STATE OF MINNESOTA
IN COURT OF APPEALS
A24-1276

Amy Sweasy Tamburino,
Appellant,

vs.

Michael O. Freeman,
Respondent,

David Hough, et al.,
Respondents.

Filed June 2, 2025
Reversed and remanded
Harris, Judge

Hennepin County District Court
File No. 27-CV-22-16364

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Considered and decided by Ede, Presiding Judge; Harris, Judge; and Smith, John Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

SYLLABUS

When a party prevails in a motion to compel under Minnesota Rule of Civil Procedure 37.01, a district court abuses its discretion when it categorically excludes from an attorney-fee award all fees associated with the mandatory meet-and-confer requirement under rule 37.01.

OPINION

HARRIS, Judge

Appellant challenges the district court's order awarding her attorney fees in relation to a successful motion to compel discovery, arguing that the district court abused its discretion when it excluded fees for mandatory meet-and-confer efforts before the date the motion to compel was filed.[1] Appellant also challenges the district court's order denying her motion for a stay of the underlying judgment pending appeal.[2] We conclude that reasonable attorney fees are recoverable for mandatory meet-and-confer efforts under rule 37.01, and that a district court abuses its discretion when categorically denying recovery for fees associated with such mandatory meetings. Additionally, we conclude that the issue

[1] For ease of reference throughout this opinion, we refer to the "good faith efforts to confer with the opposing party" found in Minnesota Rule of Civil Procedure 37 as meet and confer.

[2] In her principal brief, appellant also challenged the district court's award of costs and disbursements but concedes in her reply brief that in light of our decision in a related appeal reversing the underlying judgment this issue is now moot. Because appellant concedes that the issue of the district court's award of costs and disbursements is moot, we will not address it in this opinion.

regarding the motion for a stay pending appeal in appellant's prior appeal is moot. Therefore, we reverse and remand.

FACTS

The facts underlying this dispute are detailed in our previous decision in *Tamburino v. Freeman*, No. A24-0179, 2024 WL 5114163, at *1-4 (Minn. App. Dec. 16, 2024) (*Tamburino I*). We therefore restate only the facts most pertinent to the present appeal. Appellant Amy Sweasy Tamburino (Sweasy) commenced this litigation in November 2022 for alleged conduct that occurred in the workplace. She named respondents Hennepin County, David Hough (former Hennepin County Administrator), and Michael O. Freeman (former Hennepin County Attorney) as defendants.[3]

In December 2021, Sweasy entered mediation with Freeman and the county where she sought to be reclassified as a "principal attorney." *Tamburino I*, 2024 WL 5114163, at *2. At the time, Sweasy believed that she "would be the only one" to hold the title, the responsibilities, and the benefits of principal attorney. *Id.* Sweasy thus accepted the settlement offer (the reclassification plan) in April 2022. *Id.* One month later, Sweasy received an email from Freeman formally announcing her and six other managing attorneys as principal attorneys. *Id.* Sweasy filed suit alleging, among other things, that Freeman intended to devalue and dilute the distinction of the principal attorney role.

[3] Sweasy specifically claimed (1) breach of contract against Freeman and Hennepin County; (2) tortious interference of contract against Freeman and Hough; (3) fraud against Freeman and Hennepin County; (4) violation of the Minnesota Whistleblower Act against Hennepin County; and (5) civil conspiracy against Freeman and Hough. The district court later dismissed Hough as a defendant in an order granting in part and denying in part respondents' motion to dismiss.

In December 2022, respondents moved the district court to dismiss Sweasy's claims. The district court granted the motion in part and denied it in part, and concluded, among other things, that respondents alleged concealment of an effort to dilute the distinction of the principal attorney classification could form the basis of a misrepresentation of material fact and that they had a duty to disclose their intent to dilute Sweasy's promotion.

Sweasy anticipated that Freeman and Hennepin County would assert privilege during discovery to withhold information about "discussions, communications, and representations" concerning the reclassification plan. During the depositions of D.M. and J.B., a deputy county attorney and a managing assistant attorney, counsel for respondents asserted privilege regarding communications from Freeman to D.M. and from Hough to Freeman. Respondents' counsel also instructed D.M. and J.B. not to answer certain questions on grounds of mediation privilege.

Sweasy believed that D.M. and J.B. had knowledge about the reclassification plan and that respondents' counsel prevented D.M. and J.B. from testifying about that knowledge as it related to Sweasy's fraudulent-omission claim. On May 31, 2023, Sweasy moved the court to compel production of documents, to conduct an in-camera review if necessary, and to compel deposition testimony under Minnesota Rule of Civil Procedure 37.01(b). She asked the district court to determine "(1) whether [respondents] . . . properly assert[ed] a mediation privilege to withhold evidence related to the alleged fraud, and (2) what the proper timeframe [was] for discovery of relevant evidence." The district court granted Sweasy's motion to compel and ordered that she was entitled to recall D.M. and

J.B. for further deposition testimony to revisit the questions that they were previously instructed not to answer on privilege grounds.

The district court also ordered both parties to submit affidavits setting forth the attorney fees incurred related to the motion to compel, which both parties did. Sweasy's counsel submitted an affidavit detailing her firm's attorney fees, hours, and description of work related to discovery-related issues. According to the affidavit, Sweasy's counsel requested $57,247.50 for the total time spent on the discovery issues, including $41,910 for drafting the motion, drafting the brief, and preparing for the motion hearing, plus time and effort before the motion to compel was required. Because Sweasy succeeded on her motion to compel discovery, the district court awarded her attorney fees in the amount of $28,857.50. However, the district court excluded from recovery all fees incurred for work prior to May 30, 2024—the day before Sweasy filed the motion to compel—and reduced by one-half all fees incurred on those days where the attorney spent more than five hours working on the matter.

Stay of District Court Proceedings Pending First Appeal

In December 2023, the district court dismissed Sweasy's remaining claims in their entirety with prejudice after granting respondents' motions for summary judgment. In January 2024, Sweasy appealed the district court's decision (*Tamburino I*) and filed a motion for a stay of the district court proceedings and execution of judgment under

Minnesota Rule of Civil Procedure 62.03.[4] The following day, respondents filed a notice and application for taxable costs and disbursements, asking the district court to tax $55,270.49 against Sweasy under Minnesota Statutes section 594.04, subdivision 1 (2024).

Sweasy objected to respondents' application for taxable costs, arguing that the district court should delay its decision on taxable costs until the first appeal was decided. In June 2024, the district court denied Sweasy's motion to stay and granted respondents' application for taxable costs and disbursements in the amount of $49,456.69.

Sweasy appeals.

ISSUES

I. Did the district court abuse its discretion when it denied recovery of reasonable attorney fees for mandatory meet-and-confer efforts under rule 37.01?

II. Did our decision in *Tamburino I* render moot Sweasy's remaining claim that the district court abused its discretion when it denied appellant's motion for a stay pending her first appeal?

ANALYSIS

I. The district court abused its discretion when it denied Sweasy's request for reasonable attorney fees associated with mandatory meet-and-confer efforts under rule 37.01.

Sweasy argues that the district court abused its discretion in its attorney fees award by categorically excluding fees associated with mandatory meet-and-confer efforts related to the motion to compel, which stemmed from respondents' refusal to disclose information during discovery.

[4] In the first appeal, we affirmed in part, reversed in part, and remanded to the district court for further proceedings because there existed genuine issues of material fact on certain claims. *Tamburino I*, 2024 WL 5114163, at *1.

"We will not reverse the district court's decision on attorney fees absent an abuse of discretion." *Carlson v. SALA Architects, Inc.*, 732 N.W.2d 324, 331 (Minn. App. 2007), *rev. denied* (Minn. Aug. 21, 2007). "[T]he reasonableness of the hours expended and the fees imposed raise questions of fact, and the district court's findings will be reversed only if they are clearly erroneous." *Kelbro Co. v. Vinny's on the River, LLC*, 893 N.W.2d 390, 399 (Minn. App. 2017) (quotation omitted). A district court abuses its discretion when it "errs as a matter of law in applying improper standards in an award of fees." *Green v. BMW of N. Am.*, 826 N.W.2d 530, 535-36 (Minn. 2013). "Because the district court is the most familiar with all aspects of the action . . . it is in the best position to evaluate the reasonableness of requested attorney fees." *650 N. Main Ass'n v. Frauenshuh, Inc.*, 885 N.W.2d 478, 494 (Minn. App. 2016) (quotation omitted), *rev. denied* (Minn. Nov. 23, 2016).

Minnesota courts apply a reasonableness analysis in determining attorney fees. *Northfield Care Ctr., Inc. v. Anderson*, 707 N.W.2d 731, 736 (Minn. App. 2006). To determine whether attorney fees are reasonable, the district court considers (1) "the time and labor required"; (2) "the nature and difficulty of the responsibility assumed"; (3) "the amount involved and the results obtained"; (4) "the fees customarily charged for similar legal services"; (5) "the experience, reputation, and ability of counsel"; and (6) "the fee arrangement existing between counsel and client." *Id.*

The district court considered the factors above and excluded from recovery all fees incurred for work prior to May 30, 2024—the day before Sweasy filed the motion to compel—and reduced by one-half all fees incurred on those days where the attorney spent

more than five hours on the matter. In doing so, the district court explained that it would not "award any fees other than those directly related to preparing and presenting the motion," which was filed on May 31, 2024. The district court also concluded that the fees expended were "disproportionately large" considering that the issues—whether respondents properly asserted a mediation privilege to withhold evidence related to the alleged fraud and the proper timeframe for discovery of relevant evidence—were neither complex nor novel.

Minnesota Rule of Civil Procedure 37 empowers district courts to issue orders compelling discovery. Minn. R. Civ. P. 37.01. Rule 37 requires good faith efforts to confer with the opposing party to obtain the discovery without court action before a motion to compel can be filed. Minn. R. Civ. P. 37.01(b). A district court may award attorney fees if a party fails to provide answers to interrogatories or fails to provide documents requested as part of discovery. Minn. R. Civ. P. 37.01(d)(1) (stating that the district court shall "require the party . . . whose conduct necessitated the motion . . . to pay . . . the reasonable expenses incurred in making the motion, including attorney fees, unless . . . the motion was filed without . . . a good faith effort to obtain the discovery without court action").

Sweasy contends that the district court's decision to exclude from recovery all fees incurred prior to May 30 was an abuse of discretion because some "work had to be done on the motion before May 30" before filing it with the district court. Some of this work, she points out, included mandatory meet-and-confer efforts prior to May 30 that should have been included as recoverable fees. We agree that the district court's decision to

categorically exclude from recovery all fees incurred as part of the mandatory meet-and-confer efforts prior to May 30 was an abuse of discretion.

The district court determined that it would award fees incurred only from the actual preparation and presentation of the motion to compel, noting that "time spent 'before the motion was necessitated' is not awarded because it would have been incurred even if the parties did not proceed to motion practice." This determination is not supported by the record, and district court does not provide any support for its assumption that the time spent prior to the motion was necessitated and would have been incurred even if the parties did not proceed to motion practice.

Whether the phrase "incurred in making the motion" includes mandatory meet-and-confer meetings requires us to determine the meaning of "incurred." This presents a question of interpretation of the Minnesota Rules of Civil Procedure, which we review de novo. *Gams v. Houghton*, 884 N.W.2d 611, 616 (Minn. 2016). "When interpreting court rules, we look first to the plain language." *Id.* (quotation omitted). "If the language of the rule is plain and unambiguous, we follow the rule's plain language." *Id.*

The Minnesota Supreme Court has concluded that "incur" means "to become liable for." *Collins v. Farmers Ins. Exch.*, 135 N.W.2d 503, 507 (Minn. 1965) (quotation omitted); *see also Staffing Specifix, Inc. v. TempWorks Mgmt. Servs., Inc.*, 896 N.W.2d 115, 128 (Minn. App. 2017) (interpreting "incurred" as unambiguously meaning to become liable or subject to expenses); *The American Heritage Dictionary of the English Language* 891 (5th ed. 2018) (defining "incur" to mean "[t]o acquire or come into (something usually undesirable); sustain" or "[t]o become liable or subject to as a result of one's actions; bring

upon oneself"). Thus, under rule 37.01, a moving party "becomes liable for" the expenses related to making the motion. Under a plain reading of the rule, the mandatory "meet-and-confer" provision is a condition precedent to filing a motion to compel. Because this is a necessary first step before filing a motion to compel, the related expenses in preparing to meet and confer are fees "incurred in making the motion."

Although Minnesota courts have not yet addressed whether attorney fees may be recovered for mandatory meet-and-confer conferences, federal caselaw provides guidance. Federal Rule of Civil Procedure 37 contains analogous language to Minnesota Rule of Civil Procedure 37.01 and has been applied by federal district courts to allow recovery of expenses for meet-and-confer conferences.[5] *See, e.g.*, *Inline Packaging, LLC v. Graphic Packaging Int'l, Inc.*, 15-CV-3183(ADM/LIB), 2016 WL 6997298 (D. Minn. Nov. 2, 2016), *objections overruled*, CV 15-3183 ADM/LIB, 2017 WL 62514 (D. Minn. Jan. 5, 2017) (considering meet-and-confer conferences as reasonable fees and expenses incurred in bringing a motion to compel); *DCD Partners, LLC v. Transamerica Life Ins. Co.*, No. 2:15-CV-03238-CAS (GJSx), 2018 WL 6252450, at *3 (C.D. Cal. June 13, 2018) (concluding that "courts have discretion to award fees based on meet-and-confer efforts");[6]

[5] Federal Rule of Civil Procedure 37(a)(5)(A) provides that "the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney[ ] fees."

[6] In *DCD Partners*, the magistrate judge, in awarding attorney fees, explained that "[m]eeting and conferring (and preparing for it) is no less important and no less the result of discovery misconduct than legal research, drafting a joint stipulation, or satisfying any other prerequisite to filing a motion to compel. No meet and confer or related work would

Rackemann v. LISNR, Inc., No. 1:17-CV-00624-MJD-TWP, 2018 WL 3328140, at *6 (S.D. Ind. July 6, 2018) (stating that courts in the Seventh Circuit have recognized that meeting and conferring is made necessary by the opposing party's failure to provide the requested discovery, and may be included in attorney fees); *Marcum v. Graphic Packaging Int'l, Inc.*, No. 1:13-CV-158, 2013 WL 5406236, at *3 (N.D. Ind. Sept. 25, 2013) ("Time spent communicating with opposing counsel, related to the motion to compel, can be included in attorney[ ] fees."); *see also Laiberte v. Dollar Tree, Inc.*, 987 N.W. 2d 590, 594 (Minn. App. 2023) ("Though they do not bind us, we consider federal courts opinions for their persuasive value and afford those opinions due deference." (quotation omitted)).

Sweasy provided the district court with details related to what meet-and-confer efforts occurred and when. Therefore, the district court had sufficient information to apply the reasonableness analysis it used in determining the fees submitted after May 30, 2024, but abused its discretion when it declined to determine reasonable fees based on its interpretation of rule 37.01.

In sum, the district court abused its discretion in deciding to categorically exclude fees for all work incurred as part of the mandatory meet-and-confer requirement. Because the plain language of rule 37.01(b) requires parties to meet and confer prior to filing the motion to compel discovery, the time and effort expended in this requirement should be considered by the district court when awarding reasonable attorney fees.

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have been necessary if defendant had complied with its discovery obligations." No. 2:15-CV-03238-CAS (GJSx), 2018 WL 6252450, at *3. On review, the district court held that the magistrate judge's decision "was not clearly erroneous or contrary to law." *Id.*

II. Appellant's remaining claim that the district court abused its discretion when it denied appellant's motion for a stay pending her appeal in *Tamburino I* is moot.

Having concluded the district court abused its discretion in categorically eliminating fees for all work incurred as part of the mandatory meet-and-confer requirement, we now turn to Sweasy's remaining argument that the district court abused its discretion when it denied her motion for a stay pending appeal in *Tamburino I*.

Sweasy argues in her reply brief that "[s]ince the filing of this second appeal, this [c]ourt reversed portions of the trial court's summary-judgment ruling, requiring vacation of the prior judgment against Sweasy." She argues that "a stay should have been issued, and this [c]ourt should so hold as guidance in future cases." Sweasy essentially asks this court to issue an advisory opinion.

Generally, courts do not decide moot questions. Minnesota courts "may only hear actual cases and controversies." *Ly v. Harpstead*, 7 N.W.3d 560, 568 (Minn. 2024) (quotation omitted). Appellate courts "decline to hear moot cases because courts do not issue advisory opinions or decide cases merely to make precedents." *Winkowski v. Winkowski*, 989 N.W.2d 302, 308 n.7 (Minn. 2023) (quotation omitted). And appellate courts "will dismiss an appeal as moot when a decision on the merits is no longer necessary or an award of effective relief is no longer possible." *Id.* (quotation omitted).

Sweasy's arguments regarding a stay pending appeal are moot because in *Tamburino I*, we affirmed in part, reversed in part, and remanded the district court's summary judgment decision, and Sweasy concedes that issuing a decision on the stay issue would not affect either party. 2024 WL 5114163, at *15. Additionally, Sweasy does not

identify an exception to the mootness doctrine, and we are satisfied that none of the exceptions to the mootness rule apply here.[7] *See Snell v. Walz*, 985 N.W.2d. 277, 287 (Minn. 2023) (holding the party seeking an exception to the mootness doctrine bears the burden of demonstrating that the exception applies).

Additionally, the appropriate way for a party to seek review of a district court's decision on a stay motion is by motion filed in this court under rule 127 of the Minnesota Rules of Civil Appellate Procedure. Minn. R. Civ. App. P. 108.02, subd. 6 ("On a motion under Rule 127, [we] may review the [district] court's determinations as to whether a stay is appropriate, the terms of any stay, and the form and amount of security pending appeal."). Our special term panel rules on such motions for review of stay decisions and conditions. Here, Sweasy filed no such motion. However, because we have resolved the appeal, there is no relief available that we could now grant.

DECISION

The district court abused its discretion when it categorically excluded those fees associated with the mandatory meet-and-confer requirements under rule 37.01. On remand, the district court shall not categorically exclude fees associated with the meet-and-

[7] There are four exceptions to the mootness doctrine. *See Winkowski*, 989 N.W.2d at 308-10. The exceptions are: (1) for "issues that are capable of repetition, yet likely to evade review," *id.* at 308 (quotation omitted); (2) in cases "[w]here an appellant produces evidence that collateral consequences actually resulted from a judgment" or where "a party demonstrates that real and substantial disabilities attach to a judgment," *id.* (quotation omitted); (3) "when the case is functionally justiciable and presents an important question of statewide significance that should be decided immediately," *id.* at 309 (quotation omitted); and (4) "for instances when a party moots a case by voluntarily ceasing the allegedly wrongful action," *id.* at 310 n.10.

confer efforts prior to May 30, 2024 and instead shall exercise its discretion in considering the reasonableness of these attorney fees in deciding what amount to award Sweasy. And because we do not issue advisory opinions, we similarly decline to consider whether the district court abused its discretion when it denied appellant's motion for a stay pending appeal in *Tamburino I*.

Reversed and remanded.