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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2198**

Lawrence Ulanowski, et al.,
Appellants,

vs.

Jennifer Nepper,
Respondent.

**Filed September 6, 2011
Affirmed
Minge, Judge**

Hennepin County District Court
File No. 27-CV-08-11867

Kellen T. Fish, KTF Law Firm, LLC, Minneapolis, Minnesota (for appellants)

Nathaniel Hobbs, The Hobbs Law Firm, Minneapolis, Minnesota (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Johnson, Chief Judge; and Minge, Judge.

UNPUBLISHED OPINION

MINGE, Judge

Appellants challenge the district court's denial of their breach-of-contract and unjust-enrichment claims to collect attorney fees, denial of their motion for amended findings, and imposition of an attorney-fee sanction against appellants for attorney misconduct. Because the district court did not clearly err in finding that the verbal legal-

representation contract was not modified, because the unjust-enrichment claim is barred by the existence of the initial agreement, and because the district court did not abuse its discretion in awarding attorney fees as a sanction, we affirm.

FACTS

In 2002, appellant Lawrence Ulanowski and respondent Jennifer Nepper, together with their spouses, became co-owners of Sand Creek, LLC, which operated a small retail shopping center. In 2006, Ulanowski verbally agreed that his law firm, appellant Ulanowski Law Firm, PLLC (ULF), would represent Nepper in her marriage-dissolution proceedings. Tifanne Wolter, an associate at ULF, was the attorney of record. Both sides agree that the initial verbal agreement did not contemplate that Nepper would pay a fee but rather that there would be a quid-pro-quo exchange of services by Nepper, such as purchasing furniture for ULF, in return for legal representation. A dispute developed over whether that verbal agreement was subsequently altered to a fee arrangement.

In May 2008, ULF sued Nepper for unpaid legal fees for representing her during her dissolution proceedings, claiming breach of contract and unjust enrichment. Two months later, Ulanowski sued Nepper to gain control of Sand Creek.¹ Nepper then filed a third-party complaint for breach of fiduciary duty against Ulanowski in the attorney-fee litigation. In February 2009, Ulanowski sued Nepper for defamation and related claims. The cases were consolidated in May 2009.

¹ In November 2008, Ulanowski also sought a harassment restraining order, but it was later dismissed by stipulation in Hennepin County District Court.

Prior to trial, the district court settled discovery issues, reserved a motion for sanctions by Nepper against Ulanowski, and granted summary judgment dismissing the majority of Ulanowski's claims. The district court also awarded Nepper \$2,500 in attorney fees because Ulanowski demanded punitive damages without first seeking leave of the district court as required by statute. *See* Minn. Stat. § 549.191 (2010).

After a bench trial, the district court dismissed ULF's and Ulanowski's remaining claims for breach of contract and unjust enrichment and granted Nepper's counterclaim for attorney fees. In a posttrial order, the district court granted Nepper's motion for sanctions against Ulanowski, awarded her \$30,000 in attorney fees, and denied ULF's and Ulanowski's motion for amended findings. This appeal follows.

D E C I S I O N

I. Breach of Contract

The first issue is whether the verbal contract between Nepper and ULF for legal representation without a monetary fee was subsequently modified to include a fee.² The existence of a contract and its terms are questions for the factfinder. *Morrisette v. Harrison Int'l Corp.*, 486 N.W.2d 424, 427 (Minn. 1992). Findings of fact are reviewed for clear error, with due regard given to the district court's credibility determinations. Minn. R. Civ. P. 52.01.

² In this appeal, the parties do not consistently distinguish between Ulanowski (both as a party and as an attorney) and ULF and their respective rights and liabilities. Because in the fee-arrangement litigation, Ulanowski and ULF were apparently treated as one and the same, we do not distinguish between them and sometimes jointly refer to them as appellants, except as otherwise stated.

A contract can be modified by the parties agreeing to substitute a new contract or change its terms. *Olson v. Penkert*, 90 N.W.2d 193, 203 (Minn. 1958) (citing *Wilson v. Hayes*, 40 Minn. 531, 540, 42 N.W. 467, 471 (1889)). “Whether a pre-existing agreement has been modified depends on the parties’ objective manifestations, not their subjective understanding.” *Brodsky v. Brodsky*, 639 N.W.2d 386, 392 (Minn. App. 2002) (quotation omitted), *review denied* (Minn. Apr. 23, 2002).

Both sides agree that legal services for Nepper’s dissolution proceedings were initially provided in exchange for services by Nepper and not for a monetary fee. The district court was “not persuaded that the parties mutually agreed to modify the original arrangement” and switch to a standard-fee agreement. The district court explained that the nature of Nepper’s alleged payment obligation was unclear and, “[t]aken together with the loose billing practices employed by ULF,” was insufficient to prove a modification to the initial verbal agreement.

On appeal, appellants point to several emails between the parties to support their argument that the district court was clearly erroneous in rejecting their claim that the original verbal agreement was modified to a standard-fee arrangement. In one email, Nepper states: “I don’t get why you send me a bill I just think it creates more of a problem because you know you did me a favor. You did a very generous thing by taking my case for no financial payment.” In another email, Nepper states: “I got another bill from you – it still stresses me out but I am trusting what you said not to worry about the bill – you were just sending it to make your staff think you weren’t giving me a deal.”

While the emails do indicate that Nepper was aware of the bills, when read in context, they do more to support the district court's conclusion that appellants failed to show that the arrangement was modified than they do to support Ulanowski's position. Nepper expressed confusion as to why ULF was sending her a bill, and, in another email, she noted that Ulanowski told her not to worry about the bills. Although Nepper also referenced needing time to get back on her feet, nowhere did she link that discussion to needing time to pay any attorney fees, as Ulanowski contends.

Ulanowski and Wolter also testified that a \$1,000 payment to ULF was made as a partial payment of Nepper's fees and was evidence of the modified verbal contract. At trial, appellants were unable to produce a bill to Nepper that contained a credit for the payment and could only note that they did not have copies of some of the bills. Wolter testified that she reviewed Nepper's bills and found that the payment was never credited to Nepper's account.³ The check in question was actually for \$2,000 and was written by Nepper's parents in January 2007. Nepper testified that she gave ULF the \$2,000 check from her parents to pay part of a friend's legal bill with the firm. She also testified that at the time of that payment, she was entirely unaware that she would be billed for any dollar balance for representation in her dissolution proceeding. There is adequate support in the record to sustain the district court's acceptance of Nepper's position. For example, it

³ We note that appellants' attempt to support their argument with a series of receipts for items purchased by Nepper for appellants. However, the purchases are consistent with Nepper's contention that ULF was providing legal representation in exchange for such services and provide no evidence that the agreement was subsequently modified to a standard-fee arrangement.

appears that the first bill for Nepper was generated five days after the \$2,000 check was written.

In summary, we conclude that the record supports the district court's determination that the evidence was insufficient to establish a modified contract and that appellants' breach-of-contract claim fails.⁴

II. Unjust Enrichment

The second issue is whether the district court abused its discretion in denying ULF's unjust-enrichment claim. Unjust enrichment is an equitable remedy; we review the determinations of the district court regarding equitable relief for an abuse of discretion. *ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc.*, 544 N.W.2d 302, 305 (Minn. 1996) (stating that unjust enrichment is an equitable remedy); *City of Cloquet v. Cloquet Sand & Gravel, Inc.*, 312 Minn. 277, 279, 251 N.W.2d 642, 644 (1977) (stating standard of review for cases involving equitable relief).

Except in rare circumstances, a valid contract governing the rights and obligations of the two parties precludes an unjust-enrichment claim. *Stein v. O'Brien*, 565 N.W.2d 472, 474–75 (Minn. App. 1997). Because neither party denies that there was an initial, verbal contract governing the representation, and in the absence of any circumstances

⁴ The district court also granted Nepper's claim that Ulanowksi breached a fiduciary duty owed to her as her attorney. If an attorney breaches a fiduciary duty, the remedy to a client is the forfeiture of compensation. *Rice v. Perl*, 320 N.W.2d 407, 411 (Minn. 1982). Because we conclude that the district court did not abuse its discretion in finding no modification of the legal-representation contract, and therefore Nepper owes appellants no attorney fees, we do not reach their appeal of the breach-of-fiduciary-duty claim.

warranting an exception, we conclude that the district court did not abuse its discretion in denying ULF's unjust-enrichment claim.

III. Attorney Fees and Sanctions

The final issue is whether the district court abused its discretion in awarding Nepper attorney fees as a sanction for Ulanowski's conduct during the litigation. This court will not reverse a district court's award of attorney fees absent an abuse of discretion. *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987).

Minnesota requires an attorney to certify that the pleadings and arguments submitted to the district court are not frivolous or presented for an improper purpose. Minn. R. Civ. P. 11.02; Minn. Stat. § 549.211, subds. 1, 2 (2010). The statute and the rule are generally read and applied together. *Radloff v. First Am. Nat'l Bank of St. Cloud, N.A.*, 470 N.W.2d 154, 156 (Minn. App. 1991), *review denied* (Minn. July 24, 1991). After notice and a reasonable opportunity to respond, if the district court determines that rule 11.02 has been violated, it may impose appropriate sanctions. Minn. R. Civ. P. 11.03; Minn. Stat. § 549.211, subd. 3 (2010). Sanctions "should not be imposed when counsel has an objectively reasonable basis for pursuing a factual or legal claim or when a competent attorney could form a reasonable belief a pleading is well-grounded in fact and law." *Uselman v. Uselman*, 464 N.W.2d 130, 142-43 (Minn. 1990), *superseded on other grounds*, by Minn. Stat. § 549.21 (1990).

Prior to this appeal, Ulanowski was not only a party but also represented himself and his law firm, ULF. Nepper served the sanction motion on Ulanowski on November

25, 2008 and filed it with the court on June 5, 2009. This satisfied the safe-harbor provision of rule 11, requiring service of a sanction motion more than 21 days before filing the motion with the court. *See* Minn. R. Civ. P. 11.03(a). Nepper also provided a second safe-harbor notice after the district court reserved ruling on the initial motion.

In granting the motion for sanctions, the district court noted at least six grounds to support the award in its memorandum, including Ulanowski's motion to admit polygraph evidence despite "voluminous case law prohibiting its admittance"; his failure to request leave to make, and then failure to voluntarily dismiss, claims for punitive damages; representations to the district court on insufficient discovery that "wholly ignored the bench rulings" made by another judge; his failure to attempt contractually-agreed-to mediation before suing to remove Nepper from property management of Sand Creek, LLC; his failure to ever address his tort claims; and his service of subpoenas on nonparty tenants of the Sand Creek property after summary judgment was ordered in Nepper's favor on those claims and the discovery deadline had expired. The district court concluded that "Ulanowski's . . . apparent disregard for the obvious pitfalls of his claims, in light of the facts and law, is so blatant the [district court] is strained to find how his conduct could be categorized as anything but in bad faith, vexatious, or wanton" and awarded Nepper \$30,000 in attorney fees.

We conclude that the record supports the district court's determinations regarding Ulanowski's improper actions and that, given the number of incidents, the district court did not abuse its discretion in granting sanctions against Ulanowski personally.⁵

Affirmed.

Dated:

⁵ In his brief, Ulanowski summarily asserts that the district court "improperly dismissed Appellants' Motion for Amended Findings" and that "[t]his Court should find that the District Court erred in denying" the motion. However, this claim is not accompanied by any analysis, argument, or citation to legal authority. Because issues not properly briefed on appeal are waived, *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982), we do not consider this assertion.