STATE OF MINNESOTA
IN COURT OF APPEALS
A09-314
A09-315
A09-816
A09-1400

John O. Murrin III,
Appellant (A09-314, A09-816, A09-1400),
Plaintiff (A09-315),

DeVonna K. Murrin,
Plaintiff (A09-314),
Appellant (A09-315, A09-816, A09-1400),

vs.

Mathew S. Mosher, et al.,
Defendants,

Peder K. Davisson, et al.,
Respondents,

James Hoffman,
Respondent,

Teresa Hoffman, et al.,
Respondents,

Glenn Smogoleski, et al.,
Respondents,

Colleen Turgeon,
Respondent,

Terri Hanson,
Respondent,

Fred Blumenhagen,
Respondent,

Linda Blumenhagen,
Respondent,

Steven J. Mattson, et al.,
Respondents,

Toni Klatt,
Respondent.

Filed March 23, 2010
Affirmed in part and reversed in part
Huspeni, Judge[*]

Hennepin County District Court
File No. 27-CV-07-2974

Michael Milo, Michael Milo & Assoc., P.A., Edina, Minnesota; and

Randall D. Tigue, Golden Valley, Minnesota (for appellant/plaintiff John O. Murrin III)

Andrew Karlsen, Karlsen Law Services P.A., Elk River, Minnesota; and

Randall D. Tigue, Golden Valley, Minnesota (for plaintiff/appellant DeVonna K. Murrin)

Sean A. Shiff, Skolnick & Shiff, P.A., Minneapolis, Minnesota (for respondents Davisson, et al.)

James Hoffman, Hastings, Minnesota (pro se respondent)

Stanford P. Hill, Bassford Remele, a Professional Association, Minneapolis, Minnesota (for respondent Teresa Hoffman)

Robert M. Smith, Minneapolis, Minnesota (for respondents Smogoleski, et al.)

Patrick J. Neaton, Neaton & Puklich, PLLP, Chanhassen, Minnesota (for respondent-Turgeon)

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

Peter C. Brehm, Peter C. Brehm & Associates, P.S.C., Bloomington, Minnesota (for respondent Hanson)

Fred Blumenhagen, Palm Coast, Florida (pro se respondent)

Linda Blumenhagen, Palm Coast, Florida (pro se respondent)

Benjamin S. Houge, Stillwater, Minnesota (for respondent Steven Mattson, et al.)

Cameron R. Kelly, Eckberg, Lammers, Briggs, Wolff & Vierling, P.L.L.P., Stillwater, Minnesota (for respondent Klatt)

Considered and decided by Shumaker, Presiding Judge; Worke, Judge; and Huspeni, Judge.

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

HUSPENI, Judge

These two sets of consolidated appeals arise out of litigation in which appellants asserted respondents' liability for a Ponzi scheme involving real estate. The district court dismissed appellants' claims for failure to state a claim, by summary judgment, and under Minn. R. Civ. P. 12.05 and 41.02 for failure to comply with the pleading requirements of Minn. R. Civ. P. 8.01 and Minnesota caselaw. The district court subsequently imposed sanctions against appellants for pursuing frivolous claims and other bad-faith litigation conduct and imposed contempt fines for failing to comply with post-judgment discovery requests. This court affirmed the underlying judgment against appellants in *Murrin v. Mosher*, No. A08-1418 (Minn. App. Aug. 4, 2009), *review denied* (Minn. Oct. 28, 2009). We now affirm in part and reverse in part the sanctions and contempt judgments.

FACTS

Following the failure of a real-estate investment firm to which they had loaned funds, appellants John O. Murrin III and DeVonna K. Murrin asserted this action against several dozen defendants. John Murrin, an attorney licensed to practice in Minnesota, represented himself in the district court. DeVonna Murrin, John Murrin's wife, was represented by California attorney Christopher LaNave.[1] Early in the litigation, appellants twice amended their complaint, once before an answer was interposed and a second time with leave of court. The second amended complaint totaled 144 pages and contained 547 separately numbered paragraphs. A single district-court judge was assigned to preside over the litigation.

In the course of addressing cross-motions to compel discovery, the assigned judge[2] determined that the second amended complaint did not comply with Minn. R. Civ. P. 8.01, which requires a "short and plain statement of the claim showing that the pleader is entitled to relief," and Minnesota caselaw requiring that the complaint "put the defendant[s] on notice of the claims against [them]." *Mumm v. Mornson*, 708 N.W.2d 475, 481 (Minn. 2006). The assigned judge ordered appellants to create a chart "clearly delineating which claim is being pursued against which Defendant for each cause of action."

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[1] The sanctions judgment was entered jointly and severally against appellants and LaNave. LaNave took, but later dismissed, an appeal of that judgment.

[2] We use the term "assigned judge" to distinguish from our reference, later in this opinion, to a "substitute judge," who handled certain proceedings in the assigned judge's absence.

Appellants submitted a chart in response to the court's order, and also sought leave of court to serve and file a third amended complaint. The assigned judge denied that motion, declaring that both the second and third amended complaints were "incomprehensible and rife with errors." The assigned judge also found that the chart submitted by appellants did not comply with the order because, although it assigned the counts of the complaint to particular defendants, it did not identify the specific defendants against whom particular allegations were made. Several months later, the assigned judge denied yet another motion to amend the complaint, explaining that appellants already had been given the opportunity to correct the deficiencies in their pleadings and that allowing further amendments would prejudice respondents.

The assigned judge subsequently dismissed all of appellants' claims against each of the respondents under Minn. R. Civ. P. 12.05 and Minn. R. Civ. P. 41.02(a), which permit, respectively, dismissal for failure to provide a more definite statement and failure to comply with court rules or orders. The assigned judge also granted respondent Edina Realty's motion to dismiss claims against it for failure to state a claim, and granted summary-judgment motions asserted by respondents Glenn Smogoleski, Robin Smogoleski, and G.R.S. the Furniture and More Store, Inc. (the Smogoleski respondents), Terri Hanson, and Colleen Turgeon. Judgment was entered against appellants, who subsequently appealed to this court.

While the appeal from the initial judgment was pending, two sets of post-judgment proceedings went forward in district court. First, the assigned judge held a hearing on respondents' motions for sanctions under Minn. Stat. § 549.211 (2008) and Minn. R. Civ.

P. 11 and an order to show cause (OSC) why sanctions should not be imposed under the statute and rule. Second, another judge, substituting for the assigned judge, issued an OSC and presided over contempt motions brought by respondents Peder Davisson and Dennis DeSender (the Davisson/DeSender respondents) alleging appellants' failure to comply with an order compelling responses to post-judgment discovery requests. The assigned judge imposed sanctions and the substitute judge found appellants in contempt, resulting in judgments that constitute the bases for these appeals.

Sanctions

Following a hearing on the sanctions motions and OSC,[3] the assigned judge granted the motions, ordering the entry of judgments against appellants and in favor of respondents in the amount of attorney fees incurred. The judgments totaled $431,023.35: $136,767.60 in favor of the Smogoleski respondents; $103,352.50 in favor of the Davisson/DeSender respondents; $37,100 in favor of Hanson; $12,958.75 in favor of Klatt; $65,844.50 in favor of Turgeon; and $75,000 in favor of Edina Realty. The sanctions order also permanently enjoined appellants from "bringing another action against [respondents] based upon the subject matter of the above-entitled case."[4]

The assigned judge issued a memorandum of law in support of the sanctions order, detailing the procedural history of the case; setting forth the legal standards for imposing sanctions; and finding that appellants had engaged in sanctionable conduct. The memorandum provided three separate bases for the sanctions award: (1) respondents'

[3] John Murrin and LaNave appeared and made arguments at the hearing.

[4] In the same order, the district court awarded costs and disbursements in favor of each of the respondents; appellants do not challenge that portion of the order.

motions under Minn. Stat. § 549.211, subd. 4(a), and Minn. R. Civ. P. 11.03(a)(1); (2) the availability of sanctions on the court's own initiative under Minn. Stat. § 549.211, subd. 4(b), and Minn. R. Civ. P. 11.03(a)(2); and (3) the court's inherent authority.

After initially concluding that imposition of sanctions was procedurally appropriate, the assigned judge acknowledged the safe-harbor provisions of the statute and rule, which require that a motion for sanctions initially be served but not filed, allowing the nonmovant a 21-day period to correct the objectionable conduct. The assigned judge deemed the following communications by respondents to have met the safe-harbor requirements of the statute: (1) the Smogoleski and Davisson/DeSender respondents' pre-dismissal service of notices of motions and motions for sanctions; (2) Klatt's and Hanson's pre-dismissal letters to appellants and post-dismissal service of sanctions motions more than 21 days before they were filed with the court; (3) Turgeon's pre-dismissal letters, telephone conversations, and service of a "notice" of intent to seek sanctions; and (4) Edina Realty's post-dismissal oral notice of the intent to seek sanctions.

The assigned judge identified conduct by appellants warranting the imposition of sanctions under the statute, rule and inherent authority, and concluded that none of the respondents were involved with the appellants' loan to the failed real-estate firm; that allegations made by appellants to support liability lacked evidentiary support and were in fact contradicted by facts then known to appellants; and that appellants pursued claims against respondents in order to coerce cooperation in the litigation and/or cash settlements. The assigned judge determined that appellants violated Minn. Stat.

§ 549.211, subd. 2, and Minn. R. Civ. P. 11.02 by (1) submitting and advocating pleadings for the purposes of harassment, unnecessary delay, and increasing the cost of litigation; (2) exhibiting bad faith during discovery; and (3) asserting factual contentions lacking evidentiary support. The assigned judge determined that John Murrin, as an attorney, further violated the statute and rule by failing to adequately investigate the factual and legal underpinnings for those claims. The assigned judge observed that, "[f]ar from showing good cause why they should not be sanctioned for their conduct, [appellants] persisted in their baseless accusations against [respondents] and maintained that they had done nothing wrong."

Lastly, the assigned judge found that the attorney fees sought by respondents were an appropriate sanction, reasoning that appellants had been undeterred by previous court orders in this and related litigation and thus that severe sanctions were necessary to deter future misconduct and bad faith litigation. The assigned judge reviewed and found reasonable respondent's fee requests.

Appellants challenge the resulting judgments.

Contempt

Contempt proceedings in the district court were initiated by the Davisson/DeSender respondents' motion for contempt and an order to show cause why appellants should not be held in contempt. The contempt motion and OSC were based on appellants' failure to comply with a post-judgment order to compel issued by a special master appointed to handle discovery matters.

The Davisson/DeSender respondents served post-judgment discovery requests and deposition notices on appellants approximately two weeks after the sanctions judgments were ordered, but before the judgments actually were entered by the court clerk. Appellants failed to provide any response within 30 days of the requests. When pressed for a response, appellants served objections but made no substantive response and refused to sit for depositions, asserting that they were not required to comply with discovery requests or deposition notices served before the judgments were entered.

Counsel for the Davisson/DeSender respondents contacted the special master and scheduled a motion to compel to be heard three days later. Counsel notified John Murrin and LaNave of the hearing date and time by e-mail and advised that they could participate by telephone. John Murrin responded to the e-mail two days later, stating that he was not available for the hearing, and objecting to the hearing being held on short notice. Appellants made no submission to the special master and did not participate in the hearing, which went forward as scheduled. The special master issued an order to compel, requiring appellants to provide complete responses within four days, sit for the depositions as scheduled, and pay the Davisson/DeSender respondents' attorney fees incurred in bringing the motion to compel.

When appellants failed to comply with the order to compel, the Davisson-DeSender respondents brought a motion for contempt. At that time, the assigned judge was serving on a three-judge panel appointed to hear an election recount trial. In the assigned judge's absence, several other district-court judges had agreed to handle motions arising in her still-assigned caseload depending on their availability when a particular

matter needed to be heard. The substitute judge, who was available and agreed to preside over the contempt proceedings in this matter, issued the OSC and set a date for a hearing on the Davisson-DeSender motion and the OSC. Seven days after the Davisson/DeSender respondents filed their motion, and three days before the substitute judge issued the OSC, LaNave filed a notice to remove the substitute judge. Appellants moved to "quash" the appearance before the substitute judge based on LaNave's notice to remove and also moved the substitute judge to recuse for bias. LaNave later stipulated to withdraw his notice to remove, and appellants did not file their own notice to remove the substitute judge, despite notice of the stipulation at least three days before the contempt hearing.

The substitute judge held a hearing on the contempt motion, at which John Murrin appeared. DeVonna Murrin was not present. The substitute judge declined to recuse for bias and found that LaNave's notice of removal was untimely and ineffective because it was withdrawn. The substitute judge also rejected appellants' argument that the special master's order to compel was invalid because the discovery requests at issue had been served before the underlying judgment was entered. The substitute judge found appellants in "constructive civil contempt of court for failing to comply with post-judgment discovery requests by hiding their financial assets from their judgment creditors, and . . . willfully disobeying [the special master's] enforceable . . . [o]rder." The initial contempt order allowed appellants to purge their contempt by, within one week, providing complete responses to the post-judgment discovery requests;

reimbursing the Davisson/DeSender respondents for attorney fees incurred in bringing the motions to compel and for contempt; and appearing for their depositions.

When appellants failed to comply with the initial contempt order, the substitute judge issued a bench warrant for the arrest of John Murrin. More than one month later, when appellants still had not purged their contempt, the substitute judge issued a second contempt order, this time imposing a monetary sanction of $1,500 a day against John Murrin—who also remained subject to the bench warrant—and $5,000 a day against DeVonna Murrin for each additional day that appellants failed to purge their contempt. The substitute judge also ordered appellants to pay $2,797.50 in additional attorney fees incurred by the Davisson/DeSender respondents. The second contempt order directed counsel for the Davisson/DeSender respondents to submit a monthly affidavit of noncompliance and for judgment to be entered monthly.

By the time that the first monthly judgment was to be entered, the assigned judge had returned from the election recount trial. Based on the affidavit of counsel, the assigned judge ordered judgment entered against John Murrin for $43,500 and against DeVonna Murrin for $145,000.

Appellants challenge the contempt judgments.

D E C I S I O N

I.

The district court exercises broad discretion in determining whether to impose sanctions under Minn. Stat. § 549.211 and Minn. R. Civ. P. 11 and what type of sanctions to impose. *Kellar v. Von Holtum*, 605 N.W.2d 696, 702 (Minn. 2000). This court will

not disturb such determinations absent an abuse of that discretion. *Gibson v. Coldwell Banker Burnet*, 659 N.W.2d 782, 787 (Minn. App. 2003). To promote clarity, we shall address appellants' challenges to the sanctions in three categories: (A) challenges to the district court's authority to impose sanctions; (B) challenges to the substantive basis for sanctions against DeVonna Murrin, as a represented party; and (C) challenges to the amount of the sanctions.

A. *Authority to impose sanctions*

The district court relied on three separate sources of authority to support its sanctions award: (1) the availability of sanctions on motion under Minn. Stat. § 549.211, subd. 4(a), and Minn. R. Civ. P. 11.03(a)(1); (2) the availability of sanctions on the district court's own initiative under Minn. Stat. § 549.211, subd. 4(b), and Minn. R. Civ. P. 11.03(a)(2); and (3) the court's inherent authority. We address each source in turn.

1. *Sanctions on motion under the statute and rule*

Both section 549.211 and rule 11 authorize attorney-fee awards to sanction bad-faith litigation conduct. The statute and rule employ substantially identical language derived from Federal Rule of Civil Procedure 11. *See* Minn. R. Civ. P. 11 2000 advisory comm. cmt. (describing amendment of rule to conform completely to the federal rule and section 549.211). Both the statute and the rule require certification that submissions to the court are "not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation"; that legal claims are supported by existing law or a nonfrivolous argument for a change in the law; and that factual allegations are or will be supported by evidence. Minn. Stat. § 549.211, subd. 2;

Minn. R. Civ. P. 11.02. The district court may impose sanctions for conduct in violation of these certifications. Minn. Stat. § 549.211, subd. 3; Minn. R. Civ. P. 11.03. Both the statute and the rule require "notice and a reasonable opportunity to respond" before sanctions may be awarded and provide specific procedural requirements that must be followed before sanctions can be imposed. Minn. Stat. § 549.211, subd. 3; Minn. R. Civ. P. 11.03. The procedural requirements of the rule vary, depending on whether sanctions are sought by motion or are imposed on the court's own initiative. Minn. Stat. § 549.211, subd. 4; Minn. R. Civ. P. 11.03(a).

When sanctions are sought by motion, parties must comply with the so-called 21-day safe-harbor requirement, which requires that a separate motion for sanctions be served but not filed or otherwise presented to the court unless the challenged submission is not withdrawn within 21 days after service of the motion. Minn. Stat. § 549.211, subd. 4(a); Minn. R. Civ. P. 11.03(a)(1).

Both the 21-day-notice and the separate-motion requirements have been strictly construed and applied by this court. *See Johnson ex. rel. Johnson v. Johnson*, 726 N.W.2d 516, 519 (Minn. App. 2007) (reversing award of fees because nonmovant was not given 21 days' notice and opportunity to withdraw submission); *Dyrdal v. Golden Nuggets, Inc.*, 672 N.W.2d 578, 589 (Minn. App. 2003) (reversing award of fees because request for sanctions was not made by separate motion), *aff'd*, 689 N.W.2d 779 (Minn. 2004). We have recognized that "applying the doctrine of substantial compliance" to the procedural requirements would ignore "unambiguous, mandatory statutory requirement[s]." *Dyrdal*, 672 N.W.2d at 590; *see also Johnson*, 726 N.W.2d at 519

(explaining that any exception to mandatory safe-harbor requirement must come from legislature).

Appellants argue that the district court erred by granting respondents' sanctions motions because the 21-day safe-harbor requirement was not met. More particularly, appellants assert that respondents Hanson, Klatt, Turgeon and Edina Realty never served sanctions motions prior to the dismissal of claims against them and that the pre-dismissal motions served by the Smogoleski and Davisson/DeSender respondents were insufficient.

a. *Respondents who served prejudgment motions for sanctions*

Appellants concede that the Smogoloeski and Davisson/DeSender respondents served notices before the action was dismissed, but assert that those motions were not sufficient to comply with the safe-harbor requirements. With respect to the Smogoleski respondents, appellants assert that the filed motion differed from the served motion. Appellants do not, however, assert substantive differences between the served and filed motions that would have denied them notice of the reasons that sanctions were sought. *See, e.g.*, *Thompson v. United Transp. Union*, 167 F. Supp. 2d 1254, 1258 (D. Kan. 2001) (rejecting challenge to safe-harbor notice based on differences between motions because "[t]he motions [were] the same in all significant aspects"). With respect to the Davisson/DeSender respondents, appellants assert that the served motion did not identify the conduct alleged to violate rule 11. We conclude, however, that language employed in the Davisson/DeSender motion—stating that the motions were based on "the grounds that [appellants'] claims are frivolous, as they are not warranted by the law or the facts"—gave sufficient notice of the alleged rule 11 violations. Accordingly, we reject

appellants' assertion that the motions brought by the Smogoleski and Davisson/DeSender respondents were procedurally defective.

b. *Respondents who did not serve prejudgment motions for sanctions*

Hanson, Klatt, Turgeon, and Edina Realty do not dispute that they failed to serve separate sanctions motions before the case was dismissed, but assert, for various reasons, that sanctions were nevertheless appropriately awarded on their motions. Some of these respondents suggest that their post-judgment motions for sanctions satisfied the safe-harbor requirement because the hearing on the motions took place more than 21 days after the motions were served. This court has held, however, that post-dismissal service of a motion cannot satisfy the safe-harbor requirement because "the offending party is unable to withdraw the improper papers." *Gibson*, 659 N.W.2d at 790 (quotation omitted).

Each of these respondents except Edina Realty relies on correspondence sent by their counsel advising appellants of the intent to seek sanctions if the claims against them were not dismissed, and Turgeon relies on a "Notice Under Minn. Stat. § 549.211." Neither the correspondence nor the notice, however, meets the strict requirement for a separate motion. *See id.* at 789 (rejecting reliance on letter announcing intention to seek sanctions to satisfy requirement of separate motion); *see also In re La Casa Colonial Ltd.*, No. 08-10681, 2008 WL 1809229, at *1 (E.D. Mich. Apr. 22, 2008) (holding that service of "Notice of Intent to Seek Sanctions" did not meet Fed. R. Civ. P. 11's requirement for a separate motion); *VanDanacker v. Main Motor Sales Co.*, 109 F. Supp. 2d 1045, 1054-55 (D. Minn. 2000) (holding that letters were insufficient to meet rule 11

requirements and suggesting that "Notices of Intent" would not have been sufficient either).

Hanson asserts that this case warrants an exception to the safe-harbor requirement, citing the Minnesota Supreme Court's statement in *Uselman v. Uselman* that "[o]nly in very unusual circumstances will it be permissible for the trial court to wait until the conclusion of the litigation to announce that sanctions will be considered or imposed."[5] 464 N.W.2d 2d 130, 143 (Minn. 1990). *Uselman* was decided prior to adoption of the safe-harbor provisions, and applied a more relaxed notice-and-opportunity-to-respond standard. Hanson cites portions the 2000 advisory committee notes, however, in arguing that continued reliance on *Uselman* is appropriate despite intervening amendments to the statute and rule:

> It is the intention of the Committee that the revised Rule would modify the procedure for seeking sanctions, but would not significantly change the availability of sanctions or the conduct justifying the imposition of sanctions. Courts and practitioners *should be guided by the* Uselman *decision*, cited above, and should continue to reserve the seeking of sanctions and their imposition for substantial departures from acceptable litigation conduct.

Minn. R. Civ. P. 11 2000 advisory comm. cmt. (emphasis added).

Read in context, the advisory committee comments direct reliance on *Uselman* with regard to types of conduct warranting the imposition of sanctions, as opposed to the procedural requisites of such an award. *See also id.* (acknowledging that *Uselman*

[5] The district court's order recites this language as well, citing a portion of this court's decision in *Gibson* that summarizes *Uselman* in the context of tracing the historical treatment of sanctions under the statute and rule.

procedure has worked "fairly well," but committee has determined that conformance to federal procedure is best course); *cf. Gibson*, 659 N.W.2d at 789 (declining to "decide to what extent the 2000 amendment supersedes the minimum procedural guidelines set forth in *Uselman* and *Kellar*," but concluding that rule 11 "independently requires" compliance with safe-harbor requirement). Thus, we reject the assertion that an exception to the procedural requirements of the statute and rule is available under *Uselman*.

Hanson also relies on *Truesdell v. S. Cal. Permanente Med. Group*, 209 F.R.D. 169 (C.D. Cal. 2002), but that case is distinguishable on its facts. In *Truesdell*, the defendant served a sanctions motion more than 21 days before a scheduled hearing on a summary-judgment motion. 209 F.R.D. at 179 n.12. The court granted the motion before the scheduled hearing, acknowledging that it "essentially 'short-circuited' [d]efendant's timeline when it decided the motion to dismiss in [d]efendant's favor" before the hearing. *Id.* Here, we are addressing respondents who did not serve pre-dismissal motions for sanctions and, thus, there was no 21-day period for the district court to short-circuit.

Edina Realty asserts that the prejudgment motions served by the Smogoleski and Davisson/DeSender respondents are sufficient to satisfy the safe-harbor requirements on behalf of all of the respondents, citing federal cases employing such an analysis. *See Lehman v. Legg Mason, Inc.*, 532 F. Supp. 2d 726 (M.D. Pa. 2007); *Poole v. Alpha Therapeutic Corp.*, 698 F. Supp. 1367 (N.D. Ill. 1988). But these cases turn on the existence of a common reason why the claims against all defendants were frivolous. In this case, there were some common reasons for dismissal, including appellants' repeated

pleading of claims under repealed and inapplicable statutes. However, there were also distinct reasons why claims against each of the respondents were improper. Thus, the frivolousness turned on the relationship of each respondent to the allegedly fraudulent transaction. Under these circumstances, we conclude that each respondent was required to independently comply with the safe-harbor requirements.

Because Hanson, Klatt, Turgeon, and Edina Realty failed to comply with the safe-harbor requirements of Minn. Stat. § 549.211 and Minn. R. Civ. P. 11, we conclude that neither the statute nor the rule could serve as an appropriate basis for granting the motions for sanctions brought by those respondents.

2. *Sanctions on district court's initiative under statute and rule*

When sanctions are imposed on the court's own initiative, the safe-harbor requirement does not apply. Minn. Stat. § 549.211, subd. 4(b); Minn. R. Civ. P. 11.03(a)(2). Appellants assert that the district court nevertheless erred in awarding attorney fees as sanctions on its own initiative under the statute and rule because such an award is prohibited. We agree. The statute and the rule provide that a

> sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, *if imposed on motion* and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation.

Minn. Stat. § 549.211, subd. 5(a) (emphasis added); Minn. R. Civ. P. 11.03(b) (emphasis added). Accordingly, we conclude that the district court did not have the authority to award attorney fees on its own initiative under the statute and rule.

3. *Sanctions under the district court's inherent authority*

In addition to the statutory and rule-based authority of district courts to impose sanctions, those courts possess inherent authority to impose sanctions as necessary to protect their "vital function—the disposition of individual cases to deliver remedies for wrongs and justice freely and without purchase; completely and without denial; promptly and without delay, conformable to the laws." *Patton v. Newmar Corp.*, 538 N.W.2d 116, 118 (Minn. 1995) (quotations omitted). Such sanctions can include attorney-fees awards when 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) (quotation omitted); *see also Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766-67, 100 S. Ct. 2455, 2464 (1980) (discussing court's inherent authority to impose attorney-fees sanctions); *Harlan v. Lewis*, 982 F.2d 1255, 1260 (8th Cir. 1993) (characterizing *Chambers* and *Roadway* as setting bad-faith standard for attorney-fee awards, although not for all exercises of inherent power).

The question presented in this case is whether inherent authority of the district court may be exercised to impose sanctions that would have been available under Minn. Stat. § 549.211 and Minn. R. Civ. P. 11.03 had the safe-harbor requirements been met. This is an inquiry not lightly embarked upon. The procedural requirements of Minn. Stat. § 549.211 and Minn. R. Civ. P. 11 serve important purposes that could be obfuscated if sanctions for conduct violative of the rule and statute were regularly imposed under inherent authority. Equally compelling, however, is continued recognition that district courts must have the ability to control the proceedings before them and that the integrity

of our judicial system must be preserved. We decline to define here the extent or the limits of district-court authority generally to impose sanctions for conduct violative of Minn. Stat. § 549.211 and Minn. R. Civ. P. 11.02 when the procedural requirements of the statute and rule are not met. Under the egregious circumstances of this case, however, we conclude that the district court did not abuse its discretion by invoking its inherent authority to impose sanctions.

B. *Sanctions against DeVonna Murrin*

DeVonna Murrin challenges the substantive basis for the imposition of sanctions against her as a represented party.[6] The issue of DeVonna Murrin's responsibility for the conduct that gave rise to the imposition of sanctions in this case is a troubling one. Both rule 11 and section 549.211 generally allow sanctions against "attorneys, law firms, *or parties* that have violated [the statute or rule] or are responsible for the violation." Minn. R. Civ. P. 11.03 (emphasis added); Minn. Stat. § 549.211, subd. 3 (emphasis added). Represented parties cannot be sanctioned, however, for violation of the certification that claims are based on existing law or a good-faith argument for the extension of law. Minn. R. Civ. P. 11.03(b)(1); Minn. Stat. § 549.211, subd. 5(b). DeVonna Murrin asserts that the district court found her responsible for violating Minn. Stat. § 549.211 and Minn.

[6] Neither John Murrin and Christopher LaVave—both of whom focused on arguing *their own* lack of culpability—nor the district court separately addressed the culpability of DeVonna Murrin, who is represented for the first time on appeal by counsel not subject to the sanctions and contempt judgments below. Notwithstanding any waiver of the argument below, we address DeVonna Murrin's challenges to the sanctions imposed against her in the interests of justice.

R. Civ. P. 11.02 without any specific factual findings regarding her involvement. We agree.

We have carefully reviewed the record and are unable to locate any evidence regarding the level of DeVonna Murrin's involvement in the conduct that the district court found to violate section 549.211 and rule 11. Much of the offending conduct relates to the pursuit of frivolous legal claims, for which DeVonna Murrin cannot be held accountable as a represented party. The remaining conduct could have been perceived by Ms. Murrin as strategic decisionmaking by her husband and LaNave. There is no allegation—much less a finding—that DeVonna Murrin misrepresented facts to the court or otherwise personally violated the statute and rule. Accordingly, we conclude that there was no basis upon which sanctions could be imposed against DeVonna Murrin under the statute and rule. *See Gundacker v. Unisys Corp.*, 151 F.3d 842, 849 (8th Cir. 1998) (reversing sanctions imposed against party because "[a]t worst, [that party] did not prevent his lawyer from acting recklessly, and we will not impute liability to [him] because his attorney decided to 'run wild'"); *Kirk Capital Corp. v. Bailey*, 16 F.3d 1485, 1492 (8th Cir. 1994) (reversing sanctions imposed against party because whether facts supported claim was legal issue that "the law firm, not the lay client, was called upon to make," despite suspicion that the party was legally sophisticated).

We furthermore conclude—for reasons similar to those underlying the limitations on sanctions against represented parties in the statute and rule—that there was no basis upon which sanctions could be imposed against DeVonna Murrin under the inherent authority of the district court. *See, e.g., Charson v. Temple Israel*, 419 N.W.2d 488, 491

(Minn. 1988) (stating that where a client is not complicit in negligence or wrongdoing of attorney, the client should not be punished for attorney's acts); *Kurak v. Control Data Corp.*, 410 N.W.2d 34, 36 (Minn. App. 1987) ("A litigant is not to be penalized for the neglect or mistakes of his lawyer. Courts will relieve parties from the consequences of the neglect or mistakes of their attorney, when it can be done without substantial prejudice to their adversaries." (quotation omitted)).

Accordingly, we reverse the sanctions judgment against DeVonna Murrin.

C. *Challenges to the amount of the sanctions*

1. *Least restrictive sanction*

Appellants[7] argue that the sanctions awards violate the provision of the statute and rule limiting sanctions to "what is sufficient to deter repetition of the conduct or comparable conduct by others similarly situated." Minn. Stat. § 549.211, subd. 5(a); *see also* Minn. R. Civ. P. 11.03(b) (referring to "such conduct," instead of "the conduct"). The district court made extensive findings that a significant sanction was warranted in this case, given appellants' conduct in other litigation and failure to comply with previous court orders in this case. The court concluded with its firm belief that "left to their own, [appellants] would continue to bludgeon innocent parties with this meritless case unless

[7] In addition to challenging the basis for imposition of sanctions against her as a represented party, DeVonna Murrin joined John Murrin's challenges to the amount of the sanctions awards. Accordingly, although we have already determined to reverse the sanctions judgments against DeVonna Murrin, we continue to reference appellants collectively in addressing the balance of the challenges to the sanctions awards.

the strongest possible sanctions are imposed upon them." We conclude that the district court did not abuse its discretion with respect to the amount of the sanctions imposed.

2. *Constitutionality*

Appellants challenge the process employed by the district court in imposing sanctions, asserting that (1) they did not have notice of the specific types of sanctions under consideration; (2) the district court should have conducted an evidentiary hearing on the motions for sanctions; and (3) they were not given adequate time to brief or argue their opposition to the sanctions. "This court reviews de novo the procedural due process afforded a party." *Zellman ex rel. M.Z. v. Indep. Sch. Dist. No. 2758*, 594 N.W.2d 216, 220 (Minn. App. 1999), *review denied* (Minn. July 28, 1999).

Due process generally requires notice and an opportunity to be heard. *Staeheli v. City of St. Paul*, 732 N.W.2d 298, 304 (Minn. App. 2007). Notably, section 549.211 and rule 11, which provide multiple procedural safeguards, do not require the particular safeguards advocated by appellants here. *See, e.g.*, Minn. R. Civ. P. 11.03(a)(1) (requiring motion for sanctions to identify conduct alleged to violate the rule but not the specific sanctions sought). There is some support in the federal caselaw for the proposition that "[t]he party against whom sanctions are being considered is entitled to notice of the legal rule on which the sanctions would be based, the reasons for the sanctions, and the *form* of the potential sanctions." *In re Tutu Wells Contamination Litig.*, 120 F.3d 368, 379 (3d Cir. 1997). The purpose of this notice requirement, however, is to ensure that the party against whom sanctions are being considered has the "opportunity to mount a meaningful defense." *Id.* at 380; *see also Prosser v. Prosser*,

186 F.3d 403, 406 (3d Cir. 1999) ("Due process requires that the parties have sufficient notice of the *form* of the sanctions being considered by the court because the issues that must be addressed may differ depending upon the form.").

Appellants have not asserted how their defense against the sanctions would have differed with notice of the possibility that the district court would invoke its inherent authority to sanction, and/or impose injunctive relief. Under these circumstances, we conclude that the sanctions proceedings were substantially compliant with due-process requirements and that any de minimus violation is harmless error. *See* Minn. R. Civ. P. 61 (requiring courts to disregard harmless error).

II.

This court reviews the district court's decision to invoke its contempt powers for abuse of discretion. *Mower County Human Servs. v. Swancutt*, 551 N.W.2d 219, 222 (Minn. 1996). We address appellants' challenges to the contempt orders in the following categories: (A) challenges to the propriety and finality of the special master's order, the violation of which prompted the contempt orders; (B) challenges to the substitute judge presiding over contempt proceedings; and assertions that the contempt orders are (C) unlawful and (D) unconstitutional.

A. *Validity of the special master order to compel*

1. *Notice of motion to compel*

Appellants assert that the order to compel was invalid because they did not receive the notice contemplated by Minn. R. Gen. Pract. 115.04 (requiring nondispositive motions to be served and filed at least 14 days prior to a hearing). These time limits,

however, are expressly subject to modification by the court. *See* Minn. R. Gen Pract. 115.01(b) (explaining that "time limits . . . are to provide the court adequate opportunity to prepare for and promptly rule on matters, and the court may modify the time limits").[8] Appellants' due-process argument is likewise unavailing because they had both notice and an opportunity to be heard, and purposefully chose not to avail themselves of that opportunity.

2. *Pre-judgment service of post-judgment discovery requests*

Appellants also assert that the order to compel was invalid because—although directed to be entered by the district court—judgment had not yet been entered by the court clerk at the time that the Davisson/DeSender respondents served their post-judgment discovery requests. Appellants correctly assert that a judgment is not "effective" until entered by the district-court clerk. *See* Minn. R. Civ. P. 58.01. They do not explain, however, why the actual entry of judgment (a clerical procedure) was required in order to initiate discovery in aid of execution. Financial information generally is not discoverable because the ability to pay a judgment is not relevant to the merits of most claims. *See* 8 Charles A. Wright et al., Federal Practice & Procedure § 2010, at 269 n.18 (3d ed. 2010) (collecting authorities). But appellants do not dispute that the information became discoverable when judgment was entered, which was well before the deadline for responding to the discovery requests. Arguably, the financial

[8] Minn. R. Civ. P. 56.03 provides a separate, mandatory 10-day notice for summary-judgment motions not relevant here. *See* Minn. R. Gen. Pract. 115 1997 advisory comm. cmt. (contrasting Minn. R. Civ. P. 56.03's purpose of giving adversary notice with Minn. R. Gen. Pract. 115's purpose of giving court adequate preparation time).

information became relevant when the district court ordered judgment to be entered. Furthermore, although Minn. R. Civ. P. 69 references discovery "[i]n aid of the judgment or execution," it does not expressly address when that discovery may be initiated.

At the contempt hearing, John Murrin was unable to articulate any manner in which he could avert the entry of judgment once it had been ordered by the court.[9] Nor did appellants dispute that the special master gave them a full 30 days from the date that judgment was entered to respond to the discovery requests. And they do not now dispute that it took them several additional months to fully comply with the order to compel. Under these circumstances, we conclude that any technical error in issuing the order to compel based on discovery requests served prior to the entry of judgment was harmless. *See* Minn. R. Civ. P. 61 (requiring courts to disregard harmless error).

3. *Finality of the special master's order*

Appellants assert that the special master's discovery order was contingent on adoption by the district court and that they were not required to comply with the order until their objections were addressed by the court. We disagree. Under Minn. R. Civ. P. 53.03, a special master has authority "to regulate all proceedings and take all appropriate measures to perform fairly and efficiently the assigned duties" and "may by order impose upon a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction." The contrast between the special master's authority with respect to

[9] Appellants complain that they were denied the 30-day stay of judgment provided for by Minn. R. Gen. Pract. 125. That rule, however, applies only to judgments "following a trial." Minn. R. Gen. Pract. 125; *see also id.* 1992 advisory comm. cmt. ("The stay anticipated by this rule applies only following a trial.") Moreover, the rule allows for exception by the court, and the assigned judge ordered judgment entered forthwith.

noncontempt sanctions, which may be *imposed*, and contempt sanctions, which merely may be *recommended*, compels the conclusion that noncontempt sanctions are effective without further action by the district court.

B. *The substitute judge's handling of the matter in the assigned judge's absence*

Appellants assert error in the substitute judge's hearing the contempt motions without formal reassignment of the case. The legal authority that appellants cite to support their argument, however, is inapposite. Minn. Stat. § 484.69, subd. 3 (2008), provides that chief judges shall assign judges to *courts* within their judicial districts, and *may* assign judges to particular cases. Because the latter authority is discretionary, it provides no basis for error. The rules provide for assignment of complex cases to a single judge, *see* Minn. R. Gen. Pract. 113.01, but do not address the proper procedure for circumstances in which a district court judge is unable to preside over an assigned case for an extended period of time. *But see* Minn. R. Civ. P. 63.01 (providing for another judge to handle posttrial matters if trial judge becomes disabled). We conclude that such temporary substitution of presiding judges falls within the discretion afforded to the district courts to manage their dockets, subject to other applicable rules, including removal rules.

Appellants argue that the substitute judge erred in hearing the matter after the notice to remove was filed because this court has characterized notices to remove as jurisdictional. *See Citizens State Bank of Clara City v. Wallace*, 477 N.W.2d 741, 743 (Minn. App. 1991) ("A properly filed removal notice divests the trial court of further jurisdiction. Failure to honor a proper removal notice is reversible error requiring a new

hearing." (citation omitted)). The substitute judge determined that LaNave's notice was ineffective because it was (1) untimely filed after the substitute judge had begun presiding over the matter; and (2) withdrawn. The notice appears to have been timely under the rule, however, *see* Minn. R. Civ. P. 63.03 (providing for notice to be filed "not later than the commencement of the trial or hearing"), and was only questionably subject to withdrawal. Nevertheless, we conclude that the substitute judge's failure to remove himself is harmless error, because the assigned judge subsequently returned to preside over the case and ratified the substitute judge's contempt orders.

Appellants also allege bias, asserting that communications between the substitute judge's staff and counsel for the Davisson/DeSender respondents relating to the scheduling of the contempt motion created "the possibility of improper ex parte communication." This bare allegation, unaccompanied by factual support, is insufficient to raise a valid question regarding actual bias. And our review of the record discloses no indication of improper ex parte communication. Recusal is required only "when impartiality can reasonably be questioned . . . not merely when it may somehow be questioned." *Roatch v. Puera*, 534 N.W.2d 560, 563 (Minn. App. 1995); *cf. State ex rel. Wilberg v. McNaughton*, 159 Minn. 403, 404-05, 199 N.W. 103, 104 (1924) (holding that removal statute required affidavit stating facts "sufficient to justify a reasonable mind in believing that from bias or prejudice the judge will not be impartial"). Thus, we reject appellants' assertions of bias.

C. *Statutory challenges*

The Minnesota Statutes include provisions governing the courts' contempt powers. *See* Minn. Stat. §§ 588.01-.21 (2008). The statutes distinguish between direct contempts, which occur in the presence of the court, and constructive contempts, which do not. Minn. Stat. § 588.01, subds. 2, 3. Constructive contempts include "disobedience of any lawful judgment, order, or process of the court." *Id.*, subd. 3(3). While direct contempt can be summarily punished, Minn. Stat. § 588.03, the statutes require notice and a hearing, at which the court must examine the party alleged to be in contempt, before constructive contempt can be punished, Minn. Stat. § 588.09.

In addition to the distinction between direct and constructive contempt, a distinction between criminal contempt and civil contempt must be made. *See, e.g., State v. Tatum*, 556 N.W.2d 541, 544 (Minn. 1996) (determining as first step in review of contempt order whether the contempt was civil or criminal). It is not surprising that confusion between these latter two types may arise. While the statutes governing contempt do not expressly distinguish between criminal and civil contempts, Minnesota caselaw developed through the decades informs our understanding of the distinction. Criminal-contempt proceedings are "prosecuted to maintain and vindicate the authority of the court"; civil-contempt proceedings are "prosecuted to make effective the remedy given to a private party." *Campbell v. Motion Picture Mach. Operators*, 151 Minn. 238, 239, 186 N.W. 787, 788 (1922); *see also Hopp v. Hopp*, 156 N.W.2d 212, 216 (Minn. 1968) ("The distinctive quality of a civil, as distinguished from a criminal, contempt is that of purpose."). "Civil contempt sanctions are intended to operate in a prospective

manner and are designed to compel future compliance with a court order. . . ." *Swancutt*, 551 N.W.2d at 222 (quotation omitted); *see also Time-Share Sys., Inc. v. Schmidt*, 397 N.W.2d 438, 440-41 (Minn. App. 1986) (defining civil contempt as "the failure to obey a court order which benefits an opposing party in a civil proceeding" and civil-contempt sanctions as being "primarily to encourage future compliance with the order and to vindicate the rights of the opposing party").

Minnesota judicial decisions interpreting the contempt statutes have been guided by the civil-criminal distinction. We have enforced in the civil context those provisions of the statutes imposing general procedural requirements for contempt proceedings. *See, e.g., Westgor v. Grimm*, 381 N.W.2d 877, 880 (Minn. App. 1986) (reversing contempt judgment because contemnor was not brought before court for examination as required by Minn. Stat. § 588.09). But we have interpreted not to apply in the context of civil contempt those provisions placing limitations on the district courts' authority to punish or impose fines for contempt. *See State by Johnson v. Sports & Health Club, Inc.*, 392 N.W.2d 329, 337 (Minn. App. 1986) (upholding civil-contempt fine of $300 per day and declining to apply Minn. Stat. § 588.10, which limits punishment for contempt to $250 fine). We have explained that applying those limitations to the courts' civil-contempt authority "would result in placing severe limits on the trial court's ability to induce compliance with its lawful orders." *Id.* at 336. We further observe here that the substantive limitations imposed by the statute are not necessary in the civil context because, "in the civil contempt vernacular, the contemnor has the keys to the jail." *Swancutt*, 551 N.W.2d at 224.

Appellants assert that the district court's contempt order violates the contempt statutes because (1) the order to show cause was not personally served as required by section 588.04; (2) the court did not examine appellants as required by section 588.09; (3) the fine imposed exceeds $250 in violation of section 588.10; (4) the fine imposed exceeds $50 in violation of section 588.02; and (5) the fine imposed is noncompensable but payable to a party in violation of section 588.11. The issue of personal service was not raised before the district court and thus we decline to address it on appeal.[10] *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). We address the remaining statutory challenges in turn.

1. *Examination by the court*

Minn. Stat. § 588.09 requires the district courts to "investigate" a contempt charge by "examining the person and the witnesses for and against the person." *See also Clausen v. Clausen*, 250 Minn. 293, 298-99, 84 N.W.2d 675, 679-80 (1957) (interpreting section 588.09 to require appearance and examination in civil-contempt proceedings); *Westgor*, 381 N.W.2d at 880 (reversing contempt judgment because contemnor was not brought before court for examination). The statute does not define "examination." In this case, John Murrin, an attorney with a duty of candor to the court, appeared and engaged in extensive colloquy with the district court. John Murrin raised multiple procedural objections to the order to compel, but did not deny the failure to respond to the discovery requests. Under these circumstances, we conclude that the examination requirements of

[10] The substitute judge, in the order of March 6, 2009 stated in part: "[Appellants] object to many alleged procedural irregularities, but they do not object to service by U.S. Mail of the OSC."

the statute were met with regard to John Murrin. *Cf. Smoot v. Smoot*, 329 N.W.2d 829, 832 (Minn. 1983) (affirming contempt order entered without any appearance by the contemnor based in part on contemnor's admission of the alleged conduct through affidavit).

Our review of the contempt determination against DeVonna Murrin raises troubling questions. It is undisputed that she did not appear in person before the court. She was not examined. Nor did she submit affidavits that arguably may have provided support for the determination that she was in contempt. We conclude that DeVonna was not provided the safeguards afforded to an alleged contemnor by the Minnesota statutes and caselaw.

We do not lightly reach our decision regarding the invalidity of the contempt determination regarding DeVonna Murrin. Notwithstanding our conclusion earlier in this opinion that sanctions were improvidently awarded in regard to her, we cannot ignore the existence of a presumably valid sanctions order at the time the contempt motion was decided. Citizens should not be entitled to disregard the duty to acknowledge and comply with an order of the court until and unless that order is declared invalid. Nonetheless, our exhaustive review of the record before us in this protracted, contentious, and complex litigation convinces us that the interests of justice and consistency are best served by not only reversing the sanctions judgment against DeVonna Murrin, but by reversing the contempt judgment against her also. And we do so.

2. *Statutory limits to amount and recipient of contempt fine*

Appellants[11] assert that the district court erred by imposing a contempt fine greater than $250 and greater than $50, citing Minn. Stat. §§ 588.10 and 588.02, respectively. Each of these sections, however, limits the courts' authority to impose punishment for contempt and thus their application is properly limited to criminal contempts. *See* Minn. Stat. §§ 588.10 (providing that a person "adjudged guilty of the contempt charges . . . *shall be punished by a fine of not more than $250*, or by imprisonment in the county jail, workhouse, or work farm for not more than six months, or by both" (emphasis added)), 588.02 (authorizing the court to "*punish* a contempt by fine or imprisonment, or both," and limiting the fine to $50 "unless the right or remedy of a party to an action or special proceeding was defeated or prejudiced" by the contempt (emphasis added)).

Appellants also contend that the district court erred by awarding contempt fines payable to respondents, relying on Minn. Stat. § 588.11, which provides:

> If any actual loss or injury to a party in an action or special proceeding, prejudicial to the person's right therein, is caused by such contempt, the court or officer, *in addition to the fine or imprisonment imposed therefor*, may order the person guilty of the contempt to pay the party aggrieved a sum of money sufficient to indemnify the party and satisfy the party's costs and expenses, including a reasonable attorney's fee incurred in the prosecution of such contempt, which order, and the acceptance of money thereunder, shall be a bar to an action for such loss and injury.

[11] Again here, although we have determined to reverse the contempt judgments against DeVonna Murrin, we continue to refer to appellants collectively because they have advanced the same alternative challenges to the contempt judgments.

(Emphasis added.) We agree with respondents that this statute provides for indemnity in addition to the fine or imprisonment imposed under section 588.10, and, like that section and section 588.02, does not impact the district court's inherent authority to issue coercive civil-contempt orders, including those imposing sanctions payable to opposing parties.

D. *Constitutional challenge – excessive fine*

Appellants challenge the contempt fines as violative of the Excessive Fines Clauses of the Eighth Amendment to the U.S. Constitution and Article I, section 5 of the Minnesota Constitution. Federal courts addressing this issue have concluded that the Excessive Fines Clause does not apply to coercive civil-contempt sanctions. *In re Grand Jury Proceedings*, 280 F.3d 1103, 1110 (7th Cir. 2002) (citing *United States v. Mongelli*, 2 F.3d 29, 30 (2d Cir. 1993)). This conclusion is consistent with the distinction drawn by our courts between criminal and civil contempt. *See also Ohio Elections Comm'n v. Ohio Chamber of Commerce*, 817 N.E.2d 447, 457 (Ohio Ct. App. 2004) (reasoning that per diem fine for noncompliance with court order is "civil in nature" and thus that Excessive Fines Clause does not apply). Accordingly, we reject appellants' challenge under the Excessive Fines Clause.

E. *Modification of the contempt order*

Appellants assert that the district court exceeded its authority by modifying the contempt order to add monetary sanctions against appellants for each day of continued noncompliance with the purge conditions. In support of this assertion, appellants rely on cases addressed to the finality of criminal sentences once executed. *See, e.g., Reesman v.*

State, 449 N.W.2d 489, 490 (Minn. App. 1989) (holding that, absent statutory authorization, district court could not modify executed sentence). As we have explained, this case involves not a criminal-contempt sentence, but a civil-contempt order. Given the purpose of civil contempt—to compel compliance with court orders—we decline to hold that a district court is without authority to modify a civil-contempt order that has proven unsuccessful in compelling such compliance.

Affirmed in part and reversed in part.