STATE OF MINNESOTA
IN COURT OF APPEALS
A10-259

City of Lakeland,
Respondent,

vs.

Bruce T. Breyfogle,
Appellant.

Filed December 21, 2010
Affirmed
Minge, Judge

Washington County District Court
File No. 82-CV-07-540

Kevin S. Sandstrom, Nicholas J. Vivian, Eckberg, Lammers, Briggs, Wolff & Vierling, P.L.L.P., Stillwater, Minnesota (for respondent)

Sharon R. Osborn, Osborn Law Office, L.L.C., Minneapolis, Minnesota (for appellant)

Considered and decided by Minge, Presiding Judge; Johnson, Judge; and Crippen, Judge.[*]

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

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

MINGE, Judge

Appellant challenges the district court's denial of his motion for attorney fees. Because we conclude that the district court did not abuse its discretion in denying the motion, we affirm.

FACTS

Appellant Bruce Breyfogle resides in the City of Lakeland, the respondent in this litigation. In early 2007, Breyfogle began to have difficulties with neighbors parking on his property, parking illegally on the street near his home, and otherwise violating city ordinances. From April to November 2007, Breyfogle frequently contacted the city regarding these matters both in person and in writing. The city clerk became concerned with Breyfogle's presence and emotional tenor during his visits to city hall, and she found his letters sarcastic and aggressive. City staff became more apprehensive because some of Breyfogle's letters were hand-delivered to city hall by a process server who smelled of alcohol.

In late October 2007, city hall staff reported their concerns about Breyfogle's conduct to the office of the Washington County Sheriff, stating that he had been asked several times to no longer come to city hall due to his aggressive behavior towards city personnel. On November 7 and 8, Breyfogle made four phone calls to city hall and left three messages. One message was directed specifically to the city clerk and commented that she had six no-parking signs by her property. The city clerk was frightened by the messages and by the fact that the message referred to the location of her home. She

immediately locked the doors of city hall, kept the offices closed for the remainder of the day, and contacted the city attorney, the city administrator, and the sheriff's office about the phone messages.

At the request of the city and deputy clerks, the city petitioned the district court for a harassment restraining order. On November 13, 2007, the district court granted the requested order ex parte and set the initial hearing for January 2008. The hearing was postponed several times by agreement of attorneys for both parties in attempts to resolve the issue and conduct discovery and for personal reasons. During this time, the city proposed terminating the order if certain restrictions were met, but the offer was declined by Breyfogle. In an early April 2008 e-mail, Breyfogle counteroffered asking, among other things, that all his expenses "related to this abuse of process/rush to judgment be repaid . . . ." The counteroffer was declined by the city.

The final hearing date was set for June 2008. Shortly before the hearing, the city determined that it would request that the district court terminate the restraining order as Breyfogle's conduct had moderated. The city informed Breyfogle's attorney of its decision. Before the hearing, the parties spoke with the judge in chambers and agreed that the city would withdraw its petition, the district court would dismiss the case, and Breyfogle would move for attorney fees and costs.

On the date of the hearing, the restraining order was terminated. The same day, Breyfogle mailed the city his "Respondent's Notice Motion and Motion for Costs and Attorney's Fees Pursuant to Minn. R. Civ. P. 11.03." The parties subsequently argued this motion, and the district court ultimately denied attorney fees. This appeal followed.

D E C I S I O N

The parties assume and we agree that the award of attorney fees requested in this proceeding is a sanction. The basic issue on appeal is whether Breyfogle's motion for attorney fees complied with the "safe-harbor" provisions of Minn. Stat. § 549.211 (2008) and Minn. R. Civ. P. 11. When the material facts are not in dispute, this court reviews the district court's application of the law de novo. *In re Collier*, 726 N.W.2d 799, 803 (Minn. 2007); *see Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634, 638 (Minn. 2006) (interpreting statutes); *Rubey v. Vannett*, 714 N.W.2d 417, 421 (Minn. 2006) (interpreting rules). "Where the legislature's intent is clearly discernable from plain and unambiguous language, statutory construction is neither necessary nor permitted and courts apply the statute's plain meaning." *Am. Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001).

A motion for sanctions pursuant to court rule is a separate request for relief and must be served in accordance with Minn. R. Civ. P. 5. Minn. R. Civ. P. 11.03(a)(1); *Dyrdal v. Golden Nuggets, Inc.*, 672 N.W.2d 578, 589 (Minn. App. 2003). Rule 5 permits service in person, by fax, by mail, or if no address is known, by leaving a copy with the court administrator. Minn. R. Civ. P. 5.02. The statutory basis for sanctions establishes a parallel procedure. *See* Minn. Stat. § 549.211, subd. 4(a). Both the statute and rule 11 include a "safe-harbor" provision that requires a party seeking sanctions to serve the separate motion on the nonmoving party, wait not less than 21 days, and only if the challenged conduct has not been withdrawn or corrected, file the motion for sanctions

with the district court. *See* Minn. Stat. § 549.211, subd. 4(a); Minn. R. Civ. P. 11.03(a)(1).

Here, the restraining order was lifted at the request of the city on June 20, 2008. Breyfogle's motion for sanctions was served by mail on the city on the same day. On June 23, 2008, the motion was filed with the district court. We note that the motion for sanctions was filed after the district court dismissed the underlying action. The post-dismissal service of a motion cannot satisfy the safe-harbor requirement because "the offending party is unable to withdraw the improper papers or otherwise rectify the situation."[1] *Gibson v. Coldwell Banker Burnet*, 659 N.W.2d 782, 790 (Minn. App. 2003) (quotation omitted). Breyfogle provides no explanation for not following the 21-day safe-harbor provision. He had six months between the grant of the initial harassment restraining order and the date the city requested termination of the order. When sanctions were demanded, the action had already been dismissed and the city could no longer rectify the situation. By not providing the 21-day safe harbor, Breyfogle's motion failed to comply with the plain language of the statute and the rule.

Breyfogle argues that the district court implicitly accepted his April 8 e-mail as appropriate notice, and that this e-mail satisfied the 21-day safe-harbor provisions in the

[1] Breyfogle cites *Vegemast v. DuBois* to support the notion that the court retains jurisdiction over rule 11 sanctions after the underlying action has been dismissed. 498 N.W.2d 763, 766 (Minn. App. 1993). While that is true, the motion seeking attorney fees in that case had been filed with the court in compliance with rule 11 before the action was voluntarily dismissed. *Id.* at 764. The district court retains jurisdiction to apply sanctions after dismissal, but still the motion must be served and filed in the proper timeframe.

statute and the rule, because the district court did not directly address the significance of the e-mail in its order. That e-mail demanded the following:

- Dismissal of the harassment order within two days and file request for expungement of the order.
- Pay Breyfogle for all his expenses incident to the legal proceedings including expungement.
- Resolve all his outstanding complaints concerning ordinance violations within 15 days.
- Formally reprimand city staff for improper conduct.

Breyfogle further argues that "the procedural and ethical mis-steps" by the city in seeking a harassment restraining order should allow the sanctions motion to be heard without the "pro forma requirements of notice" for sanctions in the statute and rule.

We note that the e-mail from Breyfogle and his attorney never mentioned Minn. Stat. § 549.211, rule 11, or the word "sanctions." It simply demanded that all expenses be repaid. It provided no 21-day safe harbor. The e-mail demand for reimbursement for expenses was also part of a larger settlement offer. It was not a separate motion as required by Minn. Stat. § 549.211, subd. 4(a) and Minn. R. Civ. P. 11.03(a)(1). Furthermore, as an e-mail it did not comply with the service requirements of Minn. R. Civ. P. 5. Finally, Breyfogle cites no legal basis for his request that this appellate court ignore the law and simply waive the "pro forma requirements of notice." The rule is clear that the safe-harbor provisions should be observed. *See Dyrdal*, 672 N.W.2d at 589-90 (noting that Fed. R. Civ. P. 11 is substantively identical to Minn. R. Civ. P. 11 and that both have been strictly enforced). Based on these deficiencies, we conclude that the e-mail did not constitute a proper motion for sanctions.

In sum, because Breyfogle's motion for sanctions was not properly made, we affirm the district court's denial of the motion for sanctions.

Affirmed.

Dated: