

*This opinion is nonprecedential except as provided by  
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A23-0729**

1648 Properties, LLC, et al.,  
Appellants,

vs.

Morrisun Sund, PLLC,  
Respondent.

**Filed March 11, 2024  
Affirmed  
Reyes, Judge**

Sherburne County District Court  
File No. 71-CV-20-1114

Amy S. Conners, Michael A. Stephani, Best & Flanagan, LLP, Minneapolis, Minnesota  
(for appellants)

Ryan R. Dreyer, Eric G. Nasstrom, Scott A. Peitzer, Morrison Sund, PLLC, Minnetonka,  
Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Reyes, Judge; and Hooten,  
Judge.\*

**NONPRECEDENTIAL OPINION**

**REYES, Judge**

Appellants, former clients of respondent-law firm, challenge the district court's  
grant of summary judgment against them on respondent's breach-of-contract claim,

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

arguing that the district court erred by determining that respondent was entitled to collect certain litigation expenses as “costs incurred by [respondent] to collect overdue fees and expenses” under the parties’ retainer agreement. We affirm.

## FACTS

In May 2018, appellants Henry Stursberg (Stursberg) and 1648 Properties, LLC (collectively, the Stursberg parties) sued several defendants<sup>1</sup> (collectively, Titcomb) over disputes concerning their shared interest in two mobile-home parks (the Titcomb litigation). The Stursberg parties retained respondent Morrison Sund, PLLC (Morrison)<sup>2</sup> to represent them in the Titcomb litigation. The parties’ retainer agreement included a provision that stated: “[The Stursberg parties] agree to pay the costs incurred by [Morrison] to collect overdue fees and expenses, including attorney[] fees at the rate of \$200.00 per hour” (the collection provision).

The parties’ attorney-client relationship eventually soured, resulting in Morrison withdrawing as the Stursberg parties’ counsel in November 2019. After withdrawing, Morrison claimed \$199,339.33 (the original lien amount) in outstanding invoices from the Stursberg parties under the retainer agreement.

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<sup>1</sup> These parties included Kent Titcomb; Brenton Titcomb; Amicorp, Inc.; Amicorp Communities, LLC; KAW Parks, LLC; Pinerock Properties, LLC; and Wells Fargo Bank, N.A.

<sup>2</sup> The case caption in the district court identified respondent as “Morrisun” Sund. Respondent identifies itself as “Morrison” Sund in its appellate brief. This opinion’s caption conforms with the caption used in the district court. Minn. R. Civ. App. P. 143.01. This opinion uses the spelling provided by respondent.

***Morrison's collection efforts lead to extensive litigation between the parties.***

In December 2019, Morrison filed attorney-lien notices against 1648 Properties and one of the mobile-home parks that was the subject of the Titcomb litigation. The notices asserted that the Stursberg parties owed Morrison the original lien amount plus interest and collection costs.

After Morrison filed its attorney liens, the Stursberg parties reached a settlement agreement with Titcomb in which Titcomb agreed to buy out the Stursberg parties' interest in the mobile-home park. However, because Morrison's lien clouded the park's title, the settlement agreement provided that the Stursberg parties would be responsible for discharging the lien before the closing date. The agreement stated that, if the Stursberg parties failed to discharge the lien, Titcomb could pay any amount required to discharge the lien and deduct that amount from the buyout price. Following the settlement agreement, Titcomb entered into an agreement to sell the park to a third-party buyer. However, the Stursberg parties had failed to discharge Morrison's attorney lien, preventing the sale from closing on the scheduled date.

***Morrison files an involuntary-bankruptcy petition.***

Shortly after it filed its attorney liens, Morrison claimed to have learned that Stursberg had arranged settlements with other law-firm creditors who represented the Stursberg parties in the Titcomb litigation. To secure its fair share of Stursberg's assets, Morrison filed an involuntary-bankruptcy petition against Stursberg. Stursberg moved to dismiss the petition and filed an affidavit which attested that he had resolved his debts with other creditors.

At the hearing on Stursberg's motion to dismiss, the bankruptcy court initially admonished Morrison for improperly using an involuntary-bankruptcy petition to collect unpaid fees.<sup>3</sup> Morrison then informed the bankruptcy court that it had believed the petition was appropriate based on the information it had regarding Stursberg's creditors at the time of filing. Morrison stated that it discovered that its petition was not an appropriate remedy only after reading the affidavit Stursberg included with his motion to dismiss. According to Morrison, Stursberg's affidavit contradicted his prior representations to Morrison concerning the status of his creditors, which had led Morrison to file the petition. Nevertheless, Morrison ultimately agreed to dismiss its petition.

Stursberg subsequently filed a motion in the bankruptcy court for attorney fees, arguing that Morrison brought its petition in bad faith. The bankruptcy court denied Stursberg's motion, determining that the prior dismissal of Morrison's petition precluded recovery of attorney fees. The bankruptcy court did not issue findings regarding whether Morrison brought its petition in bad faith.

***Stursberg files federal lawsuits against Morrison.***

After the bankruptcy court dismissed Morrison's involuntary-bankruptcy petition, Stursberg filed a federal suit against Morrison in Pennsylvania. Stursberg claimed five causes of action stemming from the damages he allegedly suffered because of Morrison's petition, as well as one count entitled "Breach of Contract/Malpractice" arising from Morrison's representation of the Stursberg parties in the Titcomb litigation. *See Stursberg*

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<sup>3</sup> We take judicial notice of the parties' bankruptcy court transcripts as part of the public record. *MacDonald v. Brodkorb*, 939 N.W.2d 468, 474 (Minn. App. 2020).

*v. Morrison Sund, PLLC*, No. CV-20-1635-KSM, 2022 WL 1028935 (E.D. Pa. Dec. 11, 2020). After the Pennsylvania court dismissed Stursberg's initial suit for procedural reasons, it transferred his subsequent action to the District of Minnesota, which concluded that Stursberg's claims were preempted by the Bankruptcy Code. *See id.*; *Stursberg v. Morrison Sund PLLC*, 648 F.Supp.3d 1075 (D. Minn. 2023).

***The Stursberg parties file suit against Morrison in Minnesota state court.***

The current litigation began in October 2020, when the Stursberg parties sued to remove Morrison's attorney lien on the mobile-home park. Morrison counterclaimed for breach of contract, seeking to collect unpaid attorney fees from its representation of the Stursberg parties during the Titcomb litigation.

With Morrison's lien still in place pending the Stursberg parties' suit, and with the closing date of the mobile-home park's sale fast approaching, Titcomb agreed to pay Morrison \$250,000 to discharge its lien on the mobile-home park (the Titcomb payout). Titcomb planned to deduct the \$250,000 from the buyout price owed to the Stursberg parties, but the Stursberg parties disputed the deduction, and Titcomb paid both the \$250,000 to Morrison and the full buyout price to the Stursberg parties to salvage the sale.

Based on the Titcomb payout, the district court determined that the Stursberg parties' claims related to Morrison's lien were moot. The district court then sua sponte awarded Morrison summary judgment on its counterclaim for breach of contract after determining that the Stursberg parties' breach caused Morrison to incur damages in the amount of \$310,140.36, which included the outstanding original lien amount, the interest owed on the lien, and the costs Morrison incurred to collect the unpaid fees. The district

court deducted the \$250,000 Titcomb payout from the final judgment and ordered the Stursberg parties to pay Morrison \$60,140.36.

In January 2022, we reversed the district court's grant of summary judgment, concluding that summary judgment was premature because the Stursberg parties had no notice that the district court would consider summary judgment and did not have the opportunity to present evidence to oppose summary judgment. *1648 Props., LLC v. Morrison Sund, PLLC*, No. A21-0432, 2022 WL 93369, at \*4 (Minn. App. Jan. 10, 2022), *rev. denied* (Minn. Apr. 19, 2022). We therefore remanded the case for further proceedings. *Id.*

*The district court awards Morrison summary judgment following remand.*

After remand, the district court issued a scheduling order in June 2022 which set the deadline for fact discovery as December 1, 2022. The Stursberg parties failed to produce expert reports or other evidence during discovery, and the district court sanctioned the Stursberg parties for failing to respond to Morrison's discovery requests. Following a November 2022 summary-judgment hearing, the district court determined that the Stursberg parties "squandered their opportunity to marshal evidence in opposition to summary judgment" and therefore granted summary judgment to Morrison on its breach-of-contract counterclaim.

Citing the collection provision in the parties' retainer agreement, the district court awarded Morrison a total of \$319,584.28 for costs incurred by bringing its involuntary-bankruptcy petition, defending itself from Stursberg's federal lawsuits, and for costs stemming from the current litigation (collectively, the litigation fees). The district court

ordered Morrison to submit an affidavit outlining its updated contractual damages figures offset by the \$250,000 Titcomb payout.

This appeal follows.

## **DECISION**

The Stursberg parties argue that the district court erred by granting Morrison summary judgment because (1) the collectability of Morrison’s invoiced attorney fees under the parties’ retainer agreement presented a factual question that should be resolved by the jury; (2) the litigation fees were not collectable under the collection provision; and (3) Morrison invoiced an unreasonable amount of attorney fees.

Appellate courts review a grant of summary judgment de novo to determine whether there are genuine issues of material fact and whether the district court erred by misapplying the law. *Kenneh v. Homeward Bound, Inc.*, 944 N.W.2d 222, 228 (Minn. 2020). Appellate courts review the evidence and factual inferences in the light most favorable to the nonmoving party. *Franklin v. Evans*, 992 N.W.2d 379, 384 (Minn. 2023). To defeat a motion for summary judgment, the Stursberg parties were required to present specific facts showing that there is a genuine issue for trial. *Montemayor v. Sebright Products, Inc.*, 898 N.W.2d 623, 628 (Minn. 2017). A “genuine issue” of material fact must be established by substantial evidence. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).

### **I. The district court did not err by determining that the interpretation of the parties’ retainer agreement presented a legal question.**

Initially, the Stursberg parties assert that Morrison’s breach-of-contract claim presents factual rather than legal issues because “there is a genuine dispute of material fact

as to whether any contract can bind a party indefinitely,” and that, because Morrison did not incur the litigation fees during its representation of the Stursberg parties in the Titcomb litigation, the litigation fees were beyond the scope of the parties’ retainer agreement and could not be recovered under the collection provision. These arguments are unpersuasive.

It is axiomatic that the interpretation of a contract is a legal question unless the contract is ambiguous. *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346 (Minn. 2003); *Staffing Specifix, Inc. v. TempWorks Mgmt. Servs., Inc.*, 913 N.W.2d 687, 692 (Minn. 2018). A contract is ambiguous if its provisions are reasonably susceptible to more than one interpretation. *Id.* The Stursberg parties do not argue that the collection provision is ambiguous. Further, even the Stursberg parties’ attempts to reframe the issue reflect legal questions. *See Glacial Plains Coop. v. Chippewa Valley Ethanol Co.*, 912 N.W.2d 233, 236 (Minn. 2018) (discussing enforceability of indefinite contracts as legal issue); *Hanks v. Hubbard Broad., Inc.*, 493 N.W.2d 302, 307 (Minn. App. 1992) (noting that whether extra-contract damages are recoverable is legal issue), *rev. denied* (Minn. Feb. 12, 1993). The district court therefore did not err by determining that Morrison’s ability to recover certain classes of fees under the collection provision presented a legal issue.

**II. The district court did not err by determining that Morrison was entitled to recover the litigation fees under the collection provision.**

The Stursberg parties contend that Morrison cannot recover the litigation fees under the collection provision because they are unrelated to Morrison’s services in the Titcomb litigation. We address each litigation matter in turn.

**A. The district court did not err by determining that Morrison is entitled to attorney fees incurred from bringing its involuntary-bankruptcy petition.**

The Stursberg parties assert that Morrison cannot collect the fees it invoiced for bringing its involuntary-bankruptcy petition under the collection provision because it brought the petition in bad faith and improperly used the involuntary-bankruptcy remedy as a self-serving collection device. We are not persuaded.

“Under Minnesota law, every contract includes an implied covenant of good faith and fair dealing” that extends to all actions within the scope of the underlying contract. *In re Hennepin Cnty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 502-03 (Minn. 1995). Generally, and under bankruptcy law, the determination of whether a creditor filed an involuntary-bankruptcy petition in bad faith is a question of fact. *In re Tichy Elec. Co.*, 332 B.R. 364, 371-72 (Bankr. N.D. Iowa 2005). However, there is a presumption that the creditor filed in good faith. *In re Anmuth Holdings LLC*, 600 B.R. 168, 191 (Bankr. E.D.N.Y. 2019). The debtor therefore has the burden to show by a preponderance of the evidence that the creditor filed in bad faith. *Tichy*, 332 B.R. at 372. When the party opposing summary judgment has the burden of proof, they must present “substantial evidence” creating a factual dispute for the factfinder. *Russ*, 566 N.W.2d at 70.

Attorney fees associated with Morrison’s involuntary-bankruptcy petition were “costs incurred by [Morrison]” to recover the Stursberg parties’ unpaid fees. Morrison’s fees were therefore recoverable under the collection provision unless the Stursberg parties met their burden to provide substantial evidence that Morrison brought the involuntary-bankruptcy petition in bad faith. *Id.*; *Tichy*, 332 B.R. at 372. Here, the Stursberg parties

failed to submit any affidavits, declarations, or other evidence during discovery to support their claim. Although the Stursberg parties rely on the bankruptcy court's initial admonishment of Morrison, the bankruptcy court subsequently dismissed the petition without making a finding of bad faith. We therefore conclude that the district court did not err by granting Morrison summary judgment on its claim for attorney fees related to bringing the involuntary-bankruptcy petition.

**B. The district court did not err by determining that Morrison is entitled to fees related to defending against the Stursberg parties' federal lawsuits.**

The Stursberg parties argue that Morrison is not entitled to fees incurred from defending the Stursberg parties' federal lawsuits because those actions were entirely unrelated to Morrison's claim for unpaid attorney fees. We disagree.

We have previously concluded that collection provisions similar to the one at issue allow the creditor to be compensated for defending counterclaims that could reduce the amount owed under the contract. *See Potter v. Am. Bean & Grain Corp.*, 388 N.W.2d 22, 25 (Minn. App. 1986) (concluding that, because appellant was entitled to all reasonable collection costs under a promissory note, he was also entitled to an award for defending a counterclaim "because the counterclaim, if successful, would have reduced the amount he received under the note."), *rev. denied* (Minn. Aug. 13, 1986).

In addition to alleging causes of action related to Morrison's bankruptcy petition, the Stursberg parties' initial federal complaint directly challenged that Morrison was entitled to the amount of attorney fees it was seeking in Minnesota state court by asserting that Morrison had overbilled for the work performed during the Titcomb litigation. The

complaint included allegations that Morrison's invoices were "wildly inflated," that Morrison "ran up" legal fees, that the Titcomb litigation did not warrant \$300,000 in legal fees, and that Morrison could only recover under a theory of quantum meruit rather than its invoiced attorney fees.

The allegations in the Stursberg parties' federal complaints demonstrate that the costs Morrison incurred in defending the lawsuits were costs related to collecting overdue fees and expenses under the collection provision. The gravamen of the Stursberg parties' complaints challenges Morrison's involuntary-bankruptcy petition. Because we have already concluded that Morrison could recover the fees incurred from bringing that petition under the collection provision, Morrison was also entitled to an award for defending lawsuits which had the potential to reduce the amount it received under the parties' retainer agreement. *See Potter*, 388 N.W.2d at 25. Moreover, the Stursberg parties' initial complaint directly challenged Morrison's billing practices and the amount of attorney fees the Stursberg parties owed under the parties' retainer agreement.

If the Stursberg parties had prevailed in their federal lawsuits, their award would have been offset from the amount Morrison obtained from its state court breach-of-contract counterclaim for unpaid attorney fees. The district court therefore did not err by awarding Morrison attorney fees for defending the Stursberg parties' federal lawsuits under the collection provision. *See id.*

**C. The district court did not err by determining that Morrison is entitled to fees stemming from the current litigation.**

The Stursberg parties argue that Morrison cannot recover fees from defending the current litigation under the collection provision and that the \$250,000 Morrison received from the Titcomb payout exceeded the original lien amount, rendering its counterclaim for unpaid attorney fees moot. We are not convinced.

There is no dispute that the Stursberg parties initially failed to pay Morrison its attorney fees stemming from the Titcomb litigation. Morrison sought to recover the unpaid fees through its attorney liens on the Stursberg parties and their interest in the disputed mobile-home parks. The Stursberg parties then initiated this litigation to remove Morrison's attorney liens.

Attorney liens are designed to serve as a security for an unpaid debt. Minn. Stat. § 481.13 (2022); *Dorsey & Whitney LLP v. Grossman*, 749 N.W.2d 409, 421 (Minn. App. 2008). Because attorney liens are a mechanism for collecting unpaid debt, and because Morrison incurred “costs” in filing their attorney liens, Morrison is entitled to the costs of defending against the Stursberg parties’ suit to remove their liens, as well as the costs to bring their counterclaim for unpaid fees. *See Potter*, 388 N.W.2d at 25; *State Bank of Cokato v. Ziehwein*, 510 N.W.2d 268, 270 (Minn. App. 1994) (citing *Potter* to conclude that, because debtor violated his contractual duty, appellant-bank was entitled to costs of pursuing insurance litigation under a collection provision), *rev. denied* (Minn. Mar. 15,

1994).<sup>4</sup> Because an action to collect unpaid fees is also a cost incurred to collect those fees, the district court did not err by determining that Morrison’s fees related to the current litigation were covered under the collection provision.

The Stursberg parties’ argument that the Titcomb payout rendered Morrison’s counterclaim moot is also unavailing. A claim is moot “when a decision on the merits is no longer necessary or an award of effective relief is no longer possible.” *Snell v. Walz*, 985 N.W.2d 277, 283 (Minn. 2023) (quotation omitted). Although the Titcomb payout exceeded the original lien amount, the interest and expenses Morrison incurred in trying to recover the original lien amount caused the Stursberg parties’ debt to increase to over \$300,000. The Titcomb payout alone was therefore insufficient to resolve Morrison’s counterclaim against the Stursberg parties. Additionally, the district court acknowledged the Titcomb payout and offset \$250,000 from Morrison’s award to prevent it from being unjustly enriched. Because the remaining expenses that Morrison claimed the Stursberg parties owed under their retainer agreement constituted an effective form of relief, the Stursberg parties’ mootness argument fails. *Id.*

### **III. The Stursberg parties have waived the issue of whether Morrison’s fees were reasonable.**

The Stursberg parties contend that the district court’s award of nearly \$320,000 in attorney fees under the collection provision is “wholly unjustified and unsupported”

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<sup>4</sup> The *Ziehwein* court also supported its conclusion by citing to the Eighth Circuit’s opinion in *Duryea v. Third Nw. Nat’l Bank of Minneapolis*, 606 F.2d 823, 826 (8th Cir. 1979) (holding that creditor was entitled to recover attorney fees in both defending debtor’s claim and prosecuting counterclaim as “costs of collection.”).

because the district court: (1) provided insufficient explanations for its decision to award the fees and (2) accepted Morrison's fee submissions at face value, without allowing the Stursberg parties any opportunity to introduce counter evidence.

"A reviewing court must generally consider only those issues that the record shows were presented [to] and considered by the [district] court in deciding the matter before it." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (quotation omitted). Parties may not "obtain review by raising the same general issue litigated [at the district court] under a different theory." *Id.*

Here, the record in the underlying case, unlike in the Stursberg parties' federal complaint, reflects that the Stursberg parties did not argue that Morrison's fees were unreasonable before the district court, but only contested Morrison's ability to collect their invoiced fees under the collection provision. The Stursberg parties failed to challenge the reasonableness of either the \$200.00 per hour rate in the collection provision or the hours that Morrison invoiced in either their oral arguments or summary-judgment briefing. As a result, the Stursberg parties have waived the issue of whether Morrison's fees were reasonable on appeal. *Thiele*, 425 N.W.2d at 580.

**Affirmed.**