STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1571

Mahoney & Emerson, a Professional Association,
f/k/a Mahoney & Hagberg, a Professional Association, et al.,
Appellants,

vs.

Private Bank of Minnesota, et al.,
Defendants,

and

Private Bank of Minnesota,
Third Party Plaintiff,

vs.

Steven V. Hagberg,
third party defendant and fourth party plaintiff,
Respondent,

vs.

Mahoney & Emerson, a Professional Association, et al.,
fourth party defendants,
Appellants,

Julianne Emerson,
fourth party defendant,
Respondent.

Filed June 30, 2009
Reversed in part, remanded in part
Hudson, Judge

Hennepin County District Court
File No. 27-CV-05-016930

Jill Clark, Jill Clark, P.A., 2005 Aquila Avenue North, Golden Valley, Minnesota 55427 (for appellants)

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Considered and decided by Klaphake, Presiding Judge; Hudson, Judge; and Harten, Judge.*

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

HUDSON, Judge

On appeal from summary judgment in this indemnification and sanctions dispute, appellants argue that the district court erred when it imposed attorney-fee sanctions under Minn. R. Civ. P. 11 and Minn. Stat. § 549.211 (2008); that respondent failed to adequately plead indemnification; that summary judgment should not have been granted based on indemnification under partnership bylaws; and that summary judgment should not have been granted under the corporate indemnification statute, Minn. Stat. § 302A.521 (2008).

We conclude that the district court abused its discretion when it awarded attorney fees as sanctions under Minn. Stat. § 549.211, Minn. R. Civ. P. 11, and its inherent authority. We also conclude that appellants litigated the issue of indemnification by consent; therefore, respondent was not precluded from bringing a motion for summary judgment on this claim. Furthermore, we conclude that because respondent never

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

tendered defense of the indemnification claim the district court erred in granting summary judgment under the partnership bylaws. Finally, we conclude that there are genuine issues of material fact in connection with respondent's claim for indemnification under Minn. Stat. § 302A.521, and, thus, summary judgment on this claim was improper. We therefore reverse in part and remand in part.

FACTS

Co-appellant Michael Mahoney and respondent Steven Hagberg owned and practiced law with the law firm of Mahoney & Hagberg, a Professional Association (M&H, APA). In August 2003, Hagberg sued Mahoney; M&H, APA; Mahoney & Hagberg, Ltd. (M&H, Ltd.); Mahoney & Emerson, Ltd. (M&E, Ltd.); Mahoney & Emerson, a Professional Association (M&E, APA); and Professional Dispute Resolution, Ltd. (PDR, Ltd.), alleging various claims against Mahoney and the other defendants and seeking dissolution and liquidation of M&H, APA ("the shareholder litigation"). M&H APA was dissolved on December 31, 2003. A settlement agreement was eventually reached in the shareholder litigation ("settlement agreement").

In July 2005, Mahoney served a summons and complaint on Private Bank Minnesota (Private Bank) alleging, among other claims, conversion, civil theft, and negligence. The complaint arose from allegations that Hagberg misappropriated $29,234.85 in funds payable to M&H, APA when he opened a fraudulent account with Private Bank. Private Bank in turn brought a third-party action against Hagberg for contribution. Hagberg answered and brought a fourth-party action against Mahoney seeking indemnification under the prior negotiated, sealed, confidential settlement

agreement. Hagberg sought to disclose the contents of the settlement agreement because he alleged that Mahoney's lawsuit against Private Bank was barred by the release executed in the shareholder litigation settlement. Mahoney moved to enforce the settlement agreement and sought dismissal of Hagberg's claim for indemnification in the Private Bank litigation.

The district court heard cross-motions for discovery on February 14, 2006. The district court issued an order on February 17, 2006, and stated:

> Mahoney's responses dated November 22, 2005, to Hagberg's request for admissions, in many cases appear to be inappropriate and in bad faith. . . .
>
> On the whole, Mr. Mahoney's responses to the requests were sanctionable. The second report and recommendation of the special master . . . concluded that Mr. Mahoney engaged in abusive and vexatious discovery and that it was intentionally overbroad in three other cases . . . .

In its incorporated memorandum, the district court stated that "the discovery conducted to date by Mr. Mahoney and his responses to the discovery reflects a significant tendency to abuse the discovery process."

On February 1, 2006, Hagberg filed a motion for summary judgment on the issue of indemnification. Neither the motion nor the memorandum of law in support of that motion mentioned attorney fees or sanctions, but when questioned by the district court at the March 1, 2006 summary judgment hearing, Hagberg agreed that he had a claim for indemnification and bad faith attorney fees. On the same day as the summary judgment hearing, all of the claims and counterclaims asserted by Mahoney and Private Bank were dismissed with prejudice pursuant to a stipulation by the parties; the stipulation was also

reflected in a March 7, 2006 order of the district court. But the district court did not dismiss any of Hagberg's claims or counterclaims and specifically preserved them for further review.

On April 5, 2006, the district court dismissed count I of Hagberg's complaint (indemnification from M&E, APA, and M&E, Ltd. for the Private Bank action), and continued the February 1, 2006, motion for summary judgment on count II of Hagberg's complaint (indemnification for attorney fees and expenses). But Hagberg's February 1, 2006 summary judgment motion did not address attorney-fee sanctions under Minn. Stat. § 549.211 or Minn. R. Civ. P. 11; rather, it sought indemnification under Minn. Stat. § 302A.521, M&H's bylaws, and the settlement agreement. Nonetheless, the district court's order specified that "[i]f Mr. Hagberg intends to move the [c]ourt for an award of bad faith fees and/or [r]ule 11 sanctions he shall serve and file the motion by May 8, 2006." On June 30, 2006, Hagberg served a motion for sanctions pursuant to Minn. R. Civ. P. 11.

On September 12, 2006, the district court issued a procedural order to establish the process for resolving attorney fees and sanctions. Mahoney moved to remove the district court judge from the case for bias. That motion was denied. Mahoney then filed two interlocutory applications with the court of appeals. The first, an appeal, was dismissed as being taken from a non-appealable order. *Mahoney & Emerson v. Private Bank*, No. A06-1954 (Minn. App. Dec. 26, 2004) (order). The second, an application for a writ of prohibition, was denied. *In re Mahoney & Emerson*, No. A07-77 (Minn. App. Jan. 12,

2007). Hagberg's motion for summary judgment on his claim for indemnification was again continued to permit additional development of the sanctions issue.

On September 5, 2007, the district court granted summary judgment to Hagberg on his claim for indemnification and awarded him attorney-fee sanctions. With regard to the grant of summary judgment on the indemnification claim, the district court reasoned that the bylaws of M&H contained broad language that provided indemnification of Hagberg for the claims brought by Private Bank, and "at all times material . . . Hagberg was a director and officer of the law firm." The district court also stated that Mahoney had "not submitted any competent sworn testimony to create a genuine issue of material fact relative to this claim." The district court further reasoned that the claim for indemnification under Minn. Stat. § 302A.521 was "similar" and that "the indemnification provisions in the settlement agreement may also apply." With regard to the attorney-fee sanctions, the district court reasoned that Hagberg's November 22, 2005 memorandum provided sufficient notice to Mahoney that sanctions might be pursued. The district court also determined that it had "inherent authority" to impose sanctions.

But the issue of attorney fees and indemnification was still not fully resolved. Finally, on June 25, 2008, the district court ultimately ordered judgment against Mahoney (individually) in the amount of $79,266.82, and against M&H, APA; M&E, APA; and M&E, Ltd., in the amount of $105,688.91. The district court clarified its September 5, 2007 order, explaining that "[i]ndemnification is awarded primarily under the bylaws, but alternatively under Minnesota Statute section 302A.521. It is not awarded under the [s]ettlement [a]greement, which appears to apply to different circumstances." The

district court further clarified that it was awarding "sanctions under three options": (1) inherent authority, (2) Minn. R. Civ. P. 11; and (3) Minn. Stat. § 549.211.

The district court denied Mahoney's motion for sanctions. This appeal follows.

D E C I S I O N

I

Mahoney argues that the district court erred when it imposed attorney-fee sanctions under Minn. R. Civ. P. 11 and Minn. Stat. § 549.211. Generally, we review an award of attorney fees as a sanction under an abuse-of-discretion standard. *Becker v. Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987).

Mahoney argues that, under Minn. R. Civ. P. 11 and Minn. Stat. § 549.211, Hagberg was obligated to serve a separate motion setting forth the specific conduct that was alleged to violate the rule and statute. Hagberg argues that Mahoney received "substantial notice" of its intent to pursue attorney-fee sanctions and that the district court found that the notice was "equivalent with that required by the rule."

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). In addition, Minn. Stat. § 549.211, subd. 4(a), contains a 21-day "safe-harbor" provision.

> A motion for sanctions under this section must be made separately from other motions or requests and describe the specific conduct alleged to violate subdivision 2. It must be served as provided under the Rules of Civil Procedure, but may not be filed with or presented to the court unless, within

> 21 days after service of the motion, or another period as the court may prescribe, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

Minn. Stat. § 549.211, subd. 4(a). Compliance with the safe-harbor provisions of the rule and the statute is mandatory. *Johnson ex rel. Johnson v. Johnson*, 726 N.W.2d 516, 519 (Minn. App. 2007). A request for conduct-based attorney fees made under rule 11 or Minn. Stat. § 549.211 that arises out of the conduct of a party in a district court proceeding must be presented to the district court at a stage in the proceedings where the deterrent effect of the applicable rule and statute will be advanced. *Empire Fire & Marine Ins. Co. v. Carlson*, 476 N.W.2d 666, 669 (Minn. App. 1991).

On April 5, 2006, the district court dismissed one count and continued one count of Hagberg's indemnity complaint. The district court instructed that "[i]f Mr. Hagberg intends to move the [c]ourt for an award of bad faith fees and/or rule 11 sanctions he shall serve and file the motion by May 8, 2006." On June 30, 2006, Hagberg served Mahoney with a motion for attorney-fee sanctions pursuant to rule 11. This motion was filed with the district court on July 3, 2006, after the conclusion of litigation regarding Private Bank on March 7, 2006.

But our review of the record reveals that Mahoney did not receive notice of the motion pursuant to the rule or statute. The district court's September 5, 2007 order supported the award of attorney-fee sanctions with allegations taken directly from respondent's November 22, 2005 memorandum—allegations that the district court later characterized as "substantial notice, equivalent with that required by [rule 11]." Some of

the allegations referenced by the district court included: Hagberg referring to Mahoney's motion to enforce the settlement agreement as "another piece of duplicative and vexatious litigation initiated by [Mahoney]"; Hagberg stating that Mahoney's motion "remains entirely unsupported by fact or law"; Hagberg referring to Mahoney's action as an attempt "to collect additional alleged damages . . . based upon claims raised and settled"; Hagberg referring to Mahoney's claim against Private Bank as "vexatious and duplicative litigation"; Hagberg referencing Mahoney's claim against Private Bank as "the improper pursuit of a known and released claim." But none of the allegations listed by the district court suggest that attorney-fee sanctions would eventually be sought, nor do any of the allegations constitute a separate motion or request pursuant to the rule and statute.

More importantly, the district court did not initiate, nor did Hagberg seek an award for, sanctions until *after* Mahoney had dismissed his complaint against Private Bank (and Private Bank had dismissed its claims against Hagberg). Therefore, the allegedly offensive conduct had ended before sanctions were sought. Because of the dismissal, Mahoney was not afforded the opportunity to respond or correct the allegedly offensive conduct under Minn. Stat. § 549.211, subd. 4(a), or Minn. R. Civ. P. 11.03(a)(1). Moreover, the timing of the motion did not advance the purpose of deterrence under the statute or rule.

Under the plain language of the statute and rule, the requirement that a motion for sanctions be made separately from other motions and requests is mandatory. *See* Minn. Stat. § 645.44, subd. 15a (2008) ("'Must' is mandatory."). "Where the legislature's

intent is clearly discernible from plain and unambiguous language, statutory construction is neither necessary nor permitted and courts apply the statute's plain meaning." *Am. Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001). None of the allegations of "notice" cited by the district court or Hagberg can be properly characterized as a separate motion.

The district court, therefore, abused its discretion when it awarded attorney fees under Minn. Stat. § 549.211 or Minn. R. Civ. P. 11.

II

Sanctions on the district court's initiative

Mahoney argues that the district court abused its discretion when it awarded attorney fees on its own initiative. Fee awards under Minn. Stat. § 549.211 and rule 11 are discretionary with the district court and will not be altered on appeal absent an abuse of discretion, but appellate courts review de novo a district court's construction of statutes and rules, including Minn. Stat. § 549.211 and rule 11. *Johnson*, 726 N.W.2d at 518. Further, Minn. R. Civ. P. 11.03, subd. a(2), states that "[o]n its own initiative, the court may enter an order describing the specific conduct that appears to violate Rule 11.02 and direct[ ] an attorney, law firm, or party to show cause why it has not violated Rule 11.02 with respect thereto." Minn. Stat. § 549.211, subd. 4(b), has a similar provision.

Here, in its June 25, 2008 order, the district court cited Minn. Stat. § 549.211 and rule 11 as two bases for its award of attorney-fee sanctions and stated that "as noted in

the previous order of the [c]ourt [on September 5, 2007], [Mahoney] was provided with substantial notice, equivalent with that required by the [r]ule."

Hagberg argues that under the rule and the statute, the district court had the authority to order sanctions on its own initiative. But this authority is subject to procedural limitations. The directives of the rule and the statute are clear. If the district court enters an order describing the conduct that appears to violate the statute, then the district court must direct the party to show cause as to why it has not been shown to have violated the statute. The district court must issue an order to show cause when it intends to impose sanctions on its own initiative. The district court did not issue an order to show cause in the September 5, 2007 or June 25, 2008 order. Nor did the district court issue a separate order to show cause. Thus, Mahoney was not given an opportunity to correct the sanctionable conduct or to explain why he should not be sanctioned. Therefore, the district court abused its discretion by imposing sanctions on its own initiative without first issuing an order to show cause. *See Barrett v. Tallon*, 30 F.3d 1296, 1301 (10th Cir. 1994) (holding that abuse of discretion is shown when district court's ruling is based on erroneous view of the law); *Shepard v. City of St. Paul*, 380 N.W.2d 140, 143 (Minn. App. 1985) (stating that an abuse of discretion occurs when a district court applies an improper standard in awarding fees).

Sanctions pursuant to the district court's "inherent authority"

Mahoney argues that the district court abused its discretion when it awarded attorney-fee sanctions pursuant to its "inherent authority." In *Patton v. Newmar Corp.*, the Minnesota Supreme Court recognized a court's inherent authority to address

misconduct. 538 N.W.2d 116, 118–119 (Minn. 1995). The court held, "The task of determining what, if any, sanction is to be imposed is implicated by the broad authority provided the [district] court." *Id.* at 119. In addition, inherent judicial authority applies only when the act to be done is necessary to achieve a unique judicial function and can be done without infringing on a legislative or executive function. *State v. Chauvin*, 723 N.W.2d 20, 24 (Minn. 2006). Minnesota courts have required statutory authority, or a court rule authorizing costs, before awarding costs. *See, e.g.*, *State v. Liebrenz*, 292 Minn. 475, 477, 194 N.W.2d 291, 292 (1972); *State v. Bauerly*, 520 N.W.2d 760, 763 (Minn. App. 1994), *review denied* (Minn. Oct. 27, 1994). Fees are not recoverable absent a contractual or statutory authorization. *Osborne v. Chapman*, 574 N.W.2d 64, 68 (Minn. 1998).

In its June 25, 2008 order, the district court listed its "inherent authority" as one basis for its award of attorney-fee sanctions. The district court cited *Willhite v. Collins*, 459 F.3d 866 (8th Cir. 2006). Hagberg also relies on *Willhite* to bolster his argument that the district court had the inherent authority to sanction Mahoney with attorney fees and claims that *Willhite* is "factually analogous" to the case here. But, in our view, *Willhite* is distinguishable because the district court in *Willhite* first ordered the attorney to *show cause* as to why he should not be sanctioned pursuant to rule 11 of the Federal Rules of Civil Procedure or the court's inherent authority. *Willhite*, 459 F.3d at 869. Unlike the district court here, the federal court in *Willhite* exercised its inherent authority within the procedural bounds of the rule. Fed. R. Civ. P. 11(c).

The district court here also cited to an unpublished decision of this court, *Aboud v. Dyab*, No. A06-1937, 2008 WL 313624 (Minn. App. Feb. 5, 2008), to support its decision. In *Aboud*, we analyzed Minnesota and federal authority to award sanctions under a court's "inherent authority" and stated that

> [t]he Minnesota Supreme Court has recognized the district courts' inherent authority to impose sanctions. . . . Our supreme court has not, however, addressed the circumstances under which those sanctions may include attorney fee awards that are otherwise unsupported by statute or rule.
>
> The United States Supreme Court has addressed this issue, and has held that such awards are available where a party acts in "bad faith, vexatiously, wantonly, or for oppressive reasons." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45–46, 111 S. Ct. 2123, 2133 (1991). . . . We conclude that the federal rule is appropriately followed in this proceeding.

2008 WL 313624, at *9.

But, like *Willhite*, *Aboud* is distinguishable. In *Aboud*, the district court awarded attorney fees based on Minn. R. Civ. P. 16.06, which specifically provides for sanctions (including an award of attorney fees), for violations of scheduling and pretrial orders. *Id.* at *8. Here, the district court did not cite rule 16.06 as a basis for its award of sanctions. Moreover, as an unpublished decision, *Aboud* has no precedential authority. Minn. Stat. § 480A.08, subd. 3 (2008).

While the district court's orders clearly demonstrate its firm belief that Mahoney was acting in bad faith, the facts remain that: there was never a rule 11 motion filed by Hagberg; the district court never issued an order to show cause; and the cases that stand for the proposition that a district court may award attorney fees pursuant to its "inherent

authority" are not directly on point. In sum, the district court was not acting under the authorization of, for example, rule 11 or rule 16.06. Rather, the district court was acting under its inherent authority alone, despite the clear applicability of both statutory authority and authority under the rules of civil procedure for the award of sanctions. On this record, the district court abused its discretion by imposing sanctions.

III

Mahoney argues that the district court erred when it entered summary judgment on Hagberg's indemnification claim.

Relying on M&H's bylaws, the district court granted Hagberg summary judgment on his indemnification claim. In a later order, the district court clarified that indemnification for attorney fees was awarded *primarily* under the bylaws, but, alternatively, under Minn. Stat. § 302A.521. For the reasons that follow, we hold that these bases do not support the district court's grant of summary judgment.

"On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. The party moving for summary judgment has the burden of demonstrating that no genuine issue of material fact exists. *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988). A moving party is entitled to

summary judgment when no facts exist in the record which would "giv[e] rise to a genuine issue for trial as to the existence of an essential element of the nonmoving party's case." *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 847 (Minn. 1995). Any doubts and factual inferences must be resolved in favor of the nonmoving party. *Elstrom v. Indep. Sch. Dist. No. 270*, 533 N.W.2d 51, 55 (Minn. App. 1995), *review denied* (Minn. July 27, 1995).

If the moving party is able to make out a prima facie case, the burden shifts to the nonmoving party to raise a genuine issue as to any material fact. *Thiele*, 425 N.W.2d at 583. In doing so, the nonmoving party "cannot rely upon mere general statements of fact but rather must demonstrate . . . that specific facts are in existence which create a genuine issue for trial." *Hunt v. IBM Mid Am. Employees Fed. Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986); *see also* Minn. R. Civ. P. 56.05 (requiring nonmoving party to present specific facts showing a genuine issue for trial).

Notice of indemnification claim

As an initial procedural matter, Mahoney argues that summary judgment on the indemnification issue was improper because Hagberg's pleadings failed to allege a claim for indemnification under any bylaw or statute, and Hagberg never moved to amend his fourth-party complaint to include those allegations. Hagberg counters that his fourth-party complaint "broadly seeks indemnification based upon equitable and contractual grounds" and that his memorandum in support of his motion for summary judgment explicitly "sought indemnification pursuant to Minn. Stat. § 302A.521, M&H's Bylaws, and the Settlement Order." Hagberg alternatively argues that Mahoney was on notice of

this claim and litigated the issue of indemnification under the statute and bylaws by consent because the issue was raised in Hagberg's February 1, 2006 summary-judgment memorandum, at the February 14, 2006 hearing, and in Hagberg's November 22, 2005 memorandum.

"It is fundamental that a party must have notice of a claim against him and an opportunity to oppose it before a binding adverse judgment may be rendered." *Folk v. Home Mut. Ins. Co.*, 336 N.W.2d 265, 267 (Minn. 1983). Thus, the district court must "base relief on issues either raised by the pleadings or litigated by consent." *Id.* When a party does not raise an issue in its pleadings, the parties may litigate the issues by express or implied consent, and the district court will treat those issues as if they were raised in the pleadings. Minn. R. Civ. P. 15.02.

> Consent is commonly implied either where a party fails to object to evidence inadmissible with respect to issues raised by the pleadings or where he puts in his own evidence relating to nonpleaded issues. There is a presumption that evidence is offered and received with reference to issues framed by the pleadings and consent is not implied where evidence is actually pertinent to such issues regardless of its other probative value. Consent is not implied by mere failure to claim surprise or request a continuance.

Folk, 336 N.W.2d at 267; *see also Roberge v. Cambridge Coop. Creamery Co.*, 243 Minn. 230, 233–34, 67 N.W.2d 400, 403 (1954) (indicating that issues may be litigated by consent). "[F]air notice remains essential, and pleadings will not be deemed amended to conform to the evidence because of a supposed 'implied consent' where the circumstances were such that the other party was not put on notice that a new issue was

being raised." *Hohenstein v. Goergen*, 287 Minn. 512, 514, 176 N.W.2d 749, 751–52 (1970) (quotation omitted).

After a careful review of the record, we hold that Mahoney was put on notice that Hagberg was seeking indemnification under the M&H bylaws and Minn. Stat. § 302A.521 by his February 1, 2006 motion for summary judgment. Notably, in his memorandum in opposition to summary judgment, Mahoney did not claim that Hagberg had failed to plead the issue of indemnification. To the contrary, Mahoney addressed the merits and argued that indemnification under the bylaws and the statute was inappropriate. This suggests that Mahoney was aware that the issue of indemnification under M&H's bylaws and the statute was being argued. Mahoney is therefore held to have litigated the issue of indemnification by consent.

Summary judgment—bylaws

Mahoney argues that the district court erred when it granted summary judgment against M&E, Ltd., under its bylaws because Hagberg was never an officer, director, shareholder, employee, or lawyer at M&E, Ltd. Mahoney argues that the court's representation that the applicable bylaws of M&E, APA, and M&E, Ltd., are the same as M&H, APA, and M&H, Ltd., "is illogical and without any legal foundation" and that because Hagberg never made a claim for liability under the bylaws of M&E, the district court "search[ed] beyond arguments made by Hagberg to justify its rulings."

Even assuming, arguendo, that M&E, APA, and M&E, Ltd., *did* have a duty to indemnify Hagberg (if the M&E bylaws were indeed the same as those of M&H, and the M&E associations were indeed the continuation of M&H, APA, and M&H, Ltd.), a

dispositive question remains: whether Hagberg was required to first tender defense of the Private Bank action to Mahoney in order to recover attorney fees and costs related to the action.

Here, Hagberg's fourth-party action against Mahoney sought indemnification for "costs of investigation, court costs, attorney[] fees and other fees and expenses" in the Private Bank action. In a June 2, 2008 memorandum, Mahoney argued that Hagberg was precluded from making his indemnification claim because he failed to first tender defense of the matter to Mahoney. In its June 25, 2008 order, the district court addressed Mahoney's argument:

> Mahoney contends that Hagberg has not established that Hagberg tendered the defense to the professional corporation . . . [Mahoney's] conduct of the litigation and defense in these proceedings is a clear indication that a more specific tender would have been of no avail. Mahoney's response to the motion for indemnification was to oppose the motion in all respects. Thus, Mahoney's contention that Hagberg somehow breached a duty to tender the defense appears ill-conceived.

But in Minnesota, tender of defense is a condition precedent to the creation of an obligation to indemnify for attorney fees and costs. *See SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 316 (Minn. 1995) ("Generally, . . . the formal tender of a defense request is a condition precedent to the recovery of attorney fees that a party incurs defending claims that a third party is contractually obligated to pay."); *Hill v. Okay Constr. Co.*, 312 Minn. 324, 346, 252 N.W.2d 107, 121 (1977) (stating that "[t]he purpose of the rule is to provide the party from whom indemnity is sought the opportunity to handle its own defense" and holding that lack of tender of defense

precluded indemnification for attorney fees to defend those claims); *Diebold, Inc. v. Roadway, Express, Inc.*, 538 N.W.2d 150, 152 (Minn. App. 1995) (holding that respondent was not entitled to reimbursement for attorney fees where defense not tendered "until the last minute" giving appellant no opportunity to participate in the litigation); *Logefeil v. Logefeil*, 367 N.W.2d 114, 116 n.1 (Minn. App. 1985) (examining case law indicating that tender of defense is condition precedent to recovering attorney fees).

Here, there is no indication in the record that Hagberg ever tendered defense of the Private Bank action to Mahoney. The conclusion that "a more specific tender would have been of no avail" did not relieve Hagberg of the legal obligation to tender the defense. Accordingly, the district court erred as a matter of law when it granted Hagberg summary judgment on the indemnification claim under the bylaws because Minnesota law does not allow for recovery of attorney fees in indemnification lawsuits absent a tender of defense.

Summary judgment—Minn. Stat. § 302A.521

Mahoney argues that the district court erred when it alternatively granted summary judgment to Hagberg on the indemnification claim under Minn. Stat. § 302A.521. The district court granted summary judgment on Hagberg's claim for indemnification in its September 5, 2007 order. That order did not cite Minn. Stat. § 302A.521 as authority for the award but, rather, based the indemnification on the "provisions in the bylaws." But in its June 25, 2008 order, the district court based its grant of summary judgment for

indemnification "primarily under the bylaws, but *alternatively under Minnesota Statute section 302A.521*." (Emphasis added.)

Hagberg argues that summary judgment was proper because he was acting as an officer, namely, treasurer, when he opened the Private Bank account. Hagberg cites *C.J. Duffey Paper Co. v. Reger*, which holds that Minn. Stat. § 302A.521 "provides for mandatory indemnification of attorney fees and other expenses incurred when a corporate officer or director is made a party to legal proceeding by reason of his or her official capacity, *if certain requirements are met*." 588 N.W.2d 519, 528 (Minn. App. 1999), *review denied* (Minn. Apr. 28, 1999) (emphasis added).

Under Minn. Stat. § 302A.521, subd. 2(a), M&H was required to indemnify Hagberg as a corporate officer provided he (1) "ha[d] not been indemnified by another organization or employee benefit plan," (2) "acted in good faith," (3) "received no improper personal benefit," (4) "had no reasonable cause to believe the conduct was unlawful," and (5) "reasonably believed that the conduct was in the best interests of the corporation." "'Good faith' means honesty in fact in the conduct of the act or transaction concerned." Minn. Stat. § 302A.011, subd. 13 (2008). "Determination of what constitutes good faith necessarily involves factual findings. It is for the trier of fact to evaluate the credibility of a claim of 'honesty in fact' and, in doing so, to take account of the reasonableness or unreasonableness of the claim." *Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 728 (Minn. 1985) (internal citation omitted).

Hagberg contends that because it was "undisputed" that he was acting within his capacity as treasurer of M&H when he engaged in the alleged misconduct (corroborated

by Mahoney's complaint against Private Bank), he is automatically entitled to indemnification under the statute. But Mahoney challenged Hagberg's claim that he acted in his capacity as treasurer of M&H. Specifically, Mahoney's affidavits contend that Mahoney had no knowledge of the Private Bank account, even though it was opened in the name of M&H, and that Hagberg paid himself personally from the Private Bank account. These allegations create a genuine issue of fact regarding Hagberg's good faith, making summary judgment improper under Minn. Stat. §§ 302A.011 and 302A.521.

Accordingly, we agree with the district court's determination in its April 5, 2006 order that "whether Mr. Hagberg was acting in good faith and whether he was securing funds to pay for his personal benefit . . . are all fact questions that would have to be resolved at a trial."

To summarize, the district court abused its discretion when it: (1) awarded attorney-fee sanctions under rule 11 and Minn. Stat. § 549.211 absent Hagberg filing a separate motion for such an award; and (2) awarded attorney-fee sanctions under rule 11 and Minn. Stat. § 549.211 sua sponte and under its inherent authority without issuing an order to show cause. In addition, the district court erred when it granted summary judgment on Hagberg's claim for indemnification under the bylaws because Hagberg never tendered defense of the claim to Mahoney. Finally, the district court erred when it granted summary judgment on Hagberg's claim for indemnification under Minn. Stat. § 302A.521 because there was a genuine issue of fact regarding Hagberg's good faith in opening the Private Bank account.

We therefore reverse the district court's award of attorney fee sanctions under rule 11, Minn. Stat. § 549.211, and the district court's inherent authority. We also reverse the grant of summary judgment for indemnification under the bylaws. We remand for further proceedings solely on the issue of indemnification under Minn. Stat. § 302A.521.

Reversed in part and remanded in part.