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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A09-481**

Rose Aboud, formerly known as Rose L. Osburne,  
individually and as shareholder of RM Michaels Construction, Inc.,  
and as sole shareholder of Midwest Development, Inc.,  
Appellant,

vs.

Zack Dyab, et al.,  
Respondents,

Eastbank, et al.,  
Intervenors.

**Filed March 30, 2010  
Affirmed  
Shumaker, Judge**

Hennepin County District Court  
File No. 27-CV-03-017490

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Considered and decided by Klaphake, Presiding Judge; Peterson, Judge; and  
Shumaker, Judge.

## **UNPUBLISHED OPINION**

**SHUMAKER**, Judge

In an appeal from a judgment after a new trial following an earlier appeal, appellant Rose Aboud argues that the district court abused its discretion in its rulings on her motions to find respondent Zack Dyab in contempt; to amend the complaint to seek punitive damages; to remove the presiding judge; for a new trial based on an erroneous jury instruction; for a new trial based on alleged contempt by Dyab's counsel; and for equitable remedies. She also contends that the district court erred by awarding costs and disbursements to Dyab as the prevailing party and by awarding sanctions to Dyab in the form of attorney fees. We affirm.

### **FACTS**

Appellant Rose Aboud and respondent Zack Dyab conducted a home-remodeling and construction business through RM Michaels Construction Inc. (RMM), which had been incorporated in May 2001. In October 2003, Aboud sued Dyab, later adding several of his companies as defendants (collectively Dyab). Aboud asserted that she was a shareholder of RMM, sought its supervised dissolution, and ultimately alleged, in relevant part, fraud and misrepresentation, breach of fiduciary duty, and fraudulent conveyance. The district court issued a temporary restraining order (TRO) pursuant to Aboud's ex parte motion. The TRO was soon replaced with an October 31, 2003 order appointing a receiver to handle the wind-down of RMM and barring Aboud and Dyab from continuing operations or receiving or possessing corporate assets without the express knowledge and written authorization of the receiver (collectively

TRO/receivership order). Aboud asserted that Dyab engaged in contempt of court by transferring properties of RMM in violation of the TRO/receivership order, but the district court never found him in contempt, noting that certain transactions had to be corrected because the title company that handled the pre-litigation closings had been criminally charged regarding its failure to record deeds and its handling of monies from the closings.

The first trial was held before a jury in September 2005. The jury found in Aboud's favor. The district court granted Dyab's motion for a new trial, on the ground that the damages award had been "infected" by Aboud's misconduct or errors, and denied the remaining motions with leave to renew them after the second trial was completed. Aboud appealed, and, in relevant part, this court affirmed the order granting a new trial and remanded for retrial and decision on the contempt motion. *Aboud v. Dyab*, No. A06-1937, 2008 WL 313624 (Minn. App. Feb. 5, 2008).

The second jury trial was held and the jury found that Aboud was not a shareholder of RMM. The jury also found that Dyab had not breached any fiduciary duties owed to Aboud as an officer, shareholder, or director of RMM; did not engage in fraud and misrepresentation against Aboud in conducting the business operations of RMM; and did not engage in a fraudulent transfer against Aboud. It awarded no damages. After the district court ruled on posttrial motions, judgment was entered, and this second appeal followed.

## DECISION

### I.

We first address Aboud's challenge to the district court's order denying her motion to find Dyab in contempt of court for violating the TRO/receivership order. An appellate court will reverse a district court's contempt decision only upon a finding of an abuse of discretion. *Mower County Human Servs. ex rel. Swancutt v. Swancutt*, 551 N.W.2d 219, 222 (Minn. 1996).

Aboud initially argues that the district court erred when it did not rule on her contempt motion until after the second trial. But Aboud has not demonstrated that she raised this issue to the district court or that the district court ruled on it. This court will generally not address issues not raised to and decided by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Aboud argues that, in any event, this court's decision in the first appeal required the district court on remand to decide the contempt motion before the second trial. On remand, it is the district court's duty "to execute the mandate of the remanding court strictly according to its terms." *Duffey v. Duffey*, 432 N.W.2d 473, 476 (Minn. App. 1988). If the appellate court does not provide specific directions on how to proceed, the district court "has discretion in handling the course of the cause to proceed in any manner not inconsistent with the remand order." *Id.*

Our review of our previous decision shows that Aboud is incorrect. We stated:

On remand, Aboud's contempt motion is before the district court. The district court first considered this motion before trial and denied it, subject to renewal after trial. On remand,

the district court shall determine whether Dyab violated orders or should otherwise be held in contempt for transferring properties away from RMC and, if so, whether sanctions are appropriate.

*Aboud*, 2008 WL 313624, at \*13.

We next review Aboud's challenges to the district court's posttrial ruling on her contempt motion. The day after the jury verdict was returned and the second trial ended, the district court ordered the parties to submit proposed findings and supporting memoranda on any issues that remained to be decided by the district court, and indicated it would then schedule a hearing if necessary. Aboud moved for a new trial based on the exhibit 15d jury instruction, ultimately submitting a memorandum, affidavits, and exhibits in support of the motion, but she referred to the contempt motion only in her cover letter, asking the district court to set "the contempt and equitable remedies motions on for hearing." The district court found that this brief reference in the cover letter did not comply with the court's order, concluded that another hearing on the contempt issue was not necessary or appropriate, and then ruled on the merits.

Aboud argues on appeal that she complied with the district court order because her February 2006 contempt motion was then pending in the district court. Even though she did not advise the district court that she was relying on this motion, she faults the district court for failing to refer to it.

As the district court stated in its posttrial order denying the contempt motion, the question was whether Aboud had any evidence to support her renewed motion for contempt that had not been considered by the district court when it denied her first

motion to hold Dyab in contempt in March 2005. Most of the properties that Aboud claimed in her November 2004 motion that Dyab had transferred in violation of the TRO/receivership order were also cited in her February 2006 motion, using identical or very similar language. Thus, evidence as to these properties had already been considered and rejected in the March 2005 order and was not properly before the district court again.

In her February 2006 motion, Aboud had also alleged that Dyab violated the TRO/receivership order by improperly transferring other properties and in various other ways. But that motion could not have advised the district court what contempt claims remained after the August 2008 trial, where evidence was introduced regarding these issues. And, as the district court stated in its posttrial order denying the contempt motion, the jury had concluded that neither Dyab nor his company engaged in any wrongful conduct against Aboud regarding the properties at issue. Further, the receiver concluded in all of his reports that RMM did not have title to any real properties when this lawsuit was commenced. In addition, the district court found that although RMM had no monies to pay outstanding creditors or to complete pending projects, Dyab personally had paid certain debts of RMM. Dyab also completed the pending construction projects of RMM that the receiver was financially unable to complete, again through Dyab's personal funds and those of Ramadan Homes, Inc. Neither action was prohibited by the TRO/receivership order. Finally, the district court found that Aboud lacked clean hands, which undercut her claims for equitable relief. Aboud has not demonstrated that the district court abused its discretion in denying her contempt motion.

Aboud also contends that the district court should have held a hearing on the contempt motion. The district court advised the parties in its August 15, 2008 order that it would hold a hearing if necessary, and its decision not to hold a hearing under the circumstances was well within its discretion.

## II.

Aboud challenges the district court's pretrial order prohibiting her from introducing evidence or making arguments on her contempt claim, contending that this precluded her from establishing the similar factual basis required for a claim for punitive damages. The district court's decision on a motion for contempt and on a motion to amend the complaint to add a claim for punitive damages will not be reversed absent an abuse of discretion. *Mower County*, 551 N.W.2d at 222 (addressing contempt motions); *LeDoux v. Nw. Publ'g, Inc.*, 521 N.W.2d 59, 69 (Minn. App. 1994) (addressing motion to amend complaint to add claim for punitive damages), *review denied* (Minn. Nov. 16, 1994).

The district court ruled that Dyab's "motion in limine to preclude evidence (or argument) relating to whether [Dyab] or his attorney are in contempt of court because of replacement deeds to complete prior transfers of real estate is granted." The district court explained that the contempt issue presented a question for the district court, rather than the jury. This order did not prohibit Aboud from presenting evidence to the jury showing that Dyab improperly transferred property in receivership; it precluded her from arguing or presenting evidence to the jury showing that Dyab should be held in contempt of court for violating the TRO/receivership order. Aboud's argument is without merit.

### III.

About argues that the chief judge abused his discretion in denying her pretrial motion to remove the presiding judge for bias.

A judge who has presided at a motion or other proceeding “may not be removed except upon an affirmative showing of prejudice on the part of that judge.” Minn. R. Civ. P. 63.03. The motion for recusal must first be heard by the judge who is the subject of the motion, and the chief judge can reconsider the motion if it was denied by the presiding judge. Minn. R. Gen. Pract. 106. This court will review the decision to deny a request for recusal based on bias under an abuse-of-discretion standard. *Matson v. Matson*, 638 N.W.2d 462, 469 (Minn. App. 2002).

After the presiding judge denied About’s motion for removal, About sought review from the chief judge. *See* Minn. R. Gen. Pract. 106. The chief judge also denied the motion for removal, on the ground that About primarily relied on conclusory arguments that failed to present a credible claim of actual bias. The chief judge characterized About’s arguments as appearing to be “expressions of dissatisfaction from an unhappy litigant who disagrees with the merits” of the presiding judge’s rulings or who is unhappy with alleged delays by the presiding judge in making specific rulings. “[A] judge who feels able to preside fairly over the proceedings should not be required to step down upon allegations of a party which themselves may be unfair or which simply indicate dissatisfaction with the possible outcome of the litigation.” *Carlson v. Carlson*, 390 N.W.2d 780, 785 (Minn. App. 1986) (quotation omitted), *review denied* (Minn. Aug.



20, 1986). Aboud has not shown that the chief judge abused his discretion in denying Aboud's motion to remove the presiding judge.

Aboud cites subsequent orders by the district court judge and his conduct during the second trial to show the unfairness of her treatment, but she did not renew the request for removal or otherwise raise these complaints in the district court. Again, we cannot consider issues not presented to or decided by the district court. *Thiele*, 425 N.W.2d at 582-83.

#### IV.

Aboud argues that the district court should have granted her a new trial because it gave an erroneous and highly prejudicial jury instruction regarding exhibit 15d. “[District] courts are allowed considerable latitude in selection of language in the jury charge. They likewise possess broad latitude in determining the propriety of a specific instruction.” *Alholm v. Wilt*, 394 N.W.2d 488, 490 (Minn. 1986) (quotation and citations omitted). An erroneous instruction can form the basis for reversal only if it resulted in prejudice. *Lewis v. Equitable Life Assurance Soc’y of U.S.*, 389 N.W.2d 876, 885 (Minn. 1986). “Where the verdict is the only one warranted under the law and by the evidence, error in the charge and misconduct on the part of counsel for the prevailing party in his closing argument are harmless and no grounds for a new trial.” *DeVere v. Parten*, 222 Minn. 211, 214, 23 N.W.2d 584, 586 (1946).

In its order denying Aboud's motion for a new trial, the district court first ruled that the jury instruction was not error. Under all of the circumstances, we cannot say that this was an abuse of discretion. The district court further ruled that Aboud had not

established that the jury's failure to find any damages, regardless of its assessment of fault or liability, resulted from "the exhibit 15d issue, as opposed to the evidence on damages." The district court noted that the verdict in the first trial had been set aside because the damages award was unsupported by the evidence. In the second trial, Dyab moved for judgment as a matter of law at the close of Aboud's case; while the district court expressed "grave doubts on the record" as to whether Aboud had proved a legally sufficient claim of damages, it was unable to rule on the motion because Aboud had not provided the district court with a copy of the exhibits relating to damages. The district court also noted that it had instructed the jury that it should find facts as to damages regardless of its findings on any other part of the verdict form, but the jury awarded no damages. In a trial involving complex business transactions, Aboud did not offer any accounting evidence, and she failed to include losses or business costs in her assessment of lost profits. The district court ruled that, as at the first trial, Aboud introduced legally insufficient evidence of damages at the second trial, which the jury apparently recognized because it did not award any damages. Because Aboud has not demonstrated prejudice from the alleged error in the instruction concerning exhibit 15d, the district court did not abuse its discretion in denying the motion for a new trial.

## V.

Aboud contends that the district court erred by failing to grant a new trial as a sanction for alleged misconduct by Dyab's counsel concerning exhibit 15d. "The decision to grant a new trial based on claimed attorney misconduct rests wholly within the district court's discretion." *Lake Superior Ctr. Auth. v. Hammel, Green &*

*Abrahamson, Inc.*, 715 N.W.2d 458, 479 (Minn. App. 2006), *review denied* (Minn. Aug. 23, 2006).

The district court judge is best positioned to determine whether an attorney's misconduct has tainted the jury's verdict. The paramount consideration in determining whether a new trial is required in cases alleging misconduct is whether prejudice occurred. The prejudice must be such that it affected the outcome of the case.

*Id.* (citations omitted).

First, Aboud contends that Dyab's counsel made three allegedly false statements concerning her and her counsel. These comments, which were primarily argument, were made in discussions with the district court, outside of the hearing of the jury, and thus could not have affected the jury. *See Fischer v. Mart*, 308 Minn. 218, 220, 241 N.W.2d 320, 321-22 (1976) (upholding the district court's denial of a motion for a new trial based on improper closing argument by counsel where the district court ruled that the argument was not prejudicial). Because the challenged comments were not made to the jury, Aboud cannot prevail.

Next, Aboud challenges several statements that Dyab's counsel made to the jury and the district court regarding exhibit 15d. The district court found that any error on the part of Dyab's counsel was generated by Aboud's failure to comply with the order for the production and sharing of exhibits prior to trial, and by her conduct in altering the document and then introducing the altered document, without informing the district court or Dyab's counsel. Further, the district court ruled that Aboud had not established that she was prejudiced by the omission of certain attachments to the exhibit, which she could

have cured had she replaced the altered document with the true document herself. Finally, the district court noted that neither Aboud nor her counsel objected to the replacement exhibit 15d before it was given to the jury or alerted the district court that any attachments were missing, although they had the opportunity to review it before its submission to the jury. Aboud has not shown that the district court abused its discretion in denying a new trial on these grounds.

## VI.

Aboud argues that the district court erred in failing to grant her motion for equitable remedies under Minn. Stat. § 302A.751 (2008). This court will review a district court's decision of whether to grant equitable relief under an abuse-of-discretion standard. *Pooley v. Mankato Iron & Metal, Inc.*, 513 N.W.2d 834, 837 (Minn. App. 1994), *review denied* (Minn. May 17, 1994).

As related above, the district court issued a posttrial order that the parties file proposed findings and memoranda on any issues remaining before the district court. Aboud filed a motion for a new trial, but, as with the contempt motion, she referred to the equitable-remedies motion only in a cover letter, without submitting proposed findings or a memorandum. Nonetheless, Aboud complains that the district court failed to address her motion for equitable remedies. She asks this court to order the district court to address the motion on remand after a new trial is ordered. First, no new trial is warranted. Second, Aboud has not demonstrated that the district court abused its discretion.

## VII.

Aboud challenges the award of costs and disbursements to Dyab. “We review the district court’s award of attorney fees or costs for abuse of discretion.” *Brickner v. One Land Dev. Co.*, 742 N.W.2d 706, 711 (Minn. App. 2007), *review denied* (Minn. Mar 18, 2008).

Aboud argues that the district court erred in ruling on Dyab’s motion for costs without holding a hearing. Minn. R. Civ. P. 54.04 does not require the district court to conduct a hearing to determine the reasonableness of alleged costs, particularly where the district court’s findings are supported by the record. *Buller v. A.O. Smith Harvestore Prods., Inc.*, 518 N.W.2d 537, 543 (Minn. 1994). The district court addressed costs and disbursements in great detail in its order and Aboud has not demonstrated that she was prejudiced by the lack of a hearing.

Aboud also argues that she, not Dyab, was the prevailing party. The prevailing party “shall be allowed reasonable disbursements paid or incurred.” Minn. Stat. § 549.04, subd. 1 (2008). Briefly, “[t]he prevailing party in any action is one in whose favor the decision or verdict is rendered and judgment entered.” *Borchert v. Maloney*, 581 N.W.2d 838, 840 (Minn. 1998). Aboud contends that she was the prevailing party based on a partial settlement during the first trial. Where the district court awarded Dyab a new trial after the first trial, the jury found against Aboud in the second trial, and the district court ruled that Aboud had not prevailed and ordered judgment in favor of Dyab, Aboud has not shown that the district court abused its discretion in concluding that Dyab was the prevailing party.

Aboud also specifically challenges some of the awards. While the district court may decide which costs are reasonable, it lacks discretion to deny reasonable costs and disbursements to a prevailing party. *Quade & Sons Refrigeration, Inc. v. Minn. Mining & Mfg. Co.*, 510 N.W.2d 256, 260 (Minn. App. 1994), *review denied* (Minn. Mar. 15, 1994).

Aboud challenges an award for copying costs, because it included amounts from the first trial, in which she asserts Dyab did not prevail. In its order awarding costs for the first trial, the district court found that “[g]iven the complexity and multitude of claims, [Dyab’s] decision to order all of the copies produced by [Aboud] is reasonably related to the claims at issue and necessary for the litigation.” The district court reaffirmed this award in its costs order after the second trial and ruled that Dyab, who obtained a new trial after the first trial, had prevailed in the first trial as well. Aboud has not shown that this was an abuse of discretion.

Next, Aboud challenges an award for a deposition taken of her which was related to a matter the parties settled. The district court ruled that Dyab supplied proper documentation of all charges relating to depositions and awarded him costs requested as reasonably necessary. Aboud has not shown that the district court abused its discretion.

Finally, Aboud challenges an award of costs for the transcript from a TRO hearing involving the operations of a tobacco store previously owned by a particular entity. Absent agreement by the parties, costs for partial trial transcripts are not taxable. *Lake Superior*, 715 N.W.2d at 483. But as the district court noted, this was a transcript of the tobacco-store TRO hearing before the first trial, which Dyab asserted he needed to

prepare for his motion in limine in the first trial, in which he asked the district court to bar Aboud from re-litigating issues already resolved in the TRO. The district court, noting that the tobacco-store claims were both the subject of Dyab's motion in limine and were litigated in the first trial, granted these costs as reasonable and necessary, both after the first trial and after the second trial. Aboud has not demonstrated that this was an abuse of discretion.

### **VIII.**

Aboud challenges the district court's posttrial award of attorney fees as sanctions under Minn. R. Civ. P. 16.06 for her violation of the court's orders. Under rule 16.06, if a party fails to obey a scheduling or pretrial order, the district court shall order reasonable expenses including attorney fees incurred because of noncompliance with that order, unless the district court finds that the noncompliance was substantially justified or that other circumstances make the award of expenses unjust. The district court sanctioned Aboud for waiting until the very end of the discovery period to serve voluminous and burdensome discovery, along with multiple deposition notices.

Aboud argues that the depositions were noticed on short but not impossible time schedules, a few days remained to reschedule, and the issuance of the deposition notices did not violate the rules. Aboud also asserts that the district court should have held a hearing and specified the dates for responses to the other side. The district court quashed Aboud's multiple deposition notices for failure to give reasonable notice, because they were served with about one day's notice and just a few days before the close of discovery, in a case that had been pending since October 2003. The district court also

quashed Aboud's requests for the production of voluminous documents, which, because of the discovery deadline, would have been due within several days rather than the 30 days allowed under Minn. R. Civ. P. 34.02. The district court's decisions were well within its discretion, and Aboud has not demonstrated that the district court abused its discretion.

Finally, Aboud challenges the award of attorney fees for her failure to comply with the district court's May 7, 2008 order, which required Aboud and Dyab to exchange exhibit lists before trial and pre-mark them; the district court warned that failure to comply could lead to sanctions. Aboud, who asserts that she complied with the court's order, again has not demonstrated an abuse of discretion.

**Affirmed.**