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**STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1937**

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

vs.

Zack Dyab, et al.,
Respondents,

Eastbank, et al.,
Intervenors.

**Filed February 5, 2008
Affirmed in part, reversed in part, and remanded
Minge, Judge**

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

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

UNPUBLISHED OPINION

MINGE, Judge

Appellant claims that the district court erred by granting respondents a new trial, imposing an attorney fee sanction against her and her attorney in the amount of \$40,000, and conditioning receipt of a new trial on payment of that \$40,000 to respondents. Appellant also claims that the district court erred or abused its discretion when it (1) did not grant her posttrial motions; (2) entered a directed verdict dismissing American Choice Lending, Inc., as a codefendant and dismissing claims regarding a property in Blaine; (3) denied her motion to amend her complaint to include punitive damages; and (4) ruled in limine that she could not testify at trial regarding an alleged romantic relationship with respondent Dyab. We affirm the orders granting a new trial, dismissing American Choice Lending, dismissing claims regarding the Blaine property, and suppressing testimony regarding the alleged romantic relationship. However, because the district court abused its discretion when it awarded the attorney fee sanction in this case, we reverse the sanction award and remand for retrial. The remaining issues are remanded for consideration with the new trial.

FACTS

Appellant Rose Aboud and respondent Zack Dyab were the two shareholders of RM Michaels Construction, Inc. (RMC). RMC built single family homes, remodeled homes, developed lots for construction of residential property, and assembled modular homes. RMC was incorporated in May 2001, and ceased business in 2003.

In October 2003, Aboud brought a claim in her own right and as a shareholder of RMC and of a second corporation, Midwest Development, Inc., against Dyab for negligence in operating RMC, fraud, and breach of fiduciary duty. As tried, the suit included claims involving the development of over 20 separate properties. By an amended complaint, Aboud added three of Dyab's corporations—Rame's Enterprises, Inc., Ramdan Homes, Inc., and American Choice Lending, Inc.—as defendants.¹ Aboud and Dyab are the real parties in interest, and for convenience, this opinion refers to those parties individually throughout.

After a two-week trial, the district court granted motions for a directed verdict on certain claims, dismissing ACL as a codefendant, and dismissing claims regarding the property in Blaine. With respect to the remaining claims, eight questions were submitted to the jury. The jury found for Aboud against Dyab on claims for breach of fiduciary duty and fraud and misrepresentation. The jury also found for Aboud against Rame's Enterprises on a claim of fraudulent transfer of one parcel. The jury awarded damages to Aboud in the amount of \$175,000. On April 11, 2006, the district court granted a motion by Dyab for a new trial on the grounds that the damages awarded by the jury were unsupported by the evidence, "given under the influence of passion or prejudice," and affected by violations of court orders. The district court then sanctioned Aboud and her attorney, requiring them to pay \$40,000 of Dyab's attorney fees, and conditioned

¹ Respondent-intervenor Eastbank was granted summary judgment against Aboud and is not part of this appeal.

Aboud's receipt of a new trial on payment of that sanction. When the sanction was not paid, the district court dismissed the case with prejudice. This appeal follows.

D E C I S I O N

Aboud raises numerous issues on appeal. We consider each and decide those necessary to resolve this appeal.

I.

The first issue is whether the district court abused its discretion in granting a new trial. The district court ruled that the evidence presented at trial was insufficient to sustain the jury award of \$175,000 and that it was "given under the influence of passion and prejudice." Aboud argues that the award is supported by the evidence, and that nothing she did at trial prejudiced Dyab.

Under Minn. R. Civ. P. 59.01,

A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes:

(a) Irregularity in the proceedings of the court, referee, jury, or prevailing party, or any order or abuse of discretion, whereby the moving party was deprived of a fair trial;

(b) Misconduct of the jury or prevailing party;

. . . .

(e) Excessive or insufficient damages, appearing to have been given under the influence of passion or prejudice;

. . . .

(g) The verdict, decision, or report is not justified by the evidence, or is contrary to law; but, unless it be so

expressly stated in the order granting a new trial, it shall not be presumed, on appeal, to have been made on the ground that the verdict, decision, or report was not justified by the evidence.

This rule provides the only grounds upon which a new trial may be granted. *Clifford v. Geritom Med, Inc.*, 681 N.W.2d 680, 686 (Minn. 2004). District courts are in a better position than appellate courts to assess whether the evidence justifies the verdict, and appellate courts generally defer to a district court’s exercise of the authority to grant a new trial. *Id.* at 687. As such, we review a grant of a motion for a new trial for a clear abuse of discretion. *Id.*

The district court identified a number of bases for setting aside the damages award. It concluded that “the damages award was infected by [appellant’s] misconduct or errors at trial, despite the curative instructions of the Court.” It further concluded that “even assuming all evidence in favor of the verdict . . . the damages awarded by the jury are unsupported by the evidence and ‘given under the influence of passion or prejudice.’” Thus, Minn. R Civ. P. 59.01(a), (b), (e) and (g) are relevant.

A. Minn. R. Civ. P. 59.01(a), (b)–Irregularities and Misconduct

Rule 59.01(a) provides for a new trial in cases of irregularities that denied the moving party a fair trial. Rule 59.01(b) provides for a new trial in cases of misconduct by the prevailing party. Because the district court is in the best position to determine whether irregularities or attorney misconduct has tainted a trial, it has discretion to grant a new trial on that ground. *See 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 paramount consideration in determining whether a new trial is required in cases alleging misconduct is whether prejudice occurred . . . [t]he prejudice must be such that it affected the outcome of the case.” *Id.* (citing *Boland by Orr v. Morrill*, 270 Minn. 86, 100, 132 N.W.2d 711, 720 (1965)). A pattern of attorney misconduct, taken as a whole, may necessitate a new trial, even if no one incident would be sufficiently prejudicial to require a new trial. *Nadeau v. County of Ramsey*, 277 N.W.2d 520, 523-24 (Minn. 1979).

In his brief, Dyab asserts that Aboud and her attorney committed misconduct when they: (1) commented on Dyab’s morals; (2) commented on alleged discovery violations by Dyab; (3) attempted to elicit testimony regarding undisclosed damages; and (4) commented on alleged contempt of court by Dyab and referred to dismissed defendant ACL in closing argument. These are basically the errors and misconduct identified by the district court. Dyab claims that all of these actions violated court orders.

1. Comment on Dyab’s Morals

Dyab made a motion in limine asking that Aboud be barred from introducing evidence of an alleged romantic relationship between the two of them. The district court ruled that Aboud’s attorney could not refer to the relationship in opening arguments, and before eliciting any testimony regarding the relationship, Aboud’s attorney must approach the bench. Before attempting to introduce the relationship evidence, Aboud’s attorney approached the bench, as required, and the district court ruled the relationship evidence inadmissible. Aboud never improperly referred to this relationship during her testimony.

However, Aboud did testify about Dyab's alleged relationship with a woman named Julia Rozhansky, an officer of ACL. Aboud claimed that certain property was fraudulently transferred to ACL to benefit Rozhansky's mother and that this was motivated by a romantic relationship between Dyab and Rozhansky. The district court ruled that this testimony violated its order in limine regarding the claimed romantic relationship between Aboud and Dyab. But because the order in limine dealt with the Dyab-Rozhansky relationship, the conclusion that the Dyab-Rozhansky testimony violated an order in limine is erroneous.

2. Comment on Discovery Violations

The district court also ruled in limine that Aboud could not bring up claims that Dyab had not complied with discovery. Dyab points to one alleged example of a violation of this order. The alleged violation occurred when Aboud's attorney was attempting to lay foundation for a chart marked exhibit 45(a). One of the columns on that chart was marked "Dyab's Numbers." The following exchange took place between Aboud and her attorney:

[Aboud's Attorney]. First of all, are you the one that found those numbers?

Aboud. No. The Dyab numbers?

Q. Yes.

A. Those were offered during discovery.

....

Q. Would it be accurate to say that you requested documents through discovery?

A. Yes, I requested documents through discovery.

Q. Did you receive documents through discovery?

A. Yes.

Q. Did you request documents from Mr. Dyab?

A. Yes.

Q. Did you request . . .

At this point, Dyab's attorney objected, arguing that Aboud's attorney was attempting to bring up discovery deficiencies. Aboud's attorney denied that this was his objective. The district court cautioned Aboud's attorney to avoid referencing discovery matters, but allowed him to continue the line of questioning. Aboud's attorney did not make any specific reference to Dyab's discovery failures. Because Aboud's attorney did not violate a court order with the questioning set forth above, and because neither Dyab nor the district court has identified any other violations of this type, we determine that the district court erred in concluding that such conduct is a basis for a new trial.

3. Attempting to Introduce Undisclosed Evidence

As the trial began, the district court ruled that if either party tried to submit evidence that it had failed to provide in response to discovery requests, "the court will entertain the argument that it shall be precluded." The district court also stated that it would not allow "trial by ambush."

The district court ruled three times that Aboud violated this ruling. The first happened when Aboud's attorney asked her about the profits for a business called Wholey Smokes, Inc. Dyab moved to strike the answer, arguing that he had asked about damages in interrogatories but received no answer. In sustaining the motion, the district court stated that Aboud was engaging in trial by ambush by testifying to damages that she had failed to disclose in answers to specific discovery requests.

The second ruling occurred when Aboud's attorney asked her about a loan she was securing for a "St. Bonifacious" property. After a number of objections from Dyab, the district court asked whether Aboud had included damages for St. Bonifacious in her answers to Dyab's interrogatories. After learning that Aboud did not provide damages attributable to the St. Bonifacious property, the district court sustained Dyab's objection on other grounds, and did not allow the questioning.

Last, late in the trial, Aboud testified about a chart designated exhibit 45(h). This exhibit was objected to on a number of grounds, including that it was not produced during discovery. The district court sustained the objection.

Although Dyab's timely objections and the district court's actions in sustaining the objections and striking evidence minimized the introduction and adverse impact of improperly offered testimony about damages, the conduct of Aboud's attorney in attempting to introduce such evidence did violate the ground rules the district court established for the conduct of the trial.

4. Improper Closing Argument

Aboud's attorney made three statements during closing argument that the district court later found constituted misconduct. First, while discussing allegedly improper transfers of real estate, counsel for Aboud stated that even though the jury did not have to make any decisions regarding contempt, "[Aboud] wants to point out however that there was a court order." At this point, counsel for Dyab objected. Contempt had been an issue earlier in this case, but Dyab had not been found in contempt, as implied by Aboud.

The district court sustained the objection made by Dyab's attorney without further comment.

The second statement occurred when Aboud's attorney made the following comment: "[Y]ou say okay the Ramdan [company] did some work on [a property] regardless of whether it was pursuant to court order or [in] violation of court order, they did some work on it." Dyab objected, and the court replied "whether or not there was a violation of a court order is for the judge."

The third incident occurred when Aboud's attorney referred to damages regarding ACL. By that time, ACL had been dismissed from the case. Dyab objected, and the district court sustained the objection. Aboud's attorney immediately mentioned ACL and damages again. The district court then clarified for the jury that it was not to consider ACL in its deliberations.

While ruling on a motion for mistrial made by Dyab before the case was submitted to the jury, the district court stated that each mention of the contempt issue violated its order from "last night." That order is not further identified by the district court or by the parties, and this reviewing court cannot identify such an order in the record. The district court also called Aboud's attorney's comments "regrettable, to put it charitably." Ultimately, the district court denied the mistrial motion on the grounds that the district court instructed the jury to ignore ACL during the course of the trial and that curative instructions addressed the problem sufficiently.

To summarize, Dyab argues that Aboud's attorney violated court orders by eliciting testimony about a romantic relationship between Dyab and Rozhansky,

commenting on discovery violations, seeking to introduce evidence of undisclosed damages, and commenting during his closing argument about contempt by Dyab and about the dismissed defendant ACL. We are sympathetic with the difficulties the district court faced in conducting this trial. It was acrimonious and protracted. However, most of the incidents that have been identified do not violate any district court order identifiable by this court. Those that do were followed by objections and instructions by the district court. We conclude that individually and collectively, these improprieties are not a sufficient basis for the district court's finding that misconduct by Aboud's attorney necessitated a new trial.

B. Minn. R. Civ. P. 59.01(e)–Passion and Prejudice

Under rule 59.01(e), a district court may grant a new trial if it finds that the damages award is excessive and “given under the influence of passion or prejudice.” A district court is in the best position to determine whether or not a jury was infected with passion or prejudice. *See Lake Superior Ctr. Auth.*, 715 N.W.2d at 479. Unless there has been an abuse of discretion, this court will not interfere with a district court's decision regarding a new trial on the grounds of excessive damages. *LeDoux v. Nw. Publ'g., Inc.*, 521 N.W.2d 59, 68-69 (Minn. App. 1994), *review denied* (Minn. Nov. 16, 1994).

The district court stated the verdict was partially attributable to passion and prejudice, but it never identified what constituted such passion and prejudice. Although at oral argument, respondent claimed that his ethnicity is Arabic and his religion is Islam and that this may have influenced the jury, this source of passion and prejudice is never developed in the record. Without any finding by the district court specifying the basis for

its determination that the verdict was attributable to passion and prejudice, the passion and prejudice conclusion is not sustainable.

C. Minn. R. Civ. P. 59.01(g)–Verdict Unsupported by Evidence

Under rule 59.01(g), a new trial may be granted where the evidence does not justify the amount of a verdict. *Lesewski v. Nielsen*, 254 Minn. 286, 289, 95 N.W.2d 13, 16 (1959); *Pulkrabek v. Johnson*, 418 N.W.2d 514, 515 (Minn. App. 1988), *review denied* (Minn. May 4, 1988). Rule 59.01(g) vests broad discretionary power in the trial court. *Clifford*, 681 N.W.2d at 686-87. The district court is in the best position to assess whether the evidence justifies the verdict, and we generally defer to the district court’s judgment. *Id.* at 687. “We will not reverse a district court’s grant of a motion for a new trial absent a clear abuse of discretion.” *Id.* In particular, when a verdict indicates jury confusion, we will defer to the district court’s discretionary grant of the new trial. *Id.*

1. The Chart

Here, a problem with a proposed exhibit influenced the district court’s conclusion that the jury’s award was the result of confusion and was not justified by the evidence. On the third day of trial, a Thursday, the district court requested that Aboud’s attorney consider creating a chart listing the different properties in contention and summarizing why Aboud thought Dyab had improperly deprived her of profits from those properties. Trial did not resume until the following Monday—four days later. The district court asked the attorneys to confer over the weekend so that the exhibit could be admitted without objection. The district court noted that if an objection was made, it would determine if the numbers should be in front of the jury.

Aboud created proposed exhibit 45(a) in response to this suggestion by the district court. Contrary to the district court's instructions, however, Aboud's attorney did not disclose the chart to Dyab's attorney before bringing it to court the following Monday. As the trial resumed, proposed exhibit 45(a), although not yet admitted, was displayed on an easel in the courtroom. Dyab's attorney promptly objected to admission of the proposed exhibit for lack of foundation, noting that the jury had already been copying down numbers from the chart. The district court deferred the objection to allow Aboud's attorney to establish an adequate foundation for the admission of the exhibit. Dyab's attorney requested that, since the chart had not been admitted, it be removed from the easel. The chart was never admitted as an exhibit.

After trial, Dyab's attorney learned what materials the jury had used during their deliberations and alleged that the jury had written the chart's bottom-line damages number of \$1,880,000 on a worksheet in the deliberations room. The district court did not say whether or not it used this allegation regarding jury-room deliberations in determining that excessive damages were awarded at trial. But whether the district court considered the allegation or not, it is clear that a chart containing a large damages figure that the district court held lacked foundation was placed in front of the jury.

2. The Evidence

This was not a simple trial. It involved generalized claims of misconduct by Dyab and particular claims based on transactions involving over 20 properties. The transcript is ten volumes long, the parties' exhibits fill five large ringed binders, and there are 226 motions, memorandums, orders and other documents listed in the district court index of

the case. The jury had difficulties. The jury's apparent confusion as to damages is revealed by the questions the jury asked the district court. One such question was "[w]hat damages is plaintiff seeking?" The jury was instructed to complete a "Special Jury Verdict Form." The form requires the jury to answer a series of questions regarding liability for particular claims. The questions, and the jury's answers, are as follows:

1. Did Defendant Dyab breach any fiduciary duties owing to Plaintiff as an officer, shareholder or director of [RMC]?

Yes X No ____.

2. If your answer to Question 1 is "Yes", was the breach of fiduciary duties by Defendant Dyab the direct cause of any damages claimed by Plaintiff?

Yes X No ____.

3. Did Defendant Dyab engage in fraud and misrepresentation against Plaintiff in conducting the business operations of [RMC]?

Yes X No ____.

4. If your answer to Question 3 was "Yes", was Defendant Dyab's fraud and misrepresentation a direct cause of any damages claimed by Plaintiff?

Yes X No ____.

5. Did any of the Defendants engage in a fraudulent transfer against Plaintiff?

Yes X No ____.

6. If your answer to Question 5 is "Yes", which Defendant(s) engaged in a fraudulent transfer?

Rames [Enterprises] [Insert Name of Defendant(s)]

7. If your answer to Question 5 is "Yes", which specific properties are at issue with respect to a fraudulent transfer(s)?

[List Property or Properties] 2818 Golden Valley.

8. If your answers to Questions 1 and 2, OR 3 and 4, OR 5 and 6 are “Yes”, what amount of damages will fairly and adequately compensate Plaintiff for damages proven by her with reasonable certainty? [For purposes of this Question you cannot assume that Plaintiff is pursuing this action to pay off existing creditors of [RMC].

\$ 175,000.00 .

As a general rule, an appellant bears the burden of providing an adequate record on appeal. *Mesenbourg v. Mesenbourg*, 538 N.W.2d 489, 494 (Minn. App. 1995). The record must be “sufficient to show the alleged errors and all matters necessary for consideration of the questions presented.” *Truesdale v. Friedman*, 267 Minn. 402, 404, 127 N.W.2d 277, 279 (1964) (citation omitted).

Furthermore, parties arguing before this court have a burden to provide adequate and specific citation to the record to support the arguments in their briefs. Minn. R. Civ. App. P. 128.03. The purpose of rule 128.03 “is to provide a standardized brief format to allow appellate courts to read and absorb the voluminous presented materials in each of the multiple cases that the court simultaneously considers.” *Cole v. Star Tribune*, 581 N.W.2d 364, 371 (Minn. App. 1998). Citation to the record is particularly important where, as here, the record is extensive. *Id.* “A flagrant violation of the rules . . . to provide citations to the record may lead to non-consideration of an issue or dismissal of an appeal.” *Brett v. Watts*, 601 N.W.2d 199, 202 (Minn. App. 1999) (quotation omitted), *review denied* (Minn. Nov. 17, 1999). Even where the violation is not flagrant, failure to comply with rule 128.03 can still diminish a brief’s persuasiveness. *Id.*

To fill the gap between the damages for 2818 Golden Valley Road and the \$175,000 award and explain to this court how the district court abused its discretion in finding the award unsupported by the evidence, Aboud must show that the jury's favorable findings are supported by the record. This includes identifying evidence in the record of damages resulting from Dyab's breach of fiduciary duty or fraud and misrepresentation.

Aboud's appellate brief makes inadequate assertions regarding a large number of properties. The statements in the brief are supported by references to the record which are not helpful. These citations typically show that Dyab claimed a particular profit on a project or that he sold a property to some third party. But they fail to show facts supporting either a breach of fiduciary duty or fraud and misrepresentation by Dyab concerning particular properties and do not establish a basis for damages. Additionally, Aboud's attorney has not provided specific citations to the record for numerous factual claims. After reading the transcript and exhibits, this reviewing court cannot match particular properties to particular damages. Also, it is not possible for this court to match evidence of the various elements of fraud that were the basis for the damages claimed with individual properties and with claimed fraudulent transactions.

We emphasize that we do not determine that Aboud did not offer any evidence to support the \$175,000 award. This was a long, complicated trial involving the transfer of many properties from one corporate entity to another or to individuals. Several of these business entities and individuals were not parties to this litigation. The jury no doubt had a difficult time digesting all of the information presented to it. The district court, which

had the benefit of witnessing the trial first hand, concluded that the verdict was not supported by the record. On appeal, Aboud's citations to the record are inadequate and incomplete, making it impossible for this court to determine whether the award was supported. Aboud has failed to show that the district court's determination that the verdict was not supported by the record was an abuse of discretion. Absent such a showing, we affirm the district court's grant of a new trial on the basis of rule 59.01(g).

II.

The second issue is whether the district court erred in sanctioning Aboud and her attorney by ordering them to pay attorney fees. After the district court granted its motion for a new trial, Dyab asked for sanctions in the amount of \$85,000 against Aboud. The district court accepted the amount of \$85,000 as the "very real cost" of Dyab's defense in this case, and awarded him \$40,000 in sanctions to be paid jointly or severally by Aboud and her attorney. Aboud argues that the sanction was improper because it was not based on a statute or a contract. The district court based the sanction on Minn. R. Civ. P. 16.06 and its inherent authority to impose sanctions for misconduct.

A. Rule 16.06

First, we consider rule 16.06 as a basis for awarding attorney fees. Minnesota litigants generally are not entitled to recover attorney fees in the absence of a statutory authorization or contractual provision. *See Schwickert, Inc. v. Winnebago Seniors, Ltd.*, 680 N.W.2d 79, 87 (Minn. 2004). Rule 16.06 provides for sanctions, including an award of attorney fees, for violations of scheduling and pretrial orders.

While the district court and Dyab state that there were a large number of violations of orders, the record does not establish that there were any violations of scheduling or pretrial orders. *See supra* Part I. Although the district court noted that it would not allow trial by ambush, that admonition was made after the jury was empanelled. And while the district court stated that Aboud's attorney failed to provide a witness and exhibit list on time, no prejudice was claimed and the delay was not identified as a basis for the sanction. Furthermore, attempts by Aboud's attorney to introduce evidence not previously disclosed in response to discovery were objected to, the evidence was excluded, and the jury was instructed to ignore the attempts. We cannot identify the order forbidding comments during closing argument about contempt, and, if an order was made, it was not a pretrial or scheduling order. To the extent there were violations, we have previously observed that they were insufficient to warrant a new trial. Based on this record, we conclude that rule 16.06 is not a proper basis for the award of attorney fees.

B. Inherent Authority

The Minnesota Supreme Court has recognized the district courts' 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) (affirming, in spoliation case, "sanction" of exclusion of expert testimony regarding automobile that had since been destroyed). Our supreme court has not, however,

addressed the circumstances under which those sanctions may include attorney fee awards that are otherwise unsupported by statute or rule.

The United States Supreme Court has addressed this issue, and has held that such awards are available where a party acts in “bad faith, vexatiously, wantonly, or for oppressive reasons.” *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46, 111 S. Ct. 2123, 2133 (1991); *see also Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767, 100 S. Ct. 2455, 2465 (1979); *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); *cf. Glarner v. Time Ins. Co.*, 465 N.W.2d 591, 598 (Minn. App. 1991) (holding that district court abused its discretion by awarding attorney fees under Minn. Stat. § 549.21 (1990) (repealed 1997) where it made no finding of bad faith and the record did not support such a finding), *review denied* (Minn. Apr. 18, 1991). In *Patton*, our supreme court adopted the federal standard for spoliation sanctions. *See Patton*, 538 N.W.2d at 119 (citing *Dillon v. Nissan Motor Co., Ltd.*, 986 F.2d 263, 267 (8th Cir. 1993)). We conclude that the federal rule is appropriately followed in this proceeding.

Minnesota courts are reluctant to hold litigants accountable for the negligence or mistakes of their lawyers, and have looked to the behavior of the individual client to determine whether such conduct should be imputed to the client. *See, e.g., 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.”); *Charson v. Temple Israel*, 419 N.W.2d 488, 491 (Minn. 1988) (finding that where a client is not complicit in negligence or wrongdoing of attorney, the client should not be punished for attorney’s acts).

As previously stated, we recognize the difficulties the district court faced in conducting this trial. Had counsel for Aboud handled certain matters differently, the new trial may have been avoided. Also, we are sympathetic that the district court cannot be expected to identify with precision all of the improper conduct that occurs and that we review to determine whether the sanctions are appropriate based on the totality of the circumstances. However, even using this deferential approach, we observe that the district court did not find that Aboud or her attorney had acted in bad faith. Moreover, as noted above, many alleged violations of court orders by Aboud’s attorney were not supported by the record and do not warrant a new trial. Also there is no allegation that Aboud took part in any misconduct or otherwise acted in bad faith. Based on our review of the record, we conclude that it was an abuse of discretion and error for the district court to sanction Aboud and her attorney by awarding Dyab attorney fees, and we reverse that sanction award.²

Because we reverse the attorney fee sanction, we do not reach the issue of whether the district court erred in conditioning a new trial on payment of that award.

² Our decision is limited to the unique context of attorney fee awards. Obviously the district court maintains broad discretion to manage any trial.

III.

The next issue is whether the district court erred in directing the verdict on claims regarding the property in Blaine and claims against ACL. A party may seek a directed verdict after the opponent closes its case. Minn. R. Civ. P. 50.01. “A district court may grant a motion for a directed verdict when, as a matter of law, the evidence is insufficient to present a question of fact to the jury.” *Wall v. Fairview Hosp. & Healthcare Servs.*, 584 N.W.2d 395, 405 (Minn. 1998). “[T]he district court must treat as credible all evidence from the nonmoving party and all inferences that may be reasonably drawn from that evidence.” *Id.* A directed verdict should be granted

only in those unequivocal cases where (1) in the light of the evidence as a whole, it would clearly be the duty of the trial court to set aside a contrary verdict as being manifestly against the entire evidence, or where (2) it would be contrary to the law applicable to the case.

Jerry’s Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd., 711 N.W.2d 811, 816 (Minn. 2006). This court makes an independent determination of whether or not a directed verdict is appropriate. *Id.*

A. Directed Verdict for ACL

On appeal, Aboud argues that a directed verdict for ACL was inappropriate because that company received fees and mortgages in connection with Dyab’s claimed improper transfers of properties. This is fundamentally a fact question. The district court stated that it did not “see a single shred of evidence that [ACL] did anything wrong that could support a verdict by any reasonable jury” and granted a directed verdict. Aboud argues that sufficient evidence existed for the claim to go to the jury.

On appeal, Aboud asserts that “three types of evidence” showed that ACL improperly received money from RMC. First, she points to a number of exhibits that she argues show ACL received fees for properties that were improperly transferred. The exhibits indicate that either ACL or Dyab received a one percent commission on the sale of properties. Next, Aboud claims that ACL owns mortgages on these properties that it should not. In her brief, Aboud concedes that this evidence was not submitted at trial. Finally, Aboud states that ACL was using money from a bank account owned by Rame’s Enterprises, Inc., to make payments on behalf of ACL. The evidentiary basis for this assertion is an exhibit containing over 100 pages of checks and deposit slips from various persons and entities, paid to various persons and entities.

However, none of the evidence identified by Aboud on appeal actually establishes that ACL did anything other than simply make and receive payments. As previously stated, on appeal, the parties are responsible for citing with specificity that part of the record that is being referred to for the appellate court. Minn. R. Civ. App. P. 128.03; *Brett*, 601 N.W.2d at 202; *Cole*, 581 N.W.2d at 371-72. Aboud has failed to identify parts of the record that substantiate improper transfers of any property other than the property at 2818 Golden Valley Road. Furthermore, Aboud has not shown how ACL was in any way connected with that particular property. The record in this case is voluminous. Without identifying how ACL was involved in any fraudulent transfer, Aboud has not shown how the district court erred when it concluded that not a “single shred of evidence” pointed to wrongdoing by ACL. Therefore, we affirm the district court’s directed verdict for ACL.

B. Directed Verdict Regarding the Blaine Property

Regarding the property in Blaine, Aboud argues that Dyab usurped a corporate opportunity belonging to RMC.³ The district court determined that because RMC could not finance the Blaine project and because Dyab had no obligation to use his personal funds on behalf of the corporation, there was not evidentiary support for that usurpation claim.

Usurpation of corporate opportunity requires a plaintiff to show (1) that the business opportunity is also a corporate opportunity; and (2) that the alleged usurper should be held liable because he or she has violated duties of loyalty, good faith, and fair dealing toward the corporation. *Miller v. Miller*, 301 Minn. 207, 224-26, 222 N.W.2d 71, 81 (1974). In applying each part of this test, the fact finder has the task of considering all relevant facts. *Id.* at 225-26, 222 N.W.2d at 81-82.

One important factor in determining whether or not a corporate opportunity has been usurped is whether the corporation would have the financial ability to acquire the opportunity. *Id.* at 225, 222 N.W.2d at 81. On the same day as *Miller* was decided, the Minnesota Supreme Court found that because the corporation could not financially undertake a project, no corporate opportunity existed. *A.C. Petters Co., Inc. v. St. Cloud Enters., Inc.*, 301 Minn. 261, 266-67, 222 N.W.2d 83, 86-87 (1974). The court also held that a corporate officer has no duty to pledge his or her own funds in order to enable the corporation to obtain an opportunity. *Id.*

³ Dyab argues that Aboud must bring this as a derivative claim through RMC. Based on our disposition of the underlying issue, we do not consider this argument.

The district court found, and the record in this case is clear, that RMC did not have the financial resources to purchase the Blaine property and develop it. Aboud testified that she initially believed that RMC would pay \$125,000 cash for the Blaine project, and that she believed the company could afford to do so. RMC never had assets available at that level. Between May 2001 and March 2003, RMC's highest month-end balance was \$40,426.39 on April 30, 2002, which was down to \$6,594.63 three days later and only \$9.27 three weeks later, on May 23, 2002.

When Aboud commenced this action, neither she nor RMC had obtained financing for the Blaine property. Aboud does not assert that she had taken substantial steps towards obtaining financing. Because Aboud has not identified any evidence in the record indicating that she could actually self-finance the Blaine property and her assertions about her ability to finance are speculative, we conclude that the first requirement of *Miller* was not met and the district court did not err in directing a verdict in favor of Dyab regarding the Blaine property.

IV.

The next issue is whether the district court should have granted two of Aboud's posttrial motions: to hold Dyab in contempt of court and to enforce a settlement agreement made during trial. The district court considered these posttrial motions along with Dyab's motion for a new trial. After granting the new trial motion, the district court again denied Aboud's posttrial motions while granting leave to renew them after the second trial. When Aboud failed to pay the imposed sanctions, the district court

dismissed these motions as moot. Because we have reversed the sanction, mootness is not applicable.

Both parties acknowledge that they reached a settlement agreement during trial. They made cross-motions to the district court to enforce the settlement agreement that was read into the record before the case was submitted to the jury. The agreement reached called for Aboud to dismiss claims against Dyab based on his involvement in the purchase of companies called Wholey Smokes and Midwest Development, and in return Dyab would effect Aboud's release from a judgment against her for debts related to those businesses.

Our supreme court recently announced that district courts must treat motions to enforce a settlement agreement like motions for summary judgment and explicitly grant or deny each motion. *Voicestream Minneapolis, Inc. v. RPC Props., Inc.*, __ N.W.2d __, 2008 WL 95690, at *5 (Minn. 2008). Apparently the only reason that the settlement was not enforced is that the case was dismissed for nonpayment of sanctions. But that dismissal did not foreclose enforcement of the settlement, and certainly does not now on remand. We remand for the district court to determine if there is any basis for not enforcing the settlement agreement.

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.

V.

Next we consider the issue of whether the district court abused its discretion in its orders regarding testimony about Aboud's alleged romantic relationship with Dyab. Before trial, the district court ruled that Aboud's attorney could not refer to the relationship in opening arguments and Aboud's attorney was to approach the bench before eliciting any testimony regarding the relationship. When Aboud attempted to testify to the relationship, the district court ruled her testimony inadmissible as violative of Minn. R. Evid. 403. The district court observed that the probative value of the testimony was outweighed by the potential for prejudice. The district court further noted that it was an ancillary matter and would take too much trial time. At trial and on appeal, Aboud argues she should be allowed to submit evidence of the alleged relationship to help explain why she trusted Dyab, acceded to his will, and did not request or carefully scrutinize documents. Aboud argues that this is relevant to her fraud claim.

“The admission of evidence rests within the broad discretion of the trial court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion.” *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997) (quotation omitted). Generally, relevant evidence is admissible. Minn. R. Evid. 402. Relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Minn. R. Evid. 403. Unfair prejudice “is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is

evidence that persuades by illegitimate means, giving one party an unfair advantage.”
State v. Bell, 719 N.W.2d 635, 641 (Minn. 2006) (quotation omitted).

In determining whether Aboud was misled by Dyab, the nature of their working relationship is important. To prove fraudulent misrepresentations, one must show, amongst other things, that there was a false representation by a party of a past or existing material fact and that the representation caused the other party to act in reliance thereon. *Hoyt Props., Inc. v. Prod. Res. Group, L.L.C.*, 736 N.W.2d 313, 318 (Minn. 2007) (citation omitted). The alleged romantic relationship is arguably relevant to reliance.

On the other hand, the district court had legitimate concerns that testimony concerning an alleged romantic relationship could consume significant time and become a distracting side issue for the jury. The trial took several days and the jury appeared confused. Introducing details regarding yet another controversy could add to that confusion and distract from the more important issues of whether there were improper business dealings. Therefore, we conclude the district court did not abuse its discretion when it excluded evidence of the alleged relationship.⁴

VI.

The final issue is whether the district court erred when it denied Aboud’s motion to amend the complaint to add a claim for punitive damages. Although an initial complaint cannot include a claim for punitive damages, a party seeking to recover punitive damages may subsequently move to amend. Minn. Stat. § 549.191 (2006).

⁴ Of course, on remand the district court has discretion to permit a structured question and answer about the parties’ relationship if the district court determines such evidence is needed to provide appropriate context for the parties’ business dealings.

“Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others.” Minn. Stat. § 549.20, subd. 1(a) (2006). This standard is defined as follows:

A defendant has acted with deliberate disregard for the rights or safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:

- (1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or
- (2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

Minn. Stat. § 549.20, subd. 1(b) (2006). “[I]f the court finds prima facie evidence in support of the motion, the court shall grant the moving party permission to amend the pleadings to claim punitive damages.” Minn. Stat. § 549.191. We review decisions on whether or not to allow such an amendment to a complaint for abuse of discretion. *LeDoux*, 521 N.W.2d at 69.

While this case was pending in district court, the parties agreed to the appointment of a receiver by the district court to manage RMC. Aboud claimed that Dyab violated the court order establishing the receivership by continuing to operate RMC for his benefit and executing deeds transferring properties belonging to RMC. Based on this, Aboud moved to have Dyab held in contempt of court. As previously pointed out, the renewed contempt motion was pending at the time of dismissal and is before the district court on remand.

Aboud's motion to amend the complaint to add punitive damages is based on facts similar to those that are the basis for the pending contempt motion. Aboud asks this court to reverse the district court's denial of her motion for punitive damages. Aboud points us to no evidence that the properties were indeed transferred after the receiver was appointed, stating instead that "the contempt motion papers are lengthy, and too long to restate in this brief." Based on the record and arguments made on this appeal, we cannot determine that the district court abused its discretion when it denied the punitive-damage motion. However, we do not foreclose renewal of that motion if, during a new trial, the district court finds that Aboud establishes, by clear and convincing evidence, that Dyab transferred property that was in receivership.

CONCLUSION

In summary, we affirm the district court's orders for a new trial, a directed verdict for ACL, dismissal of claims regarding the Blaine property, and exclusion of evidence regarding the alleged relationship between Aboud and Dyab. We reverse the district court's award of attorney fees as a sanction and its dismissal for failure to pay that award. We remand for a new trial and further proceedings regarding Aboud's posttrial motions and any new punitive-damages claim.

Affirmed in part, reversed in part, and remanded.

Dated: