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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1453, A08-1475**

Want Some Weather, Inc., et al.,
Appellants (A08-1453),
Respondents (A08-1475),

vs.

Esera Tuaolo,
Respondent (A08-1453),
Appellant (A08-1475).

**Filed May 19, 2009
Affirmed
Minge, Judge**

Hennepin County District Court
File No. 27-CV-07-24521

Benjamin R. Skjold, Christopher P. Parrington, Skjold Barthel, P.A., Campbell Mithun Tower, 222 South Ninth Street, Suite 3220, Minneapolis, MN 55402 (for appellants)

Paul W. Chamberlain, Ryan R. Kuhlmann, Chamberlain Law Firm, 1907 Wayzata Boulevard, Suite 130, Wayzata, MN 55391 (for respondent)

Considered and decided by Larkin, Presiding Judge; Minge, Judge; and Stauber, Judge.

UNPUBLISHED OPINION

MINGE, Judge

These are consolidated cross-appeals from the district court's award of attorney fees to Esera Tuaolo in connection with judgment entered on res judicata grounds and

denial of Tuaolo's request for an additional \$25,000 sanction under Minn. R. Civ. P. 11. Want Some Weather, Inc. and its chief executive officer, Steve Wohlenhaus, (collectively WSW) initially challenged the district court's res judicata ruling and the denial of their summary-judgment motion, but have since withdrawn those bases for appeal. Thus, our review is limited to WSW's challenge of the district court's award of attorney fees to Tuaolo and Tuaolo's appeal of the district court's denial of his request for additional sanctions. Because we conclude that the district court did not abuse its discretion, we affirm.

FACTS

These are the fourth and fifth appeals arising out of the business relationship between WSW and Tuaolo. The first three appeals were taken from judgments and an injunction entered following a trial of Tuaolo's claims against WSW, Wohlenhaus, and a related entity, Weather Eye, Inc. Tuaolo alleged that those parties breached contractual obligations and defrauded him by misrepresenting the risk of investing in WSW, a start-up company, and promising to "roll over" Tuaolo's investment into Weather Eye should WSW fail. The jury found in Tuaolo's favor and awarded damages on Tuaolo's breach-of-contract, fraud, and conversion claims. The district court entered judgment; each party appealed; and this court affirmed in part and reversed in part. *Tuaolo v. Want Some Weather, Inc.*, No. A07-2139 (Minn. App. Dec. 9, 2008).

While the appeals from the first action were pending, WSW initiated this action, asserting claims against Tuaolo for fraudulent inducement of the investment. WSW

alleged that Tuaolo knowingly misrepresented his investor status and the steps that he had taken to evaluate the investment in WSW in a subscription agreement that he signed.

After receiving WSW's complaint in the second action, Tuaolo's counsel served on WSW's counsel an unsigned motion dated October 1, 2007 for sanctions pursuant to Minn. R. Civ. P. 11 (initial motion). The initial motion asserted that WSW's claims were barred by res judicata and thus "lacking any good faith factual or legal basis." By way of relief, Tuaolo sought "an order awarding all attorney fees, costs, and disbursements"

Several months later, together with a motion for summary judgment, Tuaolo's counsel served and filed a signed motion dated January 22, 2008, for sanctions pursuant to rule 11 (signed motion). The signed motion differed from the initial motion in one significant respect: In addition to attorney fees, costs, and disbursements, it sought a \$25,000 sanction against WSW's counsel.

The district court granted Tuaolo's motions for summary judgment and rule 11 sanctions in the amount of \$25,000 plus reasonable attorney fees. However, the district court subsequently vacated its "sanctions" award, concluding that Tuaolo had not complied with the procedural requirements of rule 11. The district court explained that the initial motion was not signed and thus did not comply with the requirements of Minn. R. Civ. P. 11.01 and that, because Tuaolo's signed motion was not timely served, it did not provide the 21-day safe-harbor period required by Minn. R. Civ. P. 11.03(a). The district court concluded that the attorney fee portion of its prior order was still in effect, and awarded fees, costs, and expenses in the amount of \$17,124.75.

Both WSW and Tuaolo challenge the district court's decision. WSW asserts that the district court erred by awarding attorney fees in spite of the signature problem. Tuaolo asserts that the district court erred by withdrawing its earlier approval of his request for additional sanctions under rule 11.

DECISION

We review a district court's decision on a rule 11 motion for abuse of discretion. *Gibson v. Coldwell Banker Burnet*, 659 N.W.2d 782, 787 (Minn. App. 2003); *see Kellar v. Von Holtum*, 605 N.W.2d 696, 702 (Minn. 2000) (stating that the district court has "wide discretion to award the type of sanctions it deems necessary."). Rule 11 provides for the imposition of sanctions when a party violates the rule. *See* Minn. R. Civ. P. 11.02 (representations to court), .03 (sanctions). Sanctions are not available, however, unless the party seeking sanctions complies with the rule's procedural requirements, including the 21-day notice requirement that is often referred to as the safe-harbor rule. *See* Minn. R. Civ. P. 11.03(a) (1).

Under the safe-harbor rule, a party seeking sanctions must initially serve but not file a motion for sanctions. *Id.* The party on whom the motion is served then has a period of 21 days—the safe-harbor period—in which to withdraw the pleading or other document alleged to violate rule 11 and thereby avoid the imposition of sanctions. *Id.* If the pleading is not withdrawn, the movant can go forward by filing its motion with the court. *Id.*

WSW asserts that the district court's attorney fee award contradicted its conclusion, in the same order, that "sanctions" were not available because the safe-harbor

requirements had not been met. We recognize that it is possible to interpret the district court's order as urged by WSW. However, we read the order to vacate only the additional \$25,000 sanction requested for the first time in the January 21, 2008 signed motion, while preserving the attorney fee award, which was requested in both the initial and signed motions.

WSW argues that the safe-harbor rule was not met because the signed motion was different from the initial motion. But the only significant difference between the two motions is that the initial motion sought the additional \$25,000 sanction, and, as noted above, the district court ultimately determined not to impose the additional sanction. Although the district court did not explain why it deleted the \$25,000, we note that it apparently was for either of two reasons: first, because it concluded that an award that did not reflect Tualo's actual expenses was not appropriate, or second, because the district court determined that the lack of notice in the initial motion that \$25,000 in sanctions would be sought was a significant omission that rendered the \$25,000 award inappropriate. Whether it was for one reason, the other, or both, we conclude that the district court did not abuse its discretion by awarding as a sanction only the attorney fees and costs that were identified in both motions. *See Ideal Instruments, Inc. v. Rivard Instruments, Inc.*, 243 F.R.D. 322, 338-39 (N.D. Iowa 2007) (holding that safe-harbor requirement was met even though signed motion differed from initial motion because grounds for and relief sought in signed motion were narrower than in initial motion); *Thompson v. United Transp. Union*, 167 F. Supp. 2d 1254, 1258 (D. Kan. 2001)

(rejecting challenge to safe-harbor notice based on difference between initial and signed motions because “[t]he motions [were] the same in all significant respects”).

WSW also asserts that the safe-harbor rule was not met because the initial motion was not signed by Tuaolo’s counsel. However, by the express language of rule 11, the failure to sign a document is a curable defect. *See* Minn. R. Civ. P. 11.01 (providing that “[a]n unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party”); *Becker v. Montgomery*, 532 U.S. 757, 765, 121 S. Ct. 1801, 1806 (2001) (holding that signature requirement for notice of appeal could be met after deadline for appeal had passed; explaining that “the signature requirement and the cure for an initial failure to meet the requirement go hand in hand”). WSW argues that Tuaolo never cured the lack of signature on the initial motion and that the signed motion cannot constitute a cure because it differs from the initial motion. But the district court did not impose the additional \$25,000 sanction identified for the first time in the signed motion. And we conclude that the signed motion cured the lack of signature in the initial motion with respect to the attorney fees that were requested in the initial motion and awarded by the district court.

Separate from the safe-harbor arguments, WSW asserts that Tuaolo’s rule 11 motion was procedurally defective because it was not made as a separate motion. *See* Minn. R. Civ. P. 11.03(a) (providing that motion for sanctions “shall be made separately from other motions”). The record does not bear this assertion out. Rather, the motion appears as a stand-alone motion in the district court file. Because rule 11 requires only a

separate motion, the fact that Tuaolo filed a joint memorandum of law in support of his motions for summary judgment and for sanctions did not violate rule 11. *Cf. Ideal Instruments*, 243 F.R.D. at 339 (“Rule 11 says nothing about requiring service of the *brief* in support of a Rule 11 motion to trigger the twenty-one day ‘safe harbor.’”).

In the alternative to their procedural arguments, WSW asserts that there was no substantive basis for the award of sanctions, arguing that its claims were not barred by res judicata and thus were not frivolous. We note that this position conflicts with WSW’s decision to abandon the portion of its appeal challenging the district court’s dismissal of its claims on res judicata grounds. Moreover, the district court based the award of attorney fees on its finding that WSW violated Minn. R. Civ. P. 11.02(a), which independently prohibits claims from being presented for “any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation.”

Tuaolo asserts that the district court erred by vacating the portion of its order imposing an additional \$25,000 sanction on WSW’s counsel. We disagree. The district court has wide discretion to award the type of sanctions it deems necessary. We further conclude that the district court did not abuse its discretion in concluding that the safe-harbor requirements had not been met with respect to the \$25,000 sanction, which was sought against WSW’s attorneys and was requested for the first time in the signed motion.

Affirmed.