STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0673

Stanford Taylor Edward McClure, Jr.,
Plaintiff,

Jesse Gant, III,
Appellant,

vs.

H. Le Phan, individually and in her capacity
as an employee/agent of Felhaber, Larson,
Fenlon & Vogt Law Firm, et al.,
Respondents.

Filed March 10, 2009
Affirmed
Halbrooks, Judge

Ramsey County District Court
File No. 62-C8-07-004921

Jesse Gant, III, 13091 Taconite Court Northeast, Blaine, MN 55449 (attorney pro se)

Paul C. Peterson, William L. Davidson, Lind, Jensen, Sullivan & Peterson, P.A., 150 South 5th Street, Suite 1700, Minneapolis, MN 55402 (for respondents)

Considered and decided by Halbrooks, Presiding Judge; Johnson, Judge; and Poritsky, Judge.*

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

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

HALBROOKS, Judge

Appellant attorney, pro se, challenges the district court's grant of respondents' motion for sanctions against him and the denial of his own motion for sanctions. Because we conclude that the district court properly exercised its discretion, we affirm the district court's grant of respondents' motion and denial of appellant's motion.

FACTS

Respondent H. Le Phan, an attorney, represented Career Systems Development Corporation (CSD) in several lawsuits brought against CSD by former employees. One of these suits was brought by Maryland Rosenbloom, pro se. *Rosenbloom v. Career Sys. Dev. Corp.*, No. 62-C8-05-012402 (Ramsey County Dist. Ct.). Former CSD employees Stanford McClure and Courtney Yorke, who were involved in separate lawsuits against CSD, together attended a February 26, 2007 motion hearing in the *Rosenbloom* matter.

The next day, Phan wrote a letter to the district court stating that she would be hiring an off-duty police officer to attend Rosenbloom's upcoming deposition because she had been intimidated by events that occurred after the hearing on February 26. Phan enclosed an affidavit dated February 27, 2007, which set forth her version of events. According to Phan, after leaving the courthouse on February 26, she saw McClure, Rosenbloom, and Yorke approximately 200 feet from her. The three men allegedly looked directly at her, walked toward her, and followed her to a parking-ramp elevator. Phan stated in her affidavit that these events led her to believe that McClure, Rosenbloom, and Yorke were waiting for her to leave the courthouse so that they could

harass and intimidate her. She also stated that their conduct put her "in fear of imminent bodily harm . . . [and] caused [her] emotional distress and anxiety," and that "McClure testified at his deposition that he fantasizes about killing people who have wronged him."

On May 7, 2007, McClure, represented by appellant Jesse Gant, filed a defamation suit against Phan and her employer, respondent Felhaber, Larson, Fenlon & Vogt Law Firm. On May 22, 2007, respondents moved to dismiss the defamation suit with prejudice pursuant to Minn. R. Civ. P. 12.02. Respondents also moved for a protective order staying discovery until the district court ruled on the motion to dismiss.

On May 23, 2007, Gant wrote to respondents' counsel, giving notice of his intent to bring a motion for sanctions against respondents and their attorney unless they withdrew the motion to dismiss. In a May 31, 2007 letter to Gant, respondents' counsel stated that he did not intend to withdraw the motion to dismiss. Respondents' counsel also enclosed a rule 11 notice of motion, stating that McClure's defamation suit was barred by absolute privilege. In a letter dated June 1, 2007, Gant replied:

> I received your letter . . . regarding your notice to file Rule 11 sanctions if I do not dismiss my client's case. That is not going to happen. Therefore, there is no need to wait the 21 days. So, for the sake of expediency, please obtain your motion date and time and provide me with notice thereof, so that I can make my motion for sanctions and await responding to your motion to dismiss.

McClure moved for sanctions on June 20, 2007. A hearing on the motion to dismiss and the cross-motions for sanctions was held on July 23, 2007.

The district court issued an order (1) granting respondents' rule 12.02 motion to dismiss; (2) dismissing McClure's defamation claim with prejudice and on the merits;

(3) dismissing McClure's motion for sanctions; and (4) dismissing respondents' motion for a protective order as moot and ordering cessation of discovery. The district court stated that the defamation case "must be dismissed on absolute privilege grounds."

Respondents subsequently moved for sanctions against Gant pursuant to Minn. R. Civ. P. 11 and Minn. Stat. § 549.211 (2006). Gant moved for sanctions against respondents and their attorney. At the motion hearing, Gant appeared on his own behalf, stating that he was not representing McClure because the motion was for sanctions against him personally. McClure did not appear at the hearing and does not appeal the dismissal of his defamation suit.

On October 31, 2007, the district court filed an order granting respondents' motion for sanctions and denying Gant's motion for sanctions. Gant was ordered to pay respondents $8,460 for attorney fees "they reasonably incurred as a result of defending this action." This appeal from the resulting money judgment follows.

D E C I S I O N

I.

Gant argues that sanctions against him are not warranted. We review a district court's award of sanctions under Minn. R. Civ. P. 11 or Minn. Stat. § 549.211 for an abuse of discretion. *Cole v. Star Tribune*, 581 N.W.2d 364, 370 (Minn. App. 1998). Because "courts should construe rule 11 somewhat narrowly to avoid deterring legitimate or arguably legitimate claims," this court will reverse a district court's award of sanctions if the sanctioned party's assertion "is not an objectively unreasonable one." *Conant v.*

Robins, Kaplan, Miller & Ciresi, L.L.P., 603 N.W.2d 143, 150 (Minn. App. 1999) (quotation omitted), *review denied* (Minn. Mar. 14, 2000).

The district court focused on whether or not Gant acted reasonably in filing McClure's defamation suit. The district court determined that Gant's filing of the suit was not objectively reasonable on three grounds: (1) the defamation claim against Phan was "unfounded" because establishing a defamation claim requires proof that a statement was false and "Phan's statements that she felt intimidated or fearful are emotions, and [could not] be proven false"; (2) "Gant could not have reasonably thought, or in good faith argued, that existing law supported his client's claims"; and (3) "Gant had knowledge of the absolute privilege doctrine from past litigation." The district court specifically noted Gant's representation of the plaintiff in *Cole*, in which Gant was sanctioned by the district court for his "unfounded arguments against awarding absolute privilege" to the defendant. The district court stated that "Gant must be held to the standard of a reasonable attorney, not his own standards. The public policy is to sanction those who bring either frivolous or harassing litigation."

Gant contends that he had an objectively reasonable basis for asserting McClure's defamation claim because: (1) McClure was not a party to *Rosenbloom* and (2) respondents stated in their answer that the February 26, 2007 *Rosenbloom* hearing was "unrelated" to McClure.

The supreme court's decision in *Mahoney & Hagberg v. Newgard*, 729 N.W.2d 302 (Minn. 2007), makes it clear that Gant's first argument is without merit. *Mahoney & Hagberg*, which Gant has cited throughout the defamation lawsuit and to this court,

involved a suit between two former business partners, Boldt and Burns. 729 N.W.2d at 304. Boldt and Burns had formed a company that provided administrative support to Mahoney & Hagberg, P.A., a law firm. *Id.* During the course of Boldt's lawsuit against Burns, Boldt's attorney drafted an affidavit signed by Newgard, a former secretary of the law firm. *Id.* Newgard's affidavit alleged improper and illegal conduct by several of the firm's attorneys. *Id.* The law firm then sued Newgard based on her affidavit. *Id.* at 305. The supreme court concluded that Newgard's statements in her affidavit had "reference and relation" to the subject matter of the litigation between Boldt and Burns; therefore the statements were relevant in the context of absolute privilege. *Id.* at 308. The supreme court noted that relevance in this context is not determined "by asking whether [the] statements are 'legally relevant.' Rather, we look to see if the statement has a connection to the case before the court, keeping in mind that any doubts about the relevance of the statement are resolved in favor of relevancy and pertinency." *Id.*

Here, the contested statements in Phan's affidavit were relevant because they had a connection to the *Rosenbloom* litigation. Phan was explaining to the district court why she would be hiring a police officer to be present at a deposition to be taken in the *Rosenbloom* suit. The relevant statements in Newgard's affidavit in *Mahoney & Hagberg* were protected by absolute privilege, although they concerned persons who were not parties to the Boldt–Burns litigation. Likewise, the relevant statements in Phan's affidavit were protected by absolute privilege, although they were made about McClure, who was not a party in *Rosenbloom*.

Gant's argument regarding respondents' answer is also without merit. In their answer, respondents stated "that at an unrelated hearing involving Mr. Rosenbloom, Ms. Phan requested that the courtroom be closed to spectators." Gant contends that respondents' use of the word "unrelated" to describe the February 26, 2007 *Rosenbloom* hearing means that McClure "had no relation" to *Rosenbloom*. Gant appears to misunderstand the concept of relevance within the context of absolute privilege. As *Mahoney & Hagberg* makes clear, the question is whether the statements in the affidavit are related to the case before the court, not whether the person claiming defamation has any relation to the case before the court. *See* 729 N.W.2d at 306, 308. Except for McClure's nonparty status in *Rosenbloom*, Gant does not contend that the statements about McClure in Phan's affidavit were unrelated to that case.

Because Gant's arguments regarding whether it was objectively reasonable for him to file the defamation claims on behalf of McClure lack merit, the district court did not abuse its discretion by granting respondents' motion for sanctions against him.

II.

Gant argues that the amount of sanctions awarded to respondents was excessive because no discovery took place, respondents took no depositions, and respondents' motion for dismissal was "rote and mundane." A district court has "wide discretion in determining the type of sanctions it deems necessary." *Peterson v. Hinz*, 605 N.W.2d 414, 417 (Minn. App. 2000), *review denied* (Minn. Apr. 18, 2000). Gant does not cite to any legal authority for his argument that it was an abuse of discretion for the district court to grant sanctions of $8,460 for fees and costs incurred in bringing a successful motion to

dismiss. A district court "has the discretion to impose a sanction in the amount sufficient to deter future litigation abuse, even if the amount is greater than the amount of attorney fees." *Gibson v. Trs. of Minn. State Basic Bldg. Trades Fringe Benefits Funds*, 703 N.W.2d 864, 871 (Minn. App. 2005), *vacated in part on other grounds* (Minn. Dec. 15, 2005). We note that the district court imposed sanctions in an amount less than the amount of attorney fees expended by respondents.[1] We therefore cannot say that the district court abused its discretion as to the amount of sanctions.

III.

Gant contends that the district court erroneously found that Phan had sought a protective order in the context of the *Rosenbloom* litigation. He argues that the district court based its decision that absolute privilege applied and that sanctions were warranted upon this factual error, requiring reversal.

In its October 31, 2007 order and memorandum, the district court twice mentioned a protective order. First, the district court stated that the basis of McClure's defamation suit "was a protective order that Phan requested based on actions of [McClure] in the underlying litigation of [*Rosenbloom*]." Second, the district court stated: "Phan testified in an affidavit that she was afraid of McClure because in his deposition he had made comments about killing people that wronged him. The judicial proceeding concerned an order of protection to have a police officer in the courtroom."

[1] The district court noted that it awarded respondents a reduced amount of costs because it believed that the legal work, namely the work on the issue of absolute privilege, was done in part for a defamation suit that Rosenbloom brought in state district court against respondents. That matter also involved Phan's February 27, 2007 affidavit.

We will not set aside findings of fact unless they are clearly erroneous. Minn. R. Civ. P. 52.01. "Findings of fact are clearly erroneous only if the reviewing court is left with the definite and firm conviction that a mistake has been made." *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999) (quotation omitted). The district court appears to be mistaken that Phan requested a protective order in *Rosenbloom*. The February 26, 2007 hearing involved Rosenbloom's and CSD's cross-motions for sanctions. The record does not contain any motion for a protective order brought by Phan or CSD in the context of *Rosenbloom*, and respondents concede that "technically, there was no request for a protective order" in *Rosenbloom*. We therefore conclude the district court's statement that Phan had requested a protective order in the *Rosenbloom* litigation was clearly erroneous.

But in order to prevail on appeal, an appellant must show both error and prejudice. *Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975); *see also* Minn. R. Civ. P. 61 (stating that harmless error is to be ignored). Gant, though he bears the burden of demonstrating that the error was prejudicial, does not explain how the erroneous statement prejudiced him. *See Bloom v. Hydrotherm, Inc.*, 499 N.W.2d 842, 845 (Minn. App. 1993), *review denied* (Minn. June 28, 1993). We conclude that the district court's decision that Gant acted unreasonably by filing McClure's defamation lawsuit is adequately supported without the inclusion of the erroneous finding. *See Hanka v. Pogatchnik*, 276 N.W.2d 633, 636 (Minn. 1979) (stating that where findings necessary for a legal conclusion are adequately supported, a court's inclusion of other unsupported findings is harmless error). The nonexistence of a

protective order in *Rosenbloom* does not alter whether the statements in Phan's affidavit were absolutely privileged. Any error was therefore harmless.

IV.

Gant argues that the district court should not have denied his October 3, 2007 motion for sanctions. At the October 11, 2007 motion hearing, respondents argued that Gant had failed to comply with the safe-harbor provision of Minn. R. Civ. P. 11. Gant did not respond to this contention. Rule 11 provides that a "motion for sanctions . . . shall not be filed with or presented to the court unless, within 21 days after service of the motion . . . , the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." Minn. R. Civ. P. 11.03(a)(1). Minn. Stat. § 549.211, subd. 4, also contains a 21-day safe-harbor provision. Compliance with the safe-harbor provisions of the rule and the statute is mandatory. *Gibson v. Coldwell Banker Burnet*, 659 N.W.2d 782, 789–90 (Minn. App. 2003); *see also Johnson v. Johnson*, 726 N.W.2d 516, 519 (Minn. App. 2007) (reversing district court's award of attorney fees to respondent who had "fail[ed] to adhere to the mandatory 'safe-harbor' provisions" of the rule and statute).

Gant signed his motion for sanctions on October 1, 2007, and filed it with the district court on October 3. There is no affidavit of service in the district court file. By filing his motion with the court a mere two days after signing it, Gant did not comply with the safe-harbor provisions of the rule and the statute. As compliance with the safe-harbor provisions is mandatory, the district court properly exercised its discretion by denying the motion.

Because we conclude that Gant's motion for sanctions was procedurally improper, we do not reach the issue of whether Gant had standing to make such a motion.

Affirmed.