STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1401, A13-2159

Theresa White,
Respondent,

vs.

Catheter Robotics, Inc.,
Appellant.

Filed June 30, 2014
Affirmed
Hooten, Judge

Washington County District Court
File No. 82-CV-11-3521

Denise Yegge Tataryn, Brian R. Christiansen, Hellmuth & Johnson, PLLC, Edina, Minnesota (for respondent)

Karl L. Cambronne, Jeffrey D. Bores, Chestnut Cambronne PA, Minneapolis, Minnesota (for appellant)

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

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

HOOTEN, Judge

Appellant-employer challenges two judgments associated with respondent-employee's Minnesota Payment of Wages Act (PWA) claims, arguing that the district court erred by (1) applying Minnesota law despite certain employment agreements stating

that they would be governed by New Jersey law; (2) determining that respondent's three-week vacation benefit vested when she signed an offer for employment; and (3) awarding attorney fees. We affirm.

FACTS

Appellant Catheter Robotics, Inc. is a medical-device company incorporated in Delaware. In April 2010, a recruiter contacted respondent Theresa White, a Minnesota resident, regarding Catheter Robotics's need for a clinical director to collaborate with a Minnesota company on clinical trials. White had several interviews with Catheter Robotics's representatives over the phone and in person in New Jersey.

On May 7, Catheter Robotics CFO James Caruso e-mailed White an offer letter signed by CEO David Jenkins. The offer outlined White's compensation and stated that she would "start out with 2 weeks personal time off in [her] first year." On May 12, White discussed the terms of the offer with Rob Newman, president of clinical and regulatory affairs. That same day, Newman e-mailed White with amended terms, including: "On vacation—we'll increase this to 3 weeks. We do not have any strict accounting of vacation days—as a start up, we're on the 'work hard, play hard' schedule. We don't see scheduling vacation time as a major issue." A day later, White accepted the amended terms via e-mail, contingent on that "vacation" will "include 10 holidays and 15 vacation days (3 weeks) per year."

White began working for Catheter Robotics on May 14 and performed most of her work in Minnesota. On May 22, White executed three agreements related to her employment: employment at-will, confidentiality, and noncompetition (collectively, the

Employment Agreements). Each of the agreements contains the following preamble: "In consideration of my continued employment by the Company and of the compensation to be paid or paid to me, I, the undersigned employee, [agree to] the following" terms. Each agreement also provides that it "contains the entire agreement and understanding between the parties . . . concerning the subject matter of [that] Agreement." Each agreement further states: "The laws of the State of New Jersey shall govern the interpretation, validity and effect of this Agreement without regard to the place of performance thereof."[1]

The employment at-will agreement provides that White may resign at any time, that Catheter Robotics may terminate the employment at any time, and that there is no specified length of employment. The confidentiality agreement provides that White will not disclose Catheter Robotics's proprietary information. The noncompetition agreement provides that White will not, for a period of one year after termination from employment, engage in any business substantially similar to that of Catheter Robotics's, divert Catheter Robotics's customers, or solicit Catheter Robotics's employees to work for a competitor.

On June 4, the parties executed a revised offer letter dated May 7, 2010. The relevant portion stated, "You will start out with 3 weeks personal time off in your first year." The revised offer also provides that it "supersedes any prior representations or agreements, whether written or oral" and that it "may not be modified or amended, except

[1] At some point, the parties also executed a stock-option-award agreement, which provides that "[t]his agreement is governed by the internal substantive laws but not the choice of law rules of the State of Delaware."

by a written agreement, signed by an authorized officer of the Company and by [White]." This offer agreement does not contain a choice-of-law provision and does not reference the Employment Agreements executed on May 22.

During her employment with Catheter Robotics, White did not take any vacation leave. On November 22, White was discharged. Upon Catheter Robotics's request, White continued working from November 23 to December 5. On November 24, White was presented with a separation agreement, which provides that White is to receive wages earned through November 22 and "$3,181.82 of severance pay" on November 30. The separation agreement also stated that White will "not [be] entitled to any [compensation or benefits not specified], including payment for unused sick or vacation time." White did not sign this agreement. On November 30, she received a payment of $3,181.82.

White's wages were subject to Minnesota withholding tax, and Catheter Robotics did not dispute White's claim for Minnesota unemployment benefits. On December 14, after learning that severance payments—unlike payments for unused vacation days—would delay the start of unemployment benefits, White demanded payment for three weeks of unused vacation. That same day, Catheter Robotics revoked the separation-agreement offer.

On December 15, Caruso informed White that, according to the employee handbook's vacation-accrual policy, White accrued 1.25 days of vacation per month that she worked and was therefore owed 7.5 days' worth of vacation pay, amounting to $4,038.45. Catheter Robotics applied the November 30 payment of $3,181.82 to this

balance and—after a $10 calculation error—determined that White was owed $846.63. On December 31, Catheter Robotics paid White $719.99, which included an unauthorized deduction for medical insurance premiums.

In January 2011, White sued Catheter Robotics for unpaid wages in the amount of $7,357.21; a penalty for Catheter Robotics's failure to timely pay her wages upon discharge and demand under a provision of the PWA, Minn. Stat. § 181.13(a) (Supp. 2013); and attorney fees under another PWA provision, Minn. Stat. § 181.171, subd. 3 (2012). Catheter Robotics answered that it complied with its vacation-accrual policy and that White's employment was governed by New Jersey law. Following discovery, Catheter Robotics moved for summary judgment. In November 2011, the district court denied the motion, reasoning that "there is a material factual dispute whether [White] received the [employee] handbook during the tenure of her employment and whether she was aware of [Catheter Robotics's] paid time off policy."

At a bench trial, White testified that she never received a copy of the employee handbook and was unaware of the existence of the handbook until Caruso informed her of it on December 15. Caruso testified that he gave White the handbook in her office at some point during the summer of 2010 but that they did not discuss it. Caruso remembered that he "looked [White] right in the eye" and said, "Look, we're official." He also remembered White's outfit that day. But the record of Caruso's testimony lacks evidence that White acknowledged receiving the handbook.

The employee handbook contains a vacation-accrual policy consistent with Caruso's calculations. The handbook states that it does not create an employment

contract and that any employment contract or special arrangement concerning the terms and conditions of employment must be in writing signed by the president of Catheter Robotics.

In June 2013, the district court ruled in favor of White on all of her requested relief. The district court determined that the PWA is applicable despite the Employment Agreements' New Jersey choice-of-law provisions. Accordingly, the district court awarded White $8,077.20 for 15 days of penalty pay. Regarding the amount of unpaid vacation pay, the district court credited White's testimony that she never received the employee handbook containing the vacation-accrual policy. The district court determined that White's "right to her vacation time was earned at the time she signed the" offer agreement executed on June 4, reasoning that the agreement "placed no limitations on [White's] entitlement to 15 days of vacation pay" and that White "signed the [a]greement based on representations that there was no policy on vacation time accrual or when vacation time could be used." Accordingly, the district court concluded that White is entitled to $7,357.21 in unpaid vacation wages.[2] The district court also awarded White reasonable attorney fees under the PWA.

Catheter Robotics appealed the June 2013 judgment. In July 2013, White moved the district court to award $37,206.50 in attorney fees and submitted an affidavit of her counsel stating that White incurred $34,380.50 in attorney fees, based in part on an

[2] This amount accounts for $719.99 already paid on December 31. The district court noted that the $3,181.92 paid on November 30 cannot be characterized as partial payment for unpaid vacation because wages were owed for White's employment after her return from the initial discharge.

hourly rate of $295. White's counsel stated that she "maintained [her] rate at $295 per hour for this case," referred to cases in which she had been awarded an hourly rate of $325, and requested that attorney fees be awarded at the market hourly rate of $325. In November 2013, the district court accepted White's proposal.

Catheter Robotics appealed the November 2013 judgment. Upon Catheter Robotics's motion, we consolidated the appeals to address the related issues.

D E C I S I O N

I.

Under the PWA, when an employee is discharged, "the wages or commissions actually earned and unpaid at the time of the discharge are immediately due and payable upon demand of the employee." Minn. Stat. § 181.13(a). If the employer does not pay the owed wages within 24 hours after demand, "the discharged employee may . . . collect a penalty equal to the amount of the employee's average daily earnings at the employee's regular rate of pay . . . for each day up to 15 days." *Id*. Catheter Robotics argues that the district court erred by applying section 181.13(a) because the choice-of-law provisions in the Employment Agreements designated New Jersey law as the applicable law. We disagree.

Minnesota courts are "committed to the rule that the parties, acting in good faith and without an intent to evade the law, may agree that the law of either state shall govern." *Combined Ins. Co. of Am. v. Bode*, 247 Minn. 458, 464, 77 N.W.2d 533, 536 (1956), *abrogated on other grounds by Balts v. Balts*, 273 Minn. 419, 142 N.W.2d 66 (1966). If a contract is unambiguous, its language must be given its plain and ordinary

meaning, and its construction and effect are questions of law. *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346–47 (Minn. 2003). A contract is ambiguous if it is reasonably susceptible to more than one interpretation based solely on its language. *Id.* at 346. The determination of whether a contract is ambiguous is a question of law, but the interpretation of an ambiguous contract is a question of fact. *Id.* "[I]t is well settled that findings of fact based on conflicting evidence will not be disturbed on appeal unless manifestly and palpably contrary to the evidence as a whole." *Grant v. Malkerson Sales, Inc.*, 259 Minn. 419, 424, 108 N.W.2d 347, 351 (1961).[3]

Despite the existence of choice-of-law provisions in the Employment Agreements, the district court determined that section 181.13(a) is applicable on three independent grounds: (1) section 181.13(a) is a statute governing a procedural timing matter that cannot be affected by the choice-of-law provisions; (2) the choice-of-law provisions apply only to the subject matters of the Employment Agreements and do not apply to the subject matter of vacation pay; and (3) the choice-of-law provisions are contrary to Minnesota's fundamental policy of favoring timely payment of wages to employees. We discuss each in turn.

[3] Catheter Robotics cites *Danielson v. Nat'l Supply Co.*, 670 N.W.2d 1, 4 (Minn. App. 2003), *review denied* (Minn. Dec. 16, 2003), and argues that "[c]hoice-of-law questions are treated as questions of law and are reviewed *de novo* by this Court." But *Danielson* is inapposite because it did not involve a contractual choice-of-law provision. Rather, *Danielson* applied a multi-step choice-of-law analysis in the absence of a contractual choice-of-law provision. 670 N.W.2d at 6–9.

Section 181.13(a) is a procedural statute

It is an "almost universal rule that matters of procedure and remedies [are] governed by the law of the forum state." *Davis v. Furlong*, 328 N.W.2d 150, 153 (Minn. 1983). Catheter Robotics argues that section 181.13(a) is a substantive statute affording remedies that are subject to the choice-of-law provisions. Significantly, however, Catheter Robotics makes this argument in only its reply brief. Accordingly, Catheter Robotics's arguments on the applicability of section 181.13(a) are not properly before us. *See McIntire v. State*, 458 N.W.2d 714, 717 n.2 (Minn. App. 1990) (stating that arguments not raised in appellant's principal brief "have been waived and cannot be revived by addressing them in the reply brief"), *review denied* (Minn. Sept. 28, 1990).

In any event, we are not persuaded that section 181.13(a) creates a substantive right. Catheter Robotics cites *Combined Ins.*, 247 Minn. at 464, 77 N.W.2d at 536, and *Hagstrom v. Am. Circuit Breaker Corp.*, 518 N.W.2d 46, 49 (Minn. App. 1994), *review denied* (Minn. Aug. 24, 1994), and argues that "[t]o suggest that Minn. Stat. § 181.13(a) is 'procedural' ignores the express nature of the statute itself and prior precedent of this Court and the Minnesota Supreme Court."

But neither *Combined Ins.* nor *Hagstrom* interpreted section 181.13(a). Rather, they stand for the undisputed proposition that parties may agree on the governing substantive law by contract. *See Combined Ins.*, 247 Minn. at 464, 77 N.W.2d at 536; *Hagstrom*, 518 N.W.2d at 49. Contrary to Catheter Robotics's assertion, the supreme court has stated that, despite its penalty nature, "section 181.13(a) is a timing statute, mandating not *what* an employer must pay a discharged employee, but *when* an employer

must pay a discharged employee." *Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117, 125 (Minn. 2007); *see also Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 836–37 (Minn. 2012) ("To recover under the [PWA] the employee must establish an independent, substantive legal right, separate and distinct from section 181.13 to the particular wage claimed."). Because section 181.13(a) does not create a substantive right, Catheter Robotics's argument fails even if it is properly before us. The district court did not err by applying section 181.13(a) on this ground despite the existence of the choice-of-law provisions.

The choice-of-law provisions do not govern vacation pay

A contractual choice-of-law provision is applicable to claims that "are closely related to the interpretation of the contracts and fall within the ambit of the express agreement that the contracts would be governed by" the laws of a specific forum. *See Nw. Airlines, Inc. v. Astraea Aviation Servs., Inc.*, 111 F.3d 1386, 1392 (8th Cir. 1997).[4] The preambles to the Employment Agreements state that White agreed to certain terms in consideration of her employment and of "the compensation to be paid." Catheter Robotics latches on to this sole reference to "compensation" and argues that the Employment Agreements "expressly make [White's] 'compensation' (i.e. vacation pay) subject to the choice of law provision" and "receipt of compensation contingent upon her agreeing to [the] choice of law provision."

[4] We refer to *Nw. Airlines* because the parties cite it for the legal standard and because federal court interpretation of state law "may be persuasive," *see Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, 330 (Minn. 2000).

But the preamble language merely expresses White's motivation for entering into the contract; it is not the contract. *See Parker v. Pulitzer Pub. Co.*, 882 S.W.2d 245, 252 (Mo. Ct. App. 1994) (interpreting the preamble language "in consideration of the mutual covenants and promises contained herein, the parties hereto agree as follows," and concluding that "the preamble merely expresses [a party's] motivation for entering into the contract" and that "[t]he actual contract . . . follows the preamble"). The preambles' references to "compensation" are not followed by any terms related to compensation, such as the amount of salary and vacation days, medical and dental benefits, or reimbursement for work-related professional memberships. The June 2010 offer agreement, on the other hand, addresses all of these compensation-related aspects of the employment. The plain and unambiguous preamble language evidences that the subject matters of the Employment Agreements are those "following" the preamble language, which are terms unrelated to compensation. That the Employment Agreements refer to "compensation" as the consideration for agreeing to certain contractual terms does not mean that the agreements govern the specifics of compensation. The district court, therefore, correctly determined that the choice-of-law provisions do not apply to the subject matter of vacation pay. The district court did not err by applying section 181.13(a) on this alternative ground.[5]

[5] Contrary to Catheter Robotics's assertion, the district court's rulings on this issue are not "blatantly contradictory." The district court's November 2011 order noted that "Minnesota law recognizes and enforces agreements regarding choice of law, such as the employment agreement at issue in this case." In its June 2013 order, and in harmony with its previous order, the district court determined that the choice-of-law provision is enforceable, but that it is inapplicable to the subject matter of vacation pay.

Minnesota's policy interest in the PWA does not override the choice-of-law provisions

The district court and the parties relied on the Eighth Circuit panel decision of *Modern Computer Sys., Inc. v. Modern Banking Sys., Inc.* to address whether enforcing the choice-of-law provisions at issue would violate a fundamental public policy of Minnesota. *See* 858 F.2d 1339, 1343–44 (8th Cir. 1988) (holding that enforcing a certain choice-of-law provision would violate Minnesota's public policy as expressed in the Minnesota Franchise Act), *vacated*, 871 F.2d 734, 735 (8th Cir. 1989).

But this reliance is misplaced because the Eighth Circuit vacated the *Modern Computer* panel decision and reheard the case en banc. 871 F.2d at 735. The Eighth Circuit recognized the "powerful countervailing policy" of "Minnesota's traditional willingness to enforce parties' choice of law agreements" and was therefore "unpersuaded by [the] argument that a fundamental public policy of Minnesota overrides [a] choice of law clause." *Id.* at 740.

In *Hagstrom*, we acknowledged the *Modern Computer* en banc decision when deciding whether to enforce a choice-of-law provision based on an argument that "the provision violates Minnesota's public policy as embodied in" the Minnesota Termination of Sales Representatives Act (TSRA). 518 N.W.2d at 48. We noted that "it is significant that the [TSRA] does not contain a provision limiting choice of law provisions." *Id.* at 49. In the absence of a showing of bad faith, we concluded: "Although Minnesota, since the time the parties designated [another state's] law, has expressed some policy interests through the [TSRA], we cannot say that this policy interest, in light of all the facts of this

case, overrides Minnesota's longstanding policy of enforcing contractual choice of law provisions." *Id.*

The PWA, similar to the TSRA, does not contain a limitation on choice-of-law provisions. So whatever policy interest Minnesota possesses in enforcing section 181.13(a) does not override the parties' agreements to the applicable law. Accordingly, we conclude that the district court erred by relying on the *Modern Computer* panel decision and by applying section 181.13(a) on this ground. But because the district court correctly applied the statute on other grounds, we need not reverse.[6]

II.

Catheter Robotics argues that the district court erred by determining that White earned her vacation pay at the time that she signed the June 2010 offer agreement. We again disagree.

Catheter Robotics first contends that the district court's determination "is clearly inconsistent with the governing law of New Jersey" because "New Jersey courts have consistently held that vacation pay . . . is not immediately payable in full upon the first day of work" and is instead "earned over time in exchange for work." But, as discussed,

[6] Catheter Robotics does not assert that the district court erred by applying Minnesota law if the New Jersey choice-of-law provisions are inapplicable to the subject matter of White's vacation pay. Generally, issues not briefed on appeal are waived. *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982). Regardless, we note that "any employer employing labor within this state" is subject to a penalty for failure to promptly pay wages upon demand. Minn. Stat. § 181.13(a). The district court found that White's wages were subject to Minnesota withholding tax and that Catheter Robotics did not dispute White's claim for Minnesota unemployment benefits. These findings support the district court's determination that Catheter Robotics is subject to the PWA based on its employment of White in Minnesota.

the choice-of-law provisions in the Employment Agreements do not govern the subject matter of White's vacation pay. Therefore, New Jersey law does not apply here.

And even if it does, both New Jersey and Minnesota allow employers and employees to contract for employment terms. *See Pine River State Bank v. Mettille*, 333 N.W.2d 622, 626 (Minn. 1983) (stating that, "[g]enerally speaking, a promise of employment on particular terms of unspecified duration, if in form an offer, and if accepted by the employee, may create a binding unilateral contract"); *Baker v. State Dep't of Labor & Indus.*, 443 A.2d 222, 225 (N.J. Super. Ct. App. Div. 1982) (holding that an employee "contractually . . . earned the monetary value of vacation days").

Here, the June 2010 offer agreement provided that White "will start out with 3 weeks personal time off in [her] first year." Catheter Robotics argues that "the language indicates that [White's] vacation pay was a *yearly* benefit that accrued over time throughout [White's] 'first year' of employment." But as a preliminary matter, Catheter Robotics has waived this argument by presenting it in only its reply brief. *See McIntire*, 458 N.W.2d at 717 n.2. Moreover, we are not persuaded by the argument. The plain language of the provision supports that White was entitled to 15 vacation days during her first year, but we agree with the district court that the provision is silent on the question here: How did those 15 days accrue over the course of the year? And to this question, Caruso represented to White that Catheter Robotics "do[es] not have any strict accounting of vacation days" and that it "do[es]n't see scheduling vacation time as a major issue." The testimony of Catheter Robotics's own witness supports the district

court's factual finding that White could have used her vacation days at any time after accepting the offer.

Catheter Robotics argues that the vacation-accrual policy in the employee handbook is "determinative of how [White's] vacation pay should be calculated." As part of this argument, Catheter Robotics challenges the district court's factual finding that White never knew of or received the handbook. But the district court based its finding on White's testimony, which the district court credited despite its contradiction with Caruso's testimony, as well as the fact that Catheter Robotics failed to produce evidence that White acknowledged receiving the employee handbook. Accordingly, we are not convinced that the district court's finding is clearly erroneous warranting our reversal. Because White never received the handbook, the district court correctly concluded that she is not subject to the handbook's vacation-accrual policy. *See Lee*, 741 N.W.2d at 123 (stating that an employee handbook's enforceability as an employment contract is predicated, in part, on the fact that "a handbook is received by an employee"). The district court correctly concluded that White was entitled to 15 days of vacation pay upon signing the offer agreement.[7]

[7] Even if White had received the employee handbook, Catheter Robotics's argument is without merit. As the district court determined, the employee handbook could not alter any agreements between the parties because the handbook itself states that it does not create an employment contract and acknowledges that the parties may execute an employment contract or special arrangement. Catheter Robotics does not challenge these determinations and therefore has waived these issues on appeal. *See Melina*, 327 N.W.2d at 20 (stating that issues not briefed on appeal are waived).

III.

Catheter Robotics challenges the district court's award of attorney fees under the PWA. The PWA provides that "the court shall order an employer who is found to have committed a violation [of section 181.13(a)] to pay to the aggrieved party reasonable . . . attorney fees." Minn. Stat. § 181.171, subds. 1, 3 (2012). We review the amount of a statutory attorney-fee award for an abuse of discretion. *Milner v. Farmers Ins. Exch.*, 748 N.W.2d 608, 620 (Minn. 2008). A district court must "make findings or otherwise concisely explain why it felt the hours claimed are reasonable or unreasonable." *Anderson v. Hunter, Keith, Marshall & Co.*, 417 N.W.2d 619, 630 (Minn. 1988).

Catheter Robotics argues that the PWA is "an entirely irrelevant Minnesota statute that has absolutely no bearing on this matter" due to the New Jersey choice-of-law provisions. But, again, the district court correctly applied section 181.13(a) regarding the recovery of unpaid wages and attorney fees despite the existence of the choice-of-law provisions. Thus, the district court correctly applied section 181.171, subdivision 3 to award attorney fees for Catheter Robotics's violation of section 181.13(a).

Catheter Robotics also argues that the district court abused its discretion by failing to explain the reasonableness of the award.[8]

> In determining the reasonableness of the hours and the reasonableness of the hourly rates, the court considers all

[8] Catheter Robotics further contends that it "has been unable to discern how the [district] court reached the $37,206.50 figure." But, clearly, the district court reached the figure by using the affidavit of White's counsel stating $34,380.50 as incurred attorney fees, and then adding $2,826 for the difference between the hourly rates of $295 and $325.

> relevant circumstances. Factors considered in determining reasonableness 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.

Milner, 748 N.W.2d at 621 (citations and quotations omitted).

Here, the district court explained that "[t]his was not a simple case" and that "significant legal research and analysis were necessary to address" the issues. The district court noted that "through no fault of" White, "the trial had to be rescheduled twice to accommodate [Catheter Robotics's] witnesses." Regarding the hourly rates, the district court determined that they were "competitive and entirely reasonable when compared to rates charged in the Twin Cities Metropolitan area." The district court added that White's counsel "enlist[ed] the services of associates and law clerks whose billing rates were much lower." The district court rejected Catheter Robotics's "argument that the fees are excessive when compared to the amount of the actual award." The district court concluded, "Both parties felt very strongly about their respective positions and standing on one's principle often comes with a price, which appears to be the case here." In light of these explicit findings, we reject Catheter Robotics's assertion that the district court failed to articulate the reasonableness of the attorney-fee award.

Catheter Robotics argues that White "was awarded only $7,357.21 on the issue of vacation pay" and therefore the district court erred in its consideration of the results obtained. But Catheter Robotics ignores that White was also awarded $8,077.20 as a penalty for its failure to timely pay her wages under the PWA. In fact, the district court

awarded White all of her requested relief. In other words, the results obtained could not be better for White and weigh in favor of reasonableness.

Finally, Catheter Robotics challenges the district court's hourly rate determination for White's counsel. "'[R]easonable fees' under [statutory authority] are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel." *See Reome v. Gottlieb*, 361 N.W.2d 75, 77–78 (Minn. App. 1985) (quotation omitted) (discussing attorney-fee award under federal statute), *review denied* (Minn. July 11, 1985).

Catheter Robotics argues that White, "having been charged only $295 per hour by her attorney, is not entitled to recover attorney fees from [it] at a higher rate of $325." But prevailing market rate is not necessarily the rate actually charged, and it may be derived from other market data. *See Moriarty v. Svec*, 233 F.3d 955, 966 (7th Cir. 2000) (stating that, "[i]f an attorney charges most clients a high fee, and then represents a client pro bono or for a reduced fee, that attorney's presumable market rate in the pro bono or reduced-fee case is still the attorney's normal high rate"); *Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516, 1524 (D.C. Cir. 1988) (stating that "the prevailing market rate method . . . used in awarding fees to traditional for-profit firms and public interest legal services organizations shall apply as well to those attorneys who practice privately and for profit but at reduced rates reflecting non-economic goals"); *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210–11 (9th Cir. 1986) (stating that a "[d]etermination of a reasonable hourly rate is not made by reference to rates actually charged the prevailing party" and that "the district court should be guided by the rate

prevailing in the community for similar work performed by attorneys of comparable skill, experience, and reputation"), *amended by* 808 F.2d 1373 (9th Cir. 1987). Here, the district court based its attorney-fee award on the market data that other courts have determined the market rate of White's counsel to be $325. We discern no abuse of discretion.

Affirmed.