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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0029**

In re the Marriage of:
Nader Charles Kazeminy,
Petitioner Below,

vs.

Jibil Eftehar Kazeminy,
Respondent,
NJK Holding Corporation, et al.,
Appellants.

**Filed February 19, 2019
Affirmed
Florey, Judge**

Hennepin County District Court
File No. 27-FA-12-7936

William R. Skolnick, Skolnick & Joyce, P.A., Minneapolis, Minnesota; and

Richard K. Walker, Walker & Peskind, P.L.L.C., Scottsdale, Arizona (for respondent)

Christopher W. Madel, Jennifer M. Robbins, Cassandra B. Merrick, Madel P.A.,
Minneapolis, Minnesota (for appellants)

Considered and decided by Reilly, Presiding Judge; Schellhas, Judge; and Florey,
Judge.

UNPUBLISHED OPINION

FLOREY, Judge

Appellants NJK Holding Corporation and Nasser Kazeminy challenge the district court's contempt order and its award of attorney fees. We affirm.

FACTS

This contempt dispute arises from a contentious dissolution of marriage between respondent Jibil Eftekhar Kazeminy (respondent-wife) and Nader Kazeminy (husband). Husband is the son of one of the appellants, Nasser Kazeminy. Nasser Kazeminy is the owner and Chairman of NJK Holding Corporation (NJK), and husband has been employed by NJK as its Chief Executive Officer (CEO) since 1992.

Husband is named as the sole direct beneficiary of two trusts (the 1992 and 1999 trusts) created by his parents as spendthrift trusts. As stated in the district court's contempt order: whether the assets held in the trusts are considered marital property subject to distribution "has been the most hotly contested issue in this case since its inception."

Husband and respondent-wife married in 1995 and had two children together, both of whom have reached the age of majority. In October 2012, husband filed a petition for dissolution. Following respondent-wife's first discovery request concerning the 1992 and 1999 trusts, husband moved the district court for summary judgment determining that the trusts were not subject to distribution in the parties' dissolution and for an order denying discovery into the amount or nature of the trust assets. In the fall of 2013, the district court appointed an expert to determine whether the trust assets were part of the marital estate.

In the spring of 2014, the court-appointed expert released a report concluding that the trusts were not marital property. As such, the district court granted husband's summary-judgment motion. The court also granted husband's request for a partial judgment and decree dissolving the parties' marriage and reserving issues concerning parenting and financial matters for trial.

In January 2016, the first portion of husband and respondent-wife's divorce trial began. At trial, respondent-wife sought access to the unredacted documents used by the expert to create the 2014 report. On January 29, 2016, the district court ordered the release to counsel of the unredacted documents, subject to a protective order limiting dissemination. Husband and appellants immediately filed motions asking the court to stay its order.¹

On February 9, 2016, the district court found that the information provided to the expert was contradicted by live testimony at trial, and ordered, again, that the unredacted supporting documents related to the 2014 report be released to counsel. On February 11, 2016, husband petitioned this court for writs of prohibition and mandamus to preclude the district court from reconsidering prior rulings, and to undo the release of the unredacted documents. Appellants filed a similar petition. This court denied both petitions. *In re*

¹ On Saturday, January 30, 2016, appellants' counsel sought an emergency writ of prohibition and a stay of the district court's January 29 order. See Minn. R. Civ. App. P. 121.01 (seeking emergency writs). Over the same weekend, appellants' counsel also contacted the district court, requesting that it stay the order pending review by this court. On February 1, 2016, the district court temporarily granted husband's request to stay the January 29 order. The district court denied appellants' request for a stay, but granted appellants' request to file a motion. On February 2, 2016, appellants' counsel filed a notice of motion and motion to stay the district court's January 29 order.

Nader Charles Kazeminy, No. A16-0245 (Minn. App. Mar. 15, 2016) (order); *In re Nasser Kazeminy, et al.*, No. A16-0246 (Minn. App. Mar. 15, 2016) (order). In June 2016, the district court vacated the summary judgment granted to husband, and it granted respondent-wife's discovery request concerning the two trusts. About one month later, the district court issued a second discovery order concerning the same matter.

Throughout the summer of 2016, process servers hired by respondent-wife repeatedly attempted to serve subpoenas on appellants. At least a dozen service attempts were avoided or refused over the course of ten days in July. After being told on August 1 that NJK officers were out of the country all week, process servers successfully completed service on NJK officers, including Nasser Kazeminy, just one day later, on August 2, 2016.

In September 2016, the district court ordered appellants, for the third time, to produce financial documents concerning the 1992 and 1999 trusts. Specifically, the court ordered that:

NJK must provide responsive financial statements, tax returns, forecasts and projections, and shareholder/member control agreements for any assets held by the 1992 or 1999 Trusts where the entities in question are not publicly traded.

In October 2016, appellants made available over 57,000 pages of documents for review at NJK's offices. However, as NJK's Chief Financial Officer (CFO), Rhonda Donahue, revealed in her deposition in November 2016, tax returns for entities held by the two trusts were not included in the disclosed documents. In the two weeks following Ms. Donahue's deposition, NJK produced an additional 10,000 pages of documents for review.

With trial set to resume in mid-December, a pretrial conference was held in late November 2016. At the conference, appellants' counsel represented to the district court that counsel believed that NJK had produced everything required by the discovery orders. Following the conference, however, NJK produced an additional 5,800 pages of responsive documents. The trial was continued.

On March 6, 2017, husband and respondent-wife's divorce trial resumed. Much of the testimony concerned the spendthrift trusts. At trial, NJK's CFO, Ms. Donahue, acknowledged that late production of the additional 10,000 pages of documents had caused the trial to be delayed. Testimony by NJK employees, including that of husband and of Nasser Kazeminy himself, suggested that appellants had intentionally withheld certain discovery. For example, husband testified, that if he had complied with the court order and produced documents that respondent-wife was seeking, he would have been fired. Nasser Kazeminy testified:

I'm not going to give nobody anything. And I said our rule, our policy in holding company from inception, if you go ahead share any of the personal information of our family, our life, you're fired. Everybody in the company knows.

The trial concluded on March 10, 2017.

In August 2017, respondent-wife filed a motion requesting that the district court hold appellants in contempt. Respondent-wife alleged that appellants had committed constructive contempt by violating the court's three separate discovery orders. As a result of appellants' alleged contempt, respondent-wife requested that the court order appellants to indemnify her for \$233,406.50 in attorney fees. Husband also filed a contempt motion,

asking the court to find respondent-wife in constructive civil contempt for failing to comply with a court order directing her to produce family photos and videos for copying.

On September 5, 2017, a hearing was held on husband and respondent-wife's contempt motions. Husband was personally present and represented by counsel, respondent-wife was personally present and represented by counsel, and appellants' attorney was also present and appearing on their behalf. The district court found both NJK and respondent-wife in contempt. With regard to NJK, the court found:

By refusing to produce responsive documents and evading service of process, NJK disobeyed this Court's orders regarding discovery, and the Court finds NJK in constructive contempt of the Court. This contempt was prejudicial to [respondent-wife's] right to discovery ordered by the Court because it limited her ability to effectively depose witnesses and develop her theories of the case.

The district court further found that respondent-wife's indemnification request of \$233,406.50 in attorney fees was "excessive," but an award of \$89,612.50 was "more reasonable." The court explained that it "limited its calculation to those billing activities actually caused by the contempt (e.g., visiting NJK's offices to facilitate service of process)" and "excluded activities carried out in the normal course of trial preparations (e.g., conducting depositions)." The court ordered "NJK or Nasser, as Chairman and sole shareholder" to "pay [respondent-wife] \$89,612.50 as indemnification for attorney's fees incurred as a result of NJK's contempt of the Court's discovery orders." This appeal followed.

DECISION

I. The district court did not abuse its discretion in finding NJK in contempt.

Appellants argue that the district court abused its discretion in finding them in contempt, and request that this court reverse and vacate the district court's contempt order. Appellants argue that the district court abused its discretion because (1) the contempt order improperly held Nasser Kazeminy personally liable; (2) the relief granted by the order was punitive in nature and moot; and (3) the award of attorney fees was unreasonable.

“When reviewing a contempt order, the appellate court may reverse or modify only if it finds the [district] court abused its discretion.” *Time-Share Sys., Inc. v. Schmidt*, 397 N.W.2d 438, 441 (Minn. App. 1986); *see also Mower Cty. Human Servs. v. Swancutt*, 551 N.W.2d 219, 222 (Minn. 1996). The district court's factual findings in a contempt order are reversed only if they are clearly erroneous. *Swancutt*, 551 N.W.2d at 222.

In Minnesota, the law of contempt has been organized into two classifications based on the purpose of the court's order: (1) criminal contempt with a punitive purpose, and (2) civil contempt with a remedial purpose. *State v. Tatum*, 556 N.W.2d 541, 544 (Minn. 1996); *Hopp v. Hopp*, 156 N.W.2d 212, 216 (Minn. 1968). Criminal contempt “vindicat[es] the court's authority” whereas civil contempt “vindicat[es] the rights of a party.” *Tatum*, 556 N.W.2d at 544.

Contempts of court are further broken down into two types: direct and constructive. *Id.* Pursuant to Minn. Stat. § 588.01, subd. 2 (2018):

Direct contempts are those occurring in the immediate view and presence of the court, and arise from one or more of the following acts:

- (1) disorderly, contemptuous, or insolent behavior toward the judge while holding court, tending to interrupt the due course of a trial or other judicial proceedings;
- (2) a breach of the peace, boisterous conduct, or violent disturbance, tending to interrupt the business of the court.

Direct contempts may be punished summarily. Minn. Stat. § 588.03 (2018).

Constructive contempts, on the other hand, are “not committed in the immediate presence of the court.” Minn. Stat. § 588.01, subd. 3 (2018). They may arise from a number of enumerated acts or omissions, including, “disobedience of any lawful judgment, order, or process of the court,” “disobedience of a subpoena duly served,” or “any other unlawful interference with the process or proceedings of a court.” Minn. Stat. § 588.01, subd. 3(3), (7), (8). Constructive contempts may not be punished summarily, and the type of procedural safeguards afforded to an accused depends on whether the purpose of the order is punitive or remedial. *Tatum*, 556 N.W.2d at 545 n.3.

A. The district court’s order properly found NJK in constructive civil contempt.

Appellants argue that Nasser Kazeminy “cannot be held personally liable” for contempt, in part, because he was not personally present at the contempt hearing.

In *Hopp v. Hopp*, the supreme court identified requirements that the district court must satisfy prior to exercising its “civil contempt power[.]” 156 N.W.2d at 216. Among those, is the requirement that, “upon due notice[,] a hearing be conducted and at such hearing the party charged with nonperformance be given an opportunity to show compliance or his reasons for failure.” *Id.*

In *Westgor v. Grimm*, we reiterated that a court “does not have authority to adjudge a person guilty of constructive civil contempt unless the person has first appeared before the court, voluntarily or involuntarily, and been examined.” 381 N.W.2d 877, 879-80 (Minn. App. 1986). We held that, even though the contemnor’s counsel was present at the motion hearing, because the contemnor himself “was not brought before the court, . . . was not personally examined, and did not submit affidavits admitting any violations of the trial court’s orders, . . . [i]t was error for the trial court to hold [him] in contempt without securing his presence.” *Id.* at 880. We did, however, affirm the district court’s award of attorney fees, pursuant to Minn. Stat. § 588.11.²

Contrary to appellants’ understanding, the district court’s order, on its face, found NJK in contempt, not Nasser Kazeminy. The district court expressly found that “NJK’s conduct, including evasion of service and failure to produce responsive documents in a timely manner, defied the Court’s orders for discovery.” (Emphasis added.) NJK had notice of respondent-wife’s intent to move the district court for a contempt order, and, on September 5, 2017, NJK was present at the contempt hearing, by and through its attorney.

² We affirmed the award of attorney fees, concluding that it was “based on affidavits of [the aggrieved party’s] attorney, which support[ed] the reasonableness of the award.” *Id.* at 880. We explained:

We affirm the award of these fees despite our holding reversing the judgment of contempt. A trial court may award attorney’s fees incurred in prosecuting a contempt proceeding prior to the actual finding of contempt if the alleged contemnor fails to appear at the hearing without justification.

Id. at 880 n.2.

See Nicollet Restoration, Inc. v. Turnham, 486 N.W.2d 753 (Minn. 1992) (“[A] corporation may appear only by attorney.”).

And, at the contempt hearing, NJK was afforded the required “opportunity to show compliance [with the court’s orders] or [its] reasons for failure.” *See Hopp*, 156 N.W.2d at 216. Indeed, at the hearing, NJK’s counsel made specific factual representations to the court on behalf of NJK:

I know of no document at NJK or Nasser Kazeminy’s that’s responsive to any court order that has not been produced. I know of nothing. And if you want me to be sworn in, I would hope that my affirmation right there is enough. My license is pretty important to me.

Further, NJK’s counsel, who represents both appellants in the matter, made no objection at the contempt hearing to proceeding without the physical presence of Nasser Kazeminy.³

³ Notably, the contempt proceeding in *Westgor* was initiated by a court-issued order to show cause, whereas the contempt proceeding in the present matter was initiated by respondent-wife’s notice of motion and motion. *See* Minn. R. Gen. Prac. 309.01 (“Contempt proceedings shall be initiated by notice of motion and motion or by an order to show cause.”). The distinction between the two means of initiating a contempt proceeding is important because an order to show cause subjects the alleged contemnor to the potential issuance of an arrest warrant and confinement for noncompliance. Thus, the primary purpose of securing physical presence in a proceeding initiated by an order to show cause is to provide the alleged contemnor—whose liberty is at stake—the opportunity to be heard. *See* Minn. R. Gen. Prac. 309.01 advisory comm. cmt. (“Service of the order to show cause upon the person provides jurisdiction for the issuance of a writ of attachment or bench warrant, if necessary, and meets the requirement for notice of an opportunity to be heard.”). On the other hand, a party’s motion for contempt neither compels an alleged contemnor to personally attend the hearing on the motion, nor does it authorize confinement for noncompliance. Consequently, had the district court found Nasser Kazeminy in contempt, in addition to or instead of NJK, our decision to affirm would not necessarily change because there is no indication that he was at risk of confinement.

B. The contempt order was not punitive in nature.

Appellants contend that the contempt order was punitive because the purpose of the order was to punish for past conduct, rather than to induce future performance. Appellants argue that, if the order was, indeed, for civil contempt, then (1) the order should have included “purge conditions”—conditions that “allow the obligor[s] to purge [themselves] of contempt” and (2) the appellants were entitled to a second hearing to determine whether the purge conditions had been met. For support, appellants cite to *Minn. State Bar Ass’n v. Divorce Assistance Ass’n, Inc.*, 248 N.W.2d 733 (Minn. 1976), and *Mahady v. Mahady*, 448 N.W.2d 888 (Minn. App. 1989). Their arguments are not persuasive.

In *Minn. State Bar Ass’n*, the supreme court held that a contempt order, which imposed “a flat 30-day sentence,” and gave no indication that the contemnor “could purge himself by complying with the [court’s] orders,” was “clearly one for criminal contempt.” 248 N.W.2d at 741. The court explained that a civil-contempt sanction “is inflicted primarily as inducement for future compliance with the order and in vindication of the opposing party’s rights.” *Id.* It declared that “the purpose behind a civil contempt citation is coercive” because “such a citation affords the contemnor the keys to his jail cell in that the sentence is conditioned upon his continued noncompliance with the court order.” *Id.*; see also *Mahady*, 448 N.W.2d at 890 (“[C]ivil contempt is said to give the contemnor the keys to the jail cell, because compliance with the order allows him to purge himself and end the sanction.”).

In *Mahady*, we affirmed the district court’s finding of contempt, but held that the court erred by directing that a warrant be issued and the contemnor be confined upon a

showing that the contemnor had not purged the contempt, because confinement requires “a specific finding that appellant [was] able to meet those conditions,” but failed to do so. 448 N.W.2d at 891-92. We, therefore, remanded in part, for a “second stage hearing.” *Id.* Unlike the appellant in *Mahady*, appellants in the present matter were not subject to arrest and confinement, and they did not claim inability to comply with the discovery orders. Accordingly, a second-stage hearing has no application here.

Pursuant to Minnesota’s indemnification statute, Minn. Stat. § 588.11 (2018), the district court properly ordered appellants to indemnify respondent-wife for the costs she incurred as a result of the contempt.⁴ Minn. Stat. § 588.11 provides that if the contemnor’s conduct was prejudicial to the opponent’s rights, the court “may order the person guilty of the contempt to pay the party aggrieved a sum of money sufficient to indemnify the party and satisfy the party’s costs and expenses.”

The purpose of the district court’s contempt order was not to vindicate the court’s authority by punishing NJK for past misconduct. Rather, it was to vindicate the rights of respondent-wife by “making her whole” again. *See Tatum*, 556 N.W.2d at 544. The court found, “[b]y refusing to produce responsive documents and evading service of process, NJK disobeyed this Court’s orders regarding discovery.” The court noted that NJK’s

⁴ Appellants argue that the application of Minn. Stat. § 588.11 is conditioned on a proper finding of contempt, which the district court never properly found because appellants were not afforded the procedural rights mandated under *Mahady*, i.e., a set of “purge conditions” and a second-stage hearing to determine whether the conditions were met. Consequently, appellants contend, indemnification under Minn. Stat. § 588.11 is inapplicable at this stage in the proceedings. Because we conclude that the district court properly found NJK in contempt, we reject appellants’ argument that section 588.11 does not apply.

contempt “was prejudicial” to respondent-wife “because it limited her ability to effectively depose witnesses and develop her theories of the case.” Pursuant to Minn. Stat. § 588.11, the court awarded respondent-wife “\$89,612.50 as indemnification for attorney’s fees incurred as a result of NJK’s contempt of the Court’s discovery orders.” The court’s meticulous review and significant reduction of respondent-wife’s requested award of attorney fees confirms the remedial purpose of the order.⁵

C. The district court’s award of attorney fees was reasonable and permissible.

Appellants argue that the attorney fees awarded to respondent-wife were unreasonable and an abuse of the district court’s discretion. According to appellants, “[a] typical award of fees for a contempt order ranges in the few thousands of dollars” and “[i]t is simply not plausible that even [the] reduced award amount is connected to the underlying alleged contempt or was incurred in prosecuting the contempt charge.” This argument is unsupported and unpersuasive.

“We will not reverse the district court’s decision on attorney fees absent an abuse of discretion.” *Carlson v. SALA Architects, Inc.*, 732 N.W.2d 324, 331 (Minn. App. 2007), review denied (Minn. Aug. 21, 2007). In *Hanson v. Thom*, we identified a three-prong test to determine whether an award of attorney fees under section 588.11 is appropriate:

First, the fees must be based on proof of actual damages.
Second, the award must not penalize the contemnor. Finally,
the party receiving the fees must actually incur the fees.

⁵ Because the district court’s civil-contempt order indemnifying respondent-wife for the attorney fees was proper and statutorily authorized, we conclude that appellants’ mootness argument is without merit and decline to address it further.

636 N.W.2d 591, 593 (Minn. App. 2001) (internal citations omitted). “Further, the party that incurred the fees must be ‘aggrieved,’ and the award must indemnify the party.” *Id.* (citing Minn. Stat. § 588.11).

The district court’s award to respondent-wife of \$89,612.50 as indemnification for attorney fees was reasonable and within its discretion. First, the attorney fees were based on proof of actual damages. Respondent-wife submitted with her contempt motion affidavits from her attorneys and copies of their billing and time records. The district court carefully reviewed, independently calculated, and significantly reduced the amount requested, and appended its calculation of fees as an exhibit to the contempt order. *See id.* at 593 (“There is little doubt that the award here was based on actual damages; the district court made its determination based on its review of the billing records reflecting the amount of attorney fees incurred.”).⁶

Second, the purpose of the award was not to penalize appellants. As stated above, the purpose of the award was remedial, that is, to reimburse respondent-wife for costs she incurred directly as a result of NJK’s contempt of the court’s three discovery orders. The district court reviewed the invoices submitted by respondent-wife and, as articulated in its contempt order, it “limited its calculation to those billing activities actually caused by the contempt.” *See Hanson*, 636 N.W.2d at 593 (“The district court carefully reviewed

⁶ Although appellants contend that “[a] typical award of fees for a contempt order ranges in the few thousands of dollars,” they fail to establish that larger awards are inappropriate when otherwise supported by the record. *See, e.g., Afremov v. Amplatz*, No. A04-952, 2005 WL 89475, at *9 (Minn. App. Jan. 18, 2005) (concluding evidence supported district court’s award of approximately \$125,000 in attorney fees).

litigation costs and awarded only those fees incurred in bringing the contempt action. There is no evidence in the record that the modest award here was a penalty.”).

Third, respondent-wife was aggrieved as a result of incurring significant attorney fees, and there is no suggestion that any other party was obligated to pay for that representation. *See, e.g., id.* at 593-94 (concluding that “[r]espondents have not suffered loss or injury because their title insurance company paid their attorney fees, and they are, therefore, not aggrieved”).

Finally, although the district court did not expressly find Nasser Kazeminy in contempt, we nevertheless affirm the court’s award of attorney fees against him. *See Westgor*, 381 N.W.2d at 880 (affirming district court’s award of attorney fees, pursuant to section 588.11, despite holding that it was error for court to hold obligor in contempt without in-person appearance). At oral argument before this court, appellants’ counsel asserted that Minnesota Rule of Civil Procedure 37, authorizing sanctions for failure to comply with court orders, is inapplicable to nonparties. Appellants’ counsel conceded, however, that if appellants had been parties to the underlying divorce action, the district court could have imposed sanctions for noncompliance under rule 37. Pursuant to binding caselaw, we conclude that appellants have misconstrued the limitations of the rule.

In *Bowman v. Bowman*, we held that the district court’s award of attorney fees against a nonparty for failure to comply with court orders was justified under rule 37. 493 N.W.2d 141, 145 (Minn. App. 1992). *Bowman* involved a similar fact pattern to the one at hand: the appellant and his son were partners in a company. *Id.* at 143. In his son’s divorce proceedings, the appellant was subpoenaed to testify and produce company records

because one of the issues was the value of the son's interest in the partnership. *Id.* After the appellant failed to comply with the court's orders, the district court held the appellant in conditional contempt and awarded attorney fees against him. *Id.* We held that, because the court never made a final contempt finding, the award of attorney fees could not "be considered part of the court's contempt power." *Id.* Nevertheless, we affirmed the award under rules 37.01 and 37.02. *Id.* at 145. In response to the appellant's argument that rule 37.02 did not apply to him because he was a nonparty, we explained:

While we recognize appellant is a nonparty, he was brought into this litigation as a result of his role as a partner in the Bowman Construction Company. Because appellant was an officer in the partnership, the trial court was authorized to issue a "just" order in regard to his failure to produce the required documents, including an award of attorney fees.

Id. at 146.

Applying *Bowman* and *Westgor* to the present matter, we conclude the district court's award of attorney fees against Nasser Kazeminy did not require a finding of contempt. Consequently, we affirm the award obligating either NJK or Nasser Kazeminy to pay respondent-wife \$89,612.50.

Affirmed.