STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0791

Adam Steele,
Appellant,

vs.

Louise Mengelkoch,
Respondent,

William Batchelder,
Respondent,

Bemidji State University, et al.,
Defendants.

Filed May 5, 2009
Affirmed
Halbrooks, Judge

Beltrami County District Court
File No. 04-C3-06-001870

Adam Steele, P.O. Box 1132, Bemidji, MN 56619 (pro se appellant)

Lori Swanson, Attorney General, P. Kenneth Kohnstamm, Assistant Attorney General, 1100 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101 (for respondent Louise Mengelkoch)

Colby B. Lund, Paul E. D. Darsow, Arthur, Chapman, Kettering, Smetak & Pikala, P.A., 500 Young Quinlan Building, 81 South 9th Street, Minneapolis, MN 55402 (for respondent William Batchelder)

Considered and decided by Ross, Presiding Judge; Halbrooks, Judge; and Johnson, Judge.

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

HALBROOKS, Judge

Appellant challenges the district court's dismissal of his claims with prejudice. Appellant also challenges the district court's denial of his motion to remove the judge for bias and the district court's order granting a motion to compel discovery against him and denying, in part, his motion to compel discovery. We affirm.

FACTS

Pro se appellant Adam Steele filed a defamation action against Bemidji State University (BSU), Google, Inc., Louise Mengelkoch, and William Batchelder. BSU and Google were dismissed; this appeal involves only respondents Mengelkoch and Batchelder.[1]

Appellant claims that Mengelkoch, a professor at BSU, libeled him in a published article. Appellant alleges that certain statements in the article written by Mengelkoch were false, defamatory, and made with actual malice, including

> statements that [appellant] had "forcible sex" (rape) with women; . . . is a pattern or serial rapist; that one of Mengelkoch's students worked for [appellant] for a day and then "filed a restraining order against him"; . . . that [appellant] threatened a woman with a rifle; . . . that [appellant] nailed a door shut to keep a woman from leaving his house; and . . . that [appellant] had been the subject of

[1] The facts of this matter are also set forth in *Steele v. Mengelkoch*, No. A07-1375, 2008 WL 2966529, at *1 (Minn. App. Aug. 5, 2008).

> accusations of sexual assault in Colorado, or elsewhere, prior to his moving to Minnesota.

Appellant also alleges that Mengelkoch slandered him during classes she taught at BSU.

In March 2004, Mengelkoch gave a public lecture at BSU. Appellant claims that during the question-and-answer portion of the lecture, attendee Batchelder "stood up and loudly and boisterously, and before all of the students and others present, stated that [appellant] was a rapist and a wife-beater." Appellant also alleges that Batchelder has engaged in a pattern of harassment and interference with appellant's newspaper business.

Appellant and Mengelkoch filed cross-motions to compel discovery in November 2007. On November 28, 2007, while Mengelkoch's motion to compel written discovery was pending, appellant was deposed but refused to answer several questions. As a result, Mengelkoch's attorney ended the deposition prematurely.

At the December 17, 2007 motion hearing, Mengelkoch's counsel asked the district court for permission to address appellant's refusal to answer various deposition questions. The district court granted Mengelkoch's motion to compel and granted appellant's motion in part. The district court ordered appellant to answer the following deposition questions:

1. His birth name.
2. His birthplace.
3. His parents' names.
4. His siblings' names.
5. His former wives' names and their most current known addresses.
6. All locations where he lived prior to 1978.
7. His date of birth.
8. Elementary and high schools he attended.

9. All post-secondary institutions he attended (whether or not for credit).
10. All criminal convictions.
11. All civil litigation in which he has been a party o[r] a witness.
12. All diaries, calendars, journals, notes, correspondence or any other records pertaining to the subject matter of this lawsuit.
13. Identify a Howard Ruhm[.]
14. Identify whether Howard Ruhm owns the house in which [appellant] lives.
15. State whether [appellant] owns the house in which he lives.
16. State his employment history prior to 1990.
17. Identify all temporary restraining orders sought against him.

The district court noted that appellant's failure to comply with the order would result in the imposition of sanctions pursuant to Minn. R. Civ. P. 37, "including the possibility of a dismissal with prejudice of all of [appellant]'s claims."

At his continued deposition on January 14, 2008, appellant invoked the Fifth Amendment when asked for his birth name, place of birth, birth date, parents' names, siblings' names, where he had lived prior to Los Angeles in the 1970s, certain educational institutions he had attended, his criminal convictions, the identity of Howard Ruhm, Ruhm's relationship to appellant, whether appellant owed $97,000 to Ruhm, and the ownership of appellant's house.

In February 2008, respondents moved the district court for rule 37 sanctions against appellant. Respondents' motions were heard on March 5, 2008. That same day, the district court issued an order that, among other things, dismissed appellant's claims against respondents with prejudice.

After respondents moved for sanctions, but before the hearing took place, appellant filed an affidavit claiming judicial bias for the purpose of removing the judge of the district court. A hearing was held on February 29, 2008. The district court denied appellant's motion to remove on March 3. The chief judge subsequently reviewed the matter and denied appellant's motion on March 4. This appeal follows.

D E C I S I O N

I.

Appellant argues that rule 37 sanctions were inappropriate because he had a right to invoke the Fifth Amendment. Appellant also assigns error to the district court's finding that no less-drastic sanction was appropriate, arguing that his invocation of the Fifth Amendment did not make it impossible for respondents to defend themselves effectively.

Minn. R. Civ. P. 37.02(b) provides that if a party "fails to obey an order to provide or permit discovery, including an order made pursuant to [rule 37.01], the court in which the action is pending may make such orders in regard to the failure as are just." The rule lists several possible sanctions, including "[a]n order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence," and "[a]n order . . . dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party." Minn. R. Civ. P. 37.02(b)(2)–(3). "The choice of sanctions under Minn. R. Civ. P. 37.02(b) for failure to comply with discovery is within the [district] court's discretion."

Przymus v. Comm'r of Pub. Safety, 488 N.W.2d 829, 832 (Minn. App. 1992), *review denied* (Minn. Sept. 15, 1992).

A. Fifth Amendment

Appellant argues that he should not be forced to choose between his defamation action and his right to assert the Fifth Amendment. We disagree. Minnesota law prohibits a civil plaintiff from prosecuting his claim while at the same time withholding information that might relieve a defendant of liability. *See Christenson v. Christenson*, 281 Minn. 507, 520, 524, 162 N.W.2d 194, 202, 204 (1968) (stating that civil plaintiff cannot be compelled to waive self-incrimination privilege but must choose between waiving it or having the action dismissed); *see also Parker v. Hennepin County Dist. Ct.*, 285 N.W.2d 81, 83 (Minn. 1979) ("This court will not permit a plaintiff to use the judicial forum to make allegations only to later insulate himself by invoking the Fifth Amendment as a shield from cross-examination.").

Appellant relies on *Wehling v. Columbia Broad. Sys.*, 608 F.2d 1084 (5th Cir. 1979).[2] *Wehling* involved a libel action that was dismissed pursuant to Fed. R. Civ. P. 37. 608 F.2d at 1085. The Fifth Circuit determined that the plaintiff was entitled to a stay, rather than dismissal of his claims, but noted that dismissal would have been appropriate "where other, less burdensome, remedies would be an ineffective means of preventing unfairness to defendant." *Id.* at 1088.

Appellant's situation is distinguishable from that of the *Wehling* plaintiff in several important ways. First, the *Wehling* plaintiff "had been subpoenaed to appear

[2] Appellant cites various federal cases but analyzes only *Wehling*.

before a federal grand jury," and at his deposition, counsel "stated that he had reason to believe that the grand jury investigation was continuing, that [plaintiff] was a target of that investigation, and that [defendant] had been cooperating with the United States Attorney's office and the Attorney General of Texas." *Id.* at 1086. Appellant made no comparable offer of proof that he was in genuine danger of self-incrimination. Appellant merely stated that his answers could "possibly" subject him "to some jeopardy." Second, the *Wehling* plaintiff asked for a stay of discovery until all threat of criminal liability had ended; appellant seeks to evade the questions permanently. *See id.* at 1086 n.3. Third, no less-drastic sanction was appropriate here, considering the prejudice to respondents.

Minnesota law does not permit appellant to use his Fifth Amendment privilege offensively—i.e., as a civil plaintiff who attempts to prosecute a claim while keeping relevant information from the opposing side. Furthermore, in a civil case "the right to plead the Fifth Amendment is not absolute. . . . [It] may only be invoked when testimony in a civil case would enhance the threat of criminal prosecution such that reasonable grounds exist to apprehend its danger." *Parker*, 285 N.W.2d at 83. The district court "and not the witness is the judge of whether there is a tendency to incriminate." *Minn. State Bar Ass'n v. Divorce Assistance Ass'n*, 311 Minn. 276, 278, 248 N.W.2d 733, 737 (1976). There was no evidence presented to the district court that appellant would be subject to criminal liability by answering the discovery requests. In fact, appellant admitted that he invoked the Fifth Amendment in response to some questions for which he "simply could not come up with an answer . . . that [he] was confident with" because

of lack of memory. Appellant also refused to make an offer of proof regarding his fear of criminal liability.

We therefore conclude the district court did not abuse its discretion by requiring appellant to choose between his Fifth Amendment rights and his prosecution of the defamation suit.

B. Less-drastic sanctions

A discovery sanction "must be no more severe . . . than is necessary to prevent prejudice to the movant." *Chicago Greatwestern Office Condo. Ass'n v. Brooks*, 427 N.W.2d 728, 731 (Minn. App. 1988) (quotation omitted). Appellant suggests that a more appropriate sanction would be "[a]n order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence." *See* Minn. R. Civ. P. 37.02(b)(2). While appellant is correct that such a sanction would be less severe than dismissal of his claims, it would not be appropriate, considering the prejudice to respondents. The record supports the district court's finding that appellant's refusal to comply with the December 17, 2007 order made it "impossible for [respondents] to defend themselves effectively against [appellant]'s claims." The district court therefore properly exercised its discretion by dismissing appellant's claims.

C. Allegedly erroneous statement

Appellant argues that the district court, during the March 5, 2008 hearing, mistakenly stated that appellant's suit involved "allegations that the statements [Mengelkoch] made in the Honors lecture were, in fact, defamatory." Appellant contends

that his claims against Mengelkoch relate to her published article and things she said during her BSU classes, not to anything she said at the lecture. It is not clear what relief appellant seeks in relation to this alleged misstatement. This court will set aside findings of fact that are clearly erroneous, Minn. R. Civ. P. 52.01, but the district court's remark at the hearing was not a factual finding.[3] Furthermore, appellant does not explain how the allegedly erroneous statement has prejudiced him. *See Bloom v. Hydrotherm, Inc.*, 499 N.W.2d 842, 845 (Minn. App. 1993), *review denied* (Minn. June 28, 1993); *see also* Minn. R. Civ. P. 61. We conclude that any error was harmless.

D. Harassment and property damage

For the first time on appeal, appellant argues that his harassment and property-damage claims against Batchelder should not have been dismissed.[4] Because appellant did not address these claims before the district court, and because he cites to no legal authority, appellant has waived this issue. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); *Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919 n.1 (Minn. App. 1994).

[3] The district court made the statement while asking appellant to explain why he had invoked the Fifth Amendment with respect to alleged inaccuracies in the content of Mengelkoch's lecture.

[4] The district court and appellant discussed injunctive relief at the March 5, 2008 motion hearing. But it is clear from the transcript that the district court considered the injunctive-relief issue in the context of defamation, not harassment or property damage.

II.

Appellant argues that the district court abused its discretion by denying his request for removal.[5] We review a decision to deny a request for removal under an abuse-of-discretion standard. *Matson v. Matson*, 638 N.W.2d 462, 469 (Minn. App. 2002). Where there is no evidence to support a claim of prejudice or bias, the appellate court will not find an abuse of discretion in denying a motion to remove. *Id.*; *see also State v. Burrell*, 743 N.W.2d 596, 601–02 (Minn. 2008) ("The mere fact that a party declares a judge partial does not in itself generate a reasonable question as to the judge's impartiality.").

We conclude that appellants' arguments are without merit. Appellant's first argument relates to the district court having heard previous matters to which appellant was a party, having made rulings (in previous matters and the current one) adverse to appellant, and having made an erroneous ruling in the current matter. But Minnesota caselaw makes it clear that a district court's familiarity with a party and prior adverse rulings—even if the rulings are erroneous—do not constitute actual bias or prejudice. *See Peterson v. Knutson*, 305 Minn. 53, 60, 233 N.W.2d 716, 720 (1975) (stating that a fundamentally erroneous result does not necessarily show bias or abuse of power on the part of the judge); *State v. Kramer*, 441 N.W.2d 502, 505 (Minn. App. 1989) (stating that a judge's "prior adverse ruling in a case is not sufficient to show prejudice which would disqualify the judge"), *review denied* (Minn. Aug. 9, 1989); *State v. Yeager*, 399 N.W.2d 648, 652 (Minn. App. 1987) ("The fact that a judge is familiar with a defendant is not an

[5] Pursuant to Minn. R. Gen. Pract. 106, the chief judge of the district court reconsidered appellant's request for removal. Appellant does not challenge the chief judge's order, which also denied appellant's request.

affirmative showing of prejudice."); *Olson v. Olson*, 392 N.W.2d 338, 341 (Minn. App. 1986) ("Prior adverse rulings . . . clearly cannot constitute bias.").

The circumstances here also indicate that appellant requested removal because he anticipated that the district court would rule against him on the rule 37 motions that were pending when he submitted his affidavit of prejudice. "[A] judge who feels able to preside fairly over the proceedings should not be required to step down upon allegations of a party which themselves may be unfair or which simply indicate dissatisfaction with the possible outcome of the litigation." *Burrell*, 743 N.W.2d at 602 (quotation omitted).

Appellant's second argument is that the district court was hostile or angry toward him, interrupted him, and threatened him with contempt. We agree with the chief judge's statement that

> [t]he instances where [the district court] has cut [appellant] off or been "hostile" towards him are examples of ordinary admonishments in the course of legal proceedings. Courts, including the appellate and supreme courts, admonish attorneys without hesitation when warranted and [appellant], acting as his own counsel, must expect the same courtroom treatment as any wayward attorney would receive.

See Liptak v. State ex rel. City of New Hope, 340 N.W.2d 366, 367 (Minn. App. 1983) (holding pro se parties to the same standards as attorneys).

Appellant's third argument relates to the district court's May 14, 2007 memorandum regarding the imposition of rule 11 sanctions against him. The memorandum referred to appellant's claims against Google and BSU as "specious" and appellant's conduct as "egregious." But the district court was addressing whether appellant's legal contentions were frivolous. *See* Minn. R. Civ. P. 11.02. The district

court's word choice reflects the requirements for rule 11 sanctions; it does not support appellant's claim of actual bias.

Appellant's fourth argument relates to the district court's statement at the December 17, 2007 hearing that it was considering the appointment of an advisory jury. Appellant contends that it would be difficult to select an impartial advisory jury. But no advisory jury was convened in this matter. We also note that it is within the discretion of the district court to convene an advisory jury. Minn. R. Civ. P. 39.02; *Hatcher v. Union Trust Co. of Md.*, 174 Minn. 241, 245, 219 N.W. 76, 77 (1928). Nor do the decisions of an advisory jury bind the district court. Minn. R. Civ. P. 52.01; *In re Estate of Murphy*, 269 Minn. 393, 404, 131 N.W.2d 220, 227 (1964). We therefore conclude the district court did not abuse its discretion by denying appellant's request for removal.

We further conclude the district court did not abuse its discretion by dismissing appellant's claims pursuant to Minn. R. Civ. P. 37. Because we affirm the dismissal of appellant's claims, we do not reach appellant's arguments regarding the district court's discovery ruling.

Affirmed.