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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A08-0605**

In re the Marriage of:  
Dean Francis Fahrendorf, petitioner,  
Appellant,

vs.

Pamela Jean Fahrendorf, n/k/a P. J. Kass,  
Respondent.

**Filed March 3, 2009  
Affirmed  
Halbrooks, Judge**

Dakota County District Court  
File No. 19-F8-00-012717

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

**UNPUBLISHED OPINION**

**HALBROOKS, Judge**

Appellant challenges the district court's denial of his motion to vacate a default  
judgment entered against him, the garnishment of his social-security disability benefit to

collect arrearages on his spousal-maintenance obligation, and two attorney-fee awards totaling \$2,100. We affirm.

## **FACTS**

The parties' 30-year marriage was dissolved by the district court on July 19, 2001. The district court ordered appellant Dean Fahrendorf to pay respondent P.J. Kass \$1,700 in permanent monthly spousal maintenance. In 2005, appellant moved the district court to eliminate or reduce his spousal-maintenance obligation and respondent moved for a cost-of-living increase. The district court denied appellant's motion and granted respondent a cost-of-living increase. The district court also found that respondent was unable to pay her own attorney fees with regard to the motions and ordered appellant to pay respondent's attorney fees in the amount of \$1,500. Although the district court concluded that rule 11 sanctions might deter repetition of what it characterized as a meritless argument by appellant to eliminate his obligation, the district court did not expressly award sanctions.

Appellant's employment was terminated on October 5, 2005. He was later diagnosed with depression, and the Social Security Administration determined that he was disabled as of September 28, 2005. In October 2005, appellant filed for bankruptcy and stopped making spousal-maintenance payments.

In May 2007, respondent served appellant with notice of entry and docketing of maintenance judgment and, after appellant failed to answer, obtained a default judgment against him for \$35,099.18 in arrears. She also moved the district court to find appellant in contempt for failing to satisfy his spousal-maintenance obligations. Appellant

responded to the contempt motion and asked the district court to deny respondent's motion, to terminate his spousal-maintenance obligation (both prospectively and retroactively to December 2005), and to vacate the default judgment. Appellant's supporting affidavit focused primarily on his disability and its effect on his ability to meet his financial obligations; it did not address why the default judgment should be vacated. In an order dated July 13, 2007, the district court denied respondent's motion to hold appellant in contempt based on its finding that there was no evidence that appellant had the present ability to pay the past-due spousal maintenance. The district court also found that appellant's qualification for social-security disability constituted a substantial change in circumstances. As a result, the district court reduced appellant's prospective spousal-maintenance obligation to \$850, but did not vacate the default judgment. Finally, the district court awarded respondent \$600 in attorney fees in connection with the contempt motion.

On October 1, 2007, appellant moved the district court to vacate the default judgment on the ground of excusable neglect, essentially because of his disability. Respondent opposed the motion and moved the district court for (1) judgment on the \$1,500 and \$600 attorney-fee awards previously made and (2) garnishment of appellant's social-security disability benefit to satisfy both his prospective spousal-maintenance obligation and the arrears that had accumulated since the July 2007 order. The district court, in an order dated February 5, 2008, denied appellant's motion to vacate and stated that appellant had "failed to meet his burden of showing excusable neglect." The district

court granted respondent's motions for garnishment and for judgment on the previously awarded attorney fees. This appeal follows.

## DECISION

### I.

Appellant argues that the district court abused its discretion when it denied his motion to vacate the default judgment for the arrears. This court reviews a district court's denial of a motion to vacate a default judgment for an abuse of discretion. *Foerster v. Folland*, 498 N.W.2d 459, 460 (Minn. 1993). A party who seeks to have a default judgment vacated on the ground of excusable neglect must show that: (1) the party has a reasonable defense on the merits, (2) the party has a reasonable excuse for failing to answer, (3) the party has acted with due diligence after being notified judgment was entered, and (4) the other party will not suffer substantial prejudice. *Hinz v. Northland Milk & Ice Cream Co.*, 237 Minn. 28, 30, 53 N.W.2d 454, 456 (1952). To satisfy the four-part test, a party must make a strong showing on at least three of the factors. *Wiethoff v. Williams*, 413 N.W.2d 533, 536 (Minn. App. 1987).

For the first *Hinz* factor, appellant argues that he had a reasonable defense on the merits based on Minn. Stat. § 518.64, subd. 2(d)(1)–(2) (2004), which permitted a party to seek retroactive modification of a maintenance order if the party was unable to serve a motion because of significant mental or physical disability or had received disability benefits during the period for which retroactive modification was sought. The legislature deleted the retroactive modification provisions in 2005. 2005 Minn. Laws ch. 164, § 10, at 1894–95. In the effective-date provision, the legislature made clear its intention to

completely eliminate the basis for retroactive modification on which appellant seeks to rely:

The provisions of this act apply to all support orders in effect prior to January 1, 2007, except that the provisions used to calculate parties' support obligations apply to actions or motions filed after January 1, 2007. The provisions of this act used to calculate parties' support obligations apply to actions or motions for past support or reimbursement filed after January 1, 2007.

2006 Minn. Laws ch. 280, § 44, at 1145. The spousal-maintenance order here was in effect before January 1, 2007, and appellant's first motion to vacate the default judgment was made in July 2007. At that point, the retroactive-modification provisions of section 518.64 on which he relies were no longer available to him. Therefore, the first *Hinz* factor weighs against appellant.

On the second *Hinz* factor, a reasonable excuse for failing to answer the motion for default judgment, appellant directs us to his disability. The record does not offer much medical evidence on which the district court could have relied to conclude that appellant's depression amounts to a reasonable excuse. The record includes only the Social Security Administration's disability determination but lacks any diagnosis of depression. Although the district court acknowledged appellant's disability status, it observed that appellant was able to hire a bankruptcy attorney and participate in his bankruptcy case while he was disabled. Declining to permit appellant to choose which legal matters he would attend to, the district court concluded that appellant's disability did not constitute a reasonable excuse. The second of the *Hinz* factors weighs against appellant.

The third *Hinz* factor is due diligence. Appellant argues he has been diligent because he first moved to vacate the default judgment less than one month after it was entered and, having been summarily denied, again moved to vacate it three months later. But appellant did not establish any legal basis for vacating the default judgment in his first motion, and the papers he filed with the district court on the second motion do not address the diligence factor. This factor weighs against appellant.

The fourth *Hinz* factor is prejudice to respondent. Appellant ignored this factor until he filed his reply brief with this court, where he attempts to shift the burden to respondent. It is not her burden to show prejudice; it is his burden to show that she would not be substantially prejudiced by vacating the default judgment. Because he has not met this burden, the fourth factor weighs against appellant.

Because appellant has not made a strong showing on any of the *Hinz* factors, we conclude that the district court did not abuse its discretion in refusing to vacate the default judgment.

## II.

Appellant argues that the district court erred in garnishing his social-security disability benefit to pay the arrears. He does not challenge the garnishment of his disability benefit to pay his prospective obligation; he takes issue only with the additional 20% awarded to reduce the arrears that accumulated after the July 13, 2007 order.

The United States government has consented to the garnishment of social-security benefits for the payment of spousal support:

[M]oneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States . . . to any individual . . . shall be subject . . . to withholding in accordance with [s]tate law . . . and to any other legal process brought . . . to enforce the legal obligation of the individual to provide . . . alimony.

42 U.S.C. § 659(a) (2000); *see also* 42 U.S.C. § 659(h)(1)(A)(ii)(I) (2000) (defining social-security benefits as moneys “considered to be based upon remuneration for employment, for purposes of this section”).

Appellant argues that the garnishment ordered by the district court exceeds the limit imposed by Minn. Stat. § 571.922 (2008). But the limitation in the statute is calculated based on “disposable earnings,” Minn. Stat. § 571.922(a)(1), a subset of “earnings,” which are defined as “compensation paid or payable to an employee for personal service.” Minn. Stat. § 571.921(a)–(b) (2008). We review questions of statutory construction and application *de novo*. *In re Kleven*, 736 N.W.2d 707, 709 (Minn. App. 2007) (construction); *Davies v. W. Publ’g Co.*, 622 N.W.2d 836, 841 (Minn. App. 2001) (application), *review denied* (Minn. May 29, 2001).

There is no suggestion that appellant’s disability benefit is compensation for personal services. While both statutes are facially concerned with employment-based compensation, Congress drafted its enactment more broadly and included social-security benefits. Appellant argues that it is nonsensical that his disability benefit is labeled “remuneration for employment” under one law and yet is not “compensation . . . to an employee” under another law. But “it is the prerogative of the legislature to define the terms critical to its enactments.” *State by Humphrey v. Baillon Co.*, 503 N.W.2d 799,

804 (Minn. App. 1993). Because appellant is not being compensated as an employee, his disability-benefit payments are not “earnings” for purposes of section 571.922’s limitation. As a result, we conclude that the district court did not err in garnishing an additional portion of appellant’s disability benefit to pay the arrears.

### III.

Appellant assigns as error the district court’s entry of judgment on \$1,500 in attorney fees awarded in August 2005, which he argues was discharged in his bankruptcy proceeding. Whether a debt is dischargeable in bankruptcy is a question of statutory construction, which we review de novo. *See Kleven*, 736 N.W.2d at 709.

Among the debts classified as nondischargeable in bankruptcy is a debt “to a . . . former spouse . . . of the debtor, for . . . maintenance for[] or support of such [former] spouse.” 11 U.S.C. § 523(a)(5) (2000). Attorney fees incurred in the enforcement of maintenance obligations are not dischargeable under the Bankruptcy Code because the fee award is used to meet the obligee spouse’s necessary expenses. *Foster v. Childers*, 416 N.W.2d 781, 784–85 (Minn. App. 1987); *accord Holliday v. Kline (In re Kline)*, 65 F.3d 749, 751 (8th Cir. 1995); *Williams v. Kemp (In re Kemp)*, 242 B.R. 178, 181–82 (B.A.P. 8th Cir. 1999). Because the \$1,500 attorney-fee award was not dischargeable, the district court did not err when it entered judgment on the award.

### IV.

Finally, appellant challenges the district court’s entry of judgment on \$600 in attorney fees awarded in July 2007. He argues that the district court failed to identify the basis for the award. But he withdrew his objection to the award at the district court’s



November 13, 2007 hearing. At oral argument, appellant's counsel conceded that this issue was waived before the district court. We therefore decline to address appellant's challenge to the \$600 award. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating appellate review is limited to matters argued to and considered by the district court).

**Affirmed.**