STATE OF MINNESOTA
IN COURT OF APPEALS
A11-101

Andrew Ellis, et al.,
Appellants,

vs.

Jon Hanson, individually as a Past or Present Shrine Noble,
Shrine Officer, Potentate, and/or as an attorney, et al.,
Respondents.

Filed November 21, 2011
Affirmed in part and reversed in part
Johnson, Chief Judge

Hennepin County District Court
File No. 27-CV-10-3977

Michael J. Keogh, Keogh Law Office, St. Paul, Minnesota (for appellants)

Britton D. Weimer, Jones Satre & Weimer, PLLC, Bloomington, Minnesota (for respondents)

Considered and decided by Johnson, Chief Judge; Peterson, Judge; and Larkin, Judge.

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

JOHNSON, Chief Judge

Andrew Ellis was a member of the Zuhrah Cycle Corps until he was expelled. He and his wife commenced three lawsuits to challenge his expulsion. This appeal concerns

the second and third actions, which were consolidated before the district court granted a motion to dismiss the complaints. We conclude that the district court did not err by dismissing the second complaint on *res judicata* grounds. We also conclude that the district court did not err by dismissing the third complaint on the ground that the Ellises failed to establish fraud on the court. But we conclude that the district court erred by awarding sanctions against the Ellises because of a violation of the 21-day safe-harbor requirements of Minn. R. Civ. P. 11.03 and Minn. Stat. § 549.211. Therefore, we affirm in part and reverse in part.

FACTS

Andrew Ellis was a member of the Zuhrah Cycle Corps from 1959 to 2004, when he was expelled from the organization. In 2006, he and his wife challenged his expulsion in a civil action against Gerald E. Burkstrand, Owen Sealey, Edwin A. Reiners, and Cycle Corps Inc., a/k/a Zuhrah Cycle Corps, in the Hennepin County District Court. That action ultimately was unsuccessful. In June 2008, the respondents moved for summary judgment. In September 2008, the district court granted the motion, and this court subsequently affirmed. *Ellis v. Estate of Burkstrand*, No. A08-1878, 2009 WL 2595953 (Minn. App. Aug. 25, 2009), *review denied* (Minn. Nov. 17, 2009).

In February 2010, three months after the first action reached final judgment, the Ellises, *pro se*, commenced a second action in the Hennepin County District Court. In the second action, they alleged breach-of-contract claims against the Corps, Zuhrah Shrine Temple, Zuhrah Temple Trustees, Inc., John Does 1-10, and Jon Hanson, who is a

member and former officer of the organization and the attorney who represented the respondents in the first action.

In April 2010, while the second action was pending, the Ellises, again *pro se*, commenced a third action, again in the Hennepin County District Court, against the same respondents named in the second action and, additionally, Hanson's law firm. In the third action, the Ellises alleged that Hanson engaged in fraud during the course of the first action. The complaint was captioned, "Independent Action for Fraud on the Court Under Minnesota Rule 60.02." The district court granted the Ellises' motion to consolidate the second and third actions.

In June 2010, the respondents moved to dismiss the consolidated actions. The district court granted the motion on the ground that the contract claims were barred by the doctrine of *res judicata* and that there was no showing of fraud to vacate the judgment. After the court administrator entered judgment, the Ellises brought a "Motion Pursuant to Minn. R. Civ. P. 52, 56, 59.03, and 60.02," asking the district court to "amend omitted findings of fact, and . . . alter the judgment or order a new trial in this matter." On November 19, 2010, the respondents filed a motion for sanctions pursuant to Minn. R. Civ. P. 11.03 and Minn. Stat. § 549.211 (2010). The district court construed the Ellises' motion as a motion for reconsideration and denied it. The district court granted the respondents' motion for sanctions and ordered entry of judgment against the Ellises in the amount of $5,260, which reflected the attorney fees incurred by respondents' counsel in responding to the Ellises' motion to reconsider. The Ellises appeal.

D E C I S I O N

I. Dismissal of Consolidated Actions

On appeal, with the assistance of counsel, the Ellises first argue that the district court erred by granting respondents' motion to dismiss the consolidated actions.

A. Dismissal of Second Action

The Ellises argue that the district court erred by dismissing their second complaint on the ground of *res judicata* despite the fact that Hanson allegedly engaged in fraud during the course of the first action.

On appeal from a rule 12.02(e) dismissal, this court seeks to determine "whether the complaint sets forth a legally sufficient claim for relief." *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008). We consider only the facts alleged in the complaint, we accept those facts as true, and we construe all reasonable inferences in favor of the nonmoving party. *Id.* We apply a *de novo* standard of review. *Id.* In considering a rule 12 motion, a court is permitted to consider not only the complaint but also "documents that are embraced by the complaint, including pleadings and orders in an underlying proceeding." *Greer v. Professional Fiduciary, Inc.*, 792 N.W.2d 120, 126-27 (Minn. App. 2011).

The doctrine of *res judicata* precludes a party from pursuing an action commenced after the completion of a prior action if "'(1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the same parties or their privies; (3) there was a final judgment on the merits; (4) the estopped party had a full and fair opportunity to litigate the matter.'" *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*,

P.L.L.P., 732 N.W.2d 209, 220 (Minn. 2007) (quoting *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004)). "Res judicata applies equally to claims actually litigated and to claims that could have been litigated in the earlier action." *Id.* "The application of res judicata is a question of law that we review de novo." *Id.* The affirmative defense of *res judicata* may, in appropriate circumstances, be resolved on a motion to dismiss pursuant to rule 12.02(e). *See Hauschildt*, 686 N.W.2d at 840.

The district court determined that the doctrine of *res judicata* applies because all four requirements are satisfied. The Ellises do not dispute that all four requirements of *res judicata* are satisfied, but they contend that the doctrine of *res judicata* cannot bar their second action because the judgment in the first action was the result of fraud. More specifically, the Ellises allege that Hanson engaged in fraud by failing to disclose facts within his personal knowledge that were relevant to the Ellises' claims.

The Ellises rely on *Halloran v. Blue & White Liberty Cab Co.*, 253 Minn. 436, 92 N.W.2d 794 (1958), in which the supreme court stated the general rule that "res judicata may not be invoked to sustain fraud." *Id.* at 442, 92 N.W.2d at 798. In *Halloran*, the defendant's counsel had defended an entire case through trial in the district court without ever disclosing to the plaintiffs or to the district court that the entity named in the complaint did not exist, and then later attempted to assert the doctrine of *res judicata* to bar a subsequent action against the proper defendant. *Id.* at 437-40, 92 N.W.2d at 796-97. The supreme court held that if "a party intentionally misleads or deceives the court as to the identity of a litigant and permits the court to waste its time on the trial of an action against a nonexistent party, such conduct constitutes a fraud upon the court." *Id.* at 443,

92 N.W.2d at 798. The supreme court reasoned that a fraud on the court occurs when a court is "misled as to material circumstances, or its process [has been] abused, resulting in the rendition of a judgment which would not have been given if the whole conduct of the case had been fair." *Id.* at 442, 92 N.W.2d at 798. But the supreme court also stated that "the mere failure to disclose to an adversary, or the court, matters which would defeat a party's claim or defense is not such extrinsic fraud as will justify or require a vacation of the judgment." *Id.* at 442-43, 92 N.W.2d at 798.

The *Halloran* case must be distinguished from this case. The Ellises have not alleged the type of fraud that was at issue in *Halloran*, which caused an entire trial to be had unnecessarily because personal jurisdiction was lacking. Rather, the Ellises allege that Hanson, a member and officer of the organization and the attorney representing the respondents in the first action, failed to disclose to the Ellises and to the district court that he had personal knowledge of facts relating to the Ellises' claims. This is exactly the type of allegation that the supreme court expressly stated would not justify vacating a judgment. *Id.* at 442-43, 92 N.W.2d at 798. In short, Hanson's alleged fraud does not defeat the application of the *res judicata* doctrine. We note, as an aside, that the district court also reasoned that the Ellises were not unaware of Hanson's knowledge during the first action but never presented such evidence to the district court and never sought to depose Hanson. Thus, the district court did not err by dismissing the second complaint.

B. Dismissal of Third Action

The Ellises also argue that the district court erred by dismissing their third complaint, which is captioned, "Independent Action for Fraud on the Court Under

Minnesota Rule 60.02." Specifically, the Ellises contend that the district court erroneously analyzed their third complaint as a motion to vacate judgment pursuant to rule 60.02 of the Minnesota Rules of Civil Procedure rather than as an independent action.

The usual remedy for a party seeking relief from a judgment is a motion to vacate pursuant to rule 60.02. But that rule expressly states that it "does not limit the power of a court to entertain an independent action . . . to set aside a judgment for fraud upon the court." Minn. R. Civ. P. 60.02. Nonetheless, "an independent action is available rarely and only under unusual circumstances." *Johnson v. St. Paul Ins. Cos.*, 305 N.W.2d 571, 573 (Minn. 1981) (citing 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure: Civil* § 2868 (1973)). The United States Supreme Court has explained that an independent action for fraud on the court is an extraordinary form of relief that is available only to "prevent a grave miscarriage of justice." *United States v. Beggerly*, 524 U.S. 38, 47, 118 S. Ct. 1862, 1868 (1998). The United States Court of Appeals for the Eighth Circuit has described more specifically the showing that must be made to prevail in an independent action for fraud on the court:

> The indispensable elements of such a cause of action are (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law.

Superior Seafoods, Inc. v. Tyson Foods, Inc., 620 F.3d 873, 878 (8th Cir. 2010). An abuse-of-discretion standard of review is appropriate when reviewing a district court's dismissal of an independent action for fraud on the court, rather than a *de novo* standard, because it would be inappropriate to "afford less deference . . . in the context of a later-filed independent equitable action seeking the same type of relief" as a rule 60 motion. *Id.* at 878-79. Because Federal Rule of Civil Procedure 60(d) is substantially identical to Minnesota's rule 60.02, we refer to the federal cases when interpreting the Minnesota rule. *See T.A. Schifsky & Sons, Inc. v. Bahr Constr., LLC*, 773 N.W.2d 783, 787 n.3 (Minn. 2009).

The district court determined that the Ellises were not entitled to relief in their third action because they had failed to identify any fraud that would warrant reopening the judgment. The district court stated, "Any evidence [appellants] have provided as 'new' could have been discovered by due diligence in the previous proceedings." On the record before us, we cannot conclude that the district court abused its discretion in granting respondents' motion to dismiss. Thus, the district court did not err by dismissing the third complaint.

II. Sanctions

The Ellises also argue that the district court erred by imposing sanctions on them in the form of an award of attorney fees.

When signing a pleading or other paper that is filed with a district court, a party or an attorney must certify that the paper is not presented to the court for an improper purpose and that the legal contentions are warranted by law or by a non-frivolous

argument for the modification, extension, or reversal of the law. Minn. R. Civ. P. 11.02(a), (b). A violation of rule 11.02 may justify sanctions, including "some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation." Minn. R. Civ. P. 11.03(b). Substantially similar provisions are contained in a statute. Minn. Stat. § 549.211, subds. 2, 3 (2010). We apply an abuse-of-discretion standard of review to a district court's award of sanctions under rule 11 and section 549.211. *Hornberger v. Wendel*, 764 N.W.2d 371, 377 (Minn. App. 2009).

The Ellises contend that the district court erred because respondents did not serve the motion on them sufficiently in advance of the district court's ruling on the motion to reconsider. A party seeking sanctions may not file the motion for sanctions with the court until at least 21 days have passed since serving the motion on the opposing party. Minn. R. Civ. P. 11.03(a)(1); Minn. Stat. § 549.211, subd. 4 (2010). The purpose of the safe-harbor requirement is to give the other party an opportunity to withdraw the offending paper before the district court rules on the motion for sanctions. *Johnson ex rel. Johnson v. Johnson*, 726 N.W.2d 516, 518-19 (Minn. App. 2007). "If the moving party does not follow the procedure provided . . . the motion for sanctions must be rejected." *Gibson v. Coldwell Banker Burnet*, 659 N.W.2d 782, 789 (Minn. App. 2003).

Before considering the Ellises' argument for reversal, we must consider respondents' counter-argument that the Ellises have not properly preserved their argument because they did not present it to the district court. The district court noted that the Ellises did not respond to respondents' motion for sanctions. Respondents' notice of motion states that the motion was to be heard on a date to be determined and was based

on their written submissions and "oral argument to be presented at the hearing on the motion, if any hearing is required." The Ellises' response to the motion was due seven days before a hearing on the motion. *See* Minn. R. Gen. Pract. 115.04. But the district court ruled on respondents' motion without a hearing. There is no indication in the record that the district court advised the Ellises of its intent to rule on the motion without a hearing. Because the Ellises apparently had no reason to expect that the district court would impose sanctions without holding a hearing, we cannot conclude that they forfeited their arguments against sanctions. *See Thompson v. Thompson*, 359 N.W.2d 311, 313 (Minn. App. 1984) (explaining that party can waive oral argument on motion but finding no indication of waiver).

The Ellises are correct that they were not given 21 days to withdraw their motion for reconsideration, as required by rule 11 and section 549.211. Respondents served their motion for sanctions on the Ellises on October 29, 2010. The district court conducted a hearing on the Ellises' motion for reconsideration only 14 days later, on November 12, 2010. And the district court issued its order denying the Ellises' motion for reconsideration on November 15, 2010, only 17 days after the sanctions motion was served. Respondents then filed the motion for sanctions on November 19, 2010. Because the Ellises were not afforded the full 21-day safe-harbor period to withdraw their motion for reconsideration, sanctions are not available under the rule or the statute. *See* Minn. R. Civ. P. 11.03(a)(1); Minn. Stat. § 549.211, subd. 4; *Gibson*, 659 N.W.2d at 790 (stating that motions for sanctions must be denied if "offending party is unable to withdraw the improper papers or otherwise rectify the situation" (quotation omitted)).

Both the district court and respondents have alluded to a "timely *Uselman* letter," which respondents apparently sent to the Ellises approximately 23 days before the November 12, 2010 hearing. Before the 2000 amendments to Minn. Stat. § 549.211 and Minn. R. Civ. P. 11.03, a party moving for sanctions was required only to give "fair notice" to the opposing party. *Uselman v. Uselman*, 464 N.W.2d 130, 143 (Minn. 1990). After the 2000 amendments, however, a letter is insufficient. *See* Minn. R. Civ. P. 11 2000 advisory comm. cmts. (explaining rejection of *Uselman* procedure); *Gibson*, 659 N.W.2d at 789 (requiring compliance with 21-day safe-harbor provision). Thus, respondents' letter purporting to give notice of potential sanctions does not satisfy the requirements of rule 11 or section 549.211. Accordingly, the district court erred by imposing sanctions on the Ellises.

In sum, we affirm the district court's dismissals of the Ellises' second and third complaints, but we reverse the district court's award of sanctions against the Ellises.

Affirmed in part and reversed in part.