesota law does. 890 N.W.2d at 766. The New York statute provides that an association may not "solicit, buy or take an assignment of, or be in any manner interested in buying or taking . . . any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon." N.Y. Jud. Law § 489 (McKinney 2018). In other words, it is the stranger's intent to sue that makes an agreement champertous in New York. *Bluebird Partners, L.P. v. First Fid. Bank, NA*, 731 N.E.2d 581, 587 (N.Y. 2000). In contrast, Minnesota common law prohibits champerty and maintenance. *Johnson v. Wright*, 682 N.W.2d 671, 675-76 (Minn. App. 2004), *review granted* (Minn. Oct. 19, 2004), *and appeal dismissed* (Minn. Jan. 10, 2005). Champerty in Minnesota is "[a]n agreement between a stranger to a lawsuit and a litigant by which the stranger pursues the litigant['s] claims as consideration for receiving part of any judgment proceeds." *Id.* at 675 (alteration in original). Maintenance is "[a]ssistance in prosecuting or defending a lawsuit given to a litigant by someone who has no bona fide interest in the case; meddling in someone else's litigation." *Id.* (alteration in original). The distinctions between New York and Minnesota law make a difference in this case. Under New York law, the agreement is valid because Prospect did not enter into it with intent to bring an action. Under Minnesota law, the agreement is not valid because it permits

Prospect to receive part of Maslowski's judgment proceeds. *See id.* at 678 (holding that agreement assigning to lender a percentage of borrower's tort recovery is champertous).

Second, the parties agree and the record demonstrates that there is no constitutional impediment to the application of either state's laws. *See Jepson v. Gen. Cas. Co. of Wis.*, 513 N.W.2d 467, 469 (Minn. 1994) ("[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." (alteration in original) (quotation omitted)).

C. The five-factor choice-of-law test favors application of Minnesota law.

When faced with a true conflict between the substantive law of two states, we employ a five-step analysis to decide what law to apply, considering the "(1) predictability of result; (2) maintenance of interstate order; (3) simplification of judicial task; (4) advancement of the forum's governmental interests; and (5) application of the better rule of law." *Schumacher v. Schumacher*, 676 N.W.2d 685, 690 (Minn. App. 2004); *see Jepson*, 513 N.W.2d at 470.[4]

The first factor, predictability of results, seeks to avoid forum shopping and preserves "the parties' justified contractual expectations." *Nodak Mut. Ins.*, 604 N.W.2d at 94. Several facts indicate the parties should have expected Minnesota law to govern their agreement. The agreement originated in Minnesota. Maslowski, Schwebel, and

[4] Maslowski argues that we need not analyze the five choice-of-law factors because Prospect did not argue in the district court that the analysis favors application of New York law. We disagree. Even if Prospect did not specifically make this argument, the general issue was presented and the district court applied the five-factor analysis.

Prospect's manager signed the agreement in Minnesota. While Prospect may have its principal place of business in New York, it also has a business presence in this state, including an office in Minnetonka. The agreement was to be fully performed in Minnesota. Given Minnesota's demonstrated "strong local interest in applying its prohibition against champerty," Prospect's claimed reliance on the agreement's choice-of-law provision was not justified. *Maslowski*, 890 N.W.2d at 767. This factor favors application of Minnesota law. *See Jepson*, 513 N.W.2d at 471 (applying North Dakota law where insurance policy was issued there, and other circumstances tied to that state suggested "what the parties' reasonable expectations should have been at the time of contract").

The second factor, maintenance of interstate order, addresses whether applying Minnesota law would "manifest disrespect" for New York or "impede the interstate movement of people and goods." *Schumacher*, 676 N.W.2d at 690. Again, the transaction occurred in Minnesota, and all of the parties were represented here, resided here, or had a business presence here. In the words of the district court, "choosing to import another state's more lenient standard would subvert the interest of the Minnesota courts." It would also encourage forum shopping, which would demonstrate disrespect for Minnesota law. *See id.* at 691. Accordingly, this factor favors application of Minnesota law.

The third factor, simplification of judicial task, is not implicated because the district court could easily apply the laws of either state.

The fourth factor, the interest of the forum, concerns which state's law "would most effectively advance a significant interest of the forum state." *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438, 455 (Minn. App. 2001) (quotation omitted). Minnesota

has a strong interest in compensating tort victims and in protecting Minnesota's judicial system and litigants from the deleterious effects of champerty and maintenance. Prospect argues that these interests are not implicated because Minnesota has no interest in "policing the actions of foreign entities operating primarily in foreign jurisdictions." We disagree. The agreement, by its terms, was to be performed in Minnesota and involves parties who reside or are present here. *See Maslowski*, 890 N.W.2d at 767 (finding a strong Minnesota interest in prohibiting champerty because of its "potential to expose personal-injury actions in Minnesota to" its "negative effects").

The fifth factor, which state has the better rule of law, includes consideration of which rule makes "good socio-economic sense for the time when the court speaks." *Jepson*, 513 N.W.2d at 473 (quotation omitted). We agree with the district court's cogent assessment that champertous agreements have untoward economic effects on the legal system that can provide both improper incentives and disincentives to pursue and settle litigation. As the district court stated in its order granting Maslowski's and Schebel's motions to dismiss,

> the high interest rates charged in champertous agreeements may both over-incentivize and discourage victims from settling their cases. These agreements may over-incentivize the settlement of claims, by encouraging victims to settle sooner and for a smaller amount than they may otherwise be entitled to, in order to reduce the interest they would have to pay the litigation funding company out of the ultimate proceeds of their action. Champertous agreements may also discourage the settlement of claims, because litigants will be less likely to settle their claims as the interest they owe on their funding skyrockets, and the amount they would receive from a settlement, after payment to the litigation funding company, plummets toward zero. In the end, litigants may be stripped of

> much of the compensation for their injuries, as the interest on their loan increases the amount owed under their champertous agreement beyond any potential recovery in their case, after repayment of their loan and payment of their attorney[] fees.

By prohibiting such conduct, Minnesota has a better rule of law.

In sum, the five choice-of-law factors favor application of Minnesota law to the agreement.

II. The agreement is void under Minnesota law.

A contract may be void as against public policy if "it is injurious to the interests of the public or contravenes some established interest of society." *Isles Wellness, Inc. v. Progressive N. Ins. Co.*, 725 N.W.2d 90, 93 (Minn. 2006) (quotation omitted). Whether a contract is void is a question of law that we review de novo. *Id.* at 92.

As noted above, Minnesota law prohibits champerty and maintenance for public policy reasons. These prohibitions are designed "to prevent officious intermeddlers from stirring up strife and contention by vexatious or speculative litigation which would disturb the peace of society, lead to corrupt practices, and pervert the remedial process of the law." *Maslowski*, 890 N.W.2d at 763 (quotation omitted). In modern vernacular, the law against champerty and maintenance aims to prevent an outsider's intrusion into a lawsuit solely for speculative gain. *Id.*

As we held in the prior appeal, the agreement meets Minnesota's definitions of champerty and maintenance. *Id.* Prospect was not a party to Maslowski's personal-injury action. The agreement speculates on Maslowski's potential recovery by effectively selling $6,000 to her in exchange for her payment of a $1,425 administrative fee and a 60% annual

interest rate on the "repurchase" of the $6,000, with Maslowski owing nothing if she does not recover in the underlying action. And the agreement requires Maslowski to relinquish control over certain aspects of her action, such as requiring Prospect to be notified if she retains a different attorney and requiring her attorney to sign an "Acknowledgement" and "Letter of Direction" as to how Prospect should be paid. The key circumstances of this case—a contingent recovery, exorbitant interest rate, and a contrived interest in the underlying litigation—are the same as those Minnesota's appellate courts have deemed to violate the law against champerty and maintenance. *See id.* at 763-64 (reviewing caselaw).

Citing authority from other jurisdictions, Prospect argues that champerty requires both "intermeddling" and a lack of interest in the underlying litigation. We are not persuaded. Other states vary in their definitions of champerty, as exemplified in the New York and Minnesota laws at issue here. But Minnesota law treats a third party's contractual stake in the recovery of the underlying lawsuit under the circumstances presented here as "intermeddling." And champerty is not limited to contracts in which a third party to an underlying litigation directly purchases an interest in the plaintiff's recovery. Because the agreement is champertous, it is void and unenforceable.

III. Maslowski and Schwebel are not entitled to recover attorney fees under the declaratory-judgment act.

District courts have discretion to award or deny attorney-fee claims. *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987). But attorney fees are generally not recoverable absent a contractual provision or statute. *Kallok v. Medtronic, Inc.*, 573 N.W.2d 356, 363 (Minn. 1998). Maslowski and Schwebel argue that they are

entitled to recover the $197,836.27 in attorney fees incurred in Minnesota and New York under the declaratory-judgment act. This argument is unavailing.

The act authorizes district courts "to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Minn. Stat. § 555.01 (2018). Among the powers conferred by the act is the district court's discretion to "make such award of *costs* as may seem equitable and just." Minn. Stat. § 555.10 (emphasis added). The act does not similarly authorize courts to award attorney fees. We must apply the statute as written. *See State v. Boecker*, 893 N.W.2d 348, 351 (Minn. 2017) ("The plain language of the statute controls when the meaning of [a] statute is unambiguous.").[5]

Maslowski and Schwebel cite *Andrist v. First Trust Co. of St. Paul*, 260 N.W. 229 (Minn. 1935), to support their argument that the declaratory-judgment act authorizes an award of attorney fees. This reliance is misplaced. In *Andrist*, a will granted a trust company "full power" to manage a trust fund, including selling all of its property, and further authorized the trust company to "employ counsel . . . in the discharge of its duties and . . . pay to them reasonable compensation." 260 N.W. at 230. After the trust company was faced with litigation regarding purported mismanagement of the trust, the supreme court concluded that the trust company was entitled "to recover reasonable attorneys' fees paid by it in the conduct of its defense" because "it would be inequitable and unfair if

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[5] Review of other statutory remedies shows the legislature distinguishes costs from attorney fees. *See*, *e.g.*, Minn. Stat. §§ 8.31, subd. 3a (permitting parties to recover attorney fees and costs for violations of laws the attorney general is authorized to enforce), 181.75, subd. 4 (including attorney fees and costs as separate remedies for violation of the polygraph statute), 363A.33, subd. 7 (including attorney fees and costs allowed for violation of the Minnesota Human Rights Act) (2018).

necessary fees paid to counsel by the trustee were disallowed." *Id.* at 229, 231. *Andrist* turned on the fact that the will permitted the trust company to retain an attorney in defense of the trust and the fact that the fees were incurred only in defending against the petitioners' unmeritorious claims.

More importantly, Maslowski and Schwebel's argument ignores our supreme court's more recent jurisprudence, which holds that the declaratory-judgment act does not provide a statutory basis for attorney fees. *See Garrick v. Northland Ins. Co.*, 469 N.W.2d 709, 714 (Minn. 1991) (rejecting argument that declaratory-judgment act entitled insured to recover attorney fees in action seeking first-party insurance benefits); *see also Sazama Excavating, Inc. v. Wausau Ins. Cos.*, 521 N.W.2d 379, 384 (Minn. App. 1994) (declining to award attorney fees absent "specific legislative authorization" in a declaratory-judgment action brought to determine whether an insurer had properly cancelled a workers' compensation policy), *review denied* (Minn. Oct. 27, 1994).

We are mindful of the lengthy and costly efforts Maslowski and Schwebel undertook to obtain a judicial declaration that the agreement is void. But we are constrained to follow supreme court precedent. *See State v. Curtis*, 921 N.W.2d 342, 346 (Minn. 2018) ("The court of appeals is bound by supreme court precedent . . . ."). And there is no precedent for awarding attorney fees under the circumstances of this case. We observe no error or abuse of discretion in the district court's denial of the requested attorney fees.

Affirmed.