

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1812**

In the Matter of: Ronda L. Bourke, petitioner,
Respondent,

vs.

Timothy Wayne Voss,
Appellant.

**Filed September 23, 2008
Affirmed in part, reversed in part, and remanded
Minge, Judge**

Chisago County District Court
File No. 13-FA-06-484

Rhonda L. Bourke, 1680 Goose Lake Lane, Stanchfield, MN 55080 (pro se respondent)

Shane C. Perry, Perry, Perry & Perry, 5401 Gamble Drive, Suite 270, Parkdale 1,
Minneapolis, MN 55416 (for appellant)

Considered and decided by Lansing, Presiding Judge; Minge, Judge; and
Muehlberg, Judge.*

UNPUBLISHED OPINION

MINGE, Judge

Appellant challenges the district court's decision that respondent's petition for an
ex parte order for protection was not frivolous and denial of his motions for attorney fees

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

for initiating a frivolous claim, and for respondent's failure to appear at her duly-noticed deposition. We affirm in part, reverse in part, and remand.

FACTS

This case arises out of an ex parte petition for an order for protection (OFP) brought by respondent Ronda Bourke on December 20, 2006, against appellant Timothy Voss. Bourke and Voss have been involved in a contentious relationship and previously lived together. The OFP petition alleged that on December 19, 2006, Voss insisted that they see each other and Bourke suggested they meet at the Pizza Pub in Pine City. The petition further alleges that while at the Pizza Pub, Bourke attempted to end her relationship with Voss, that he became distressed, and that after Voss paid the bill they went to the parking lot, where Voss said he had a "new friend" and showed Bourke a revolver. Bourke then allegedly told Voss that she was considering getting a handgun, and Voss told her that she would need one. The petition states that Bourke understood Voss's statement as a threat, and told him "why don't you just kill me now if that's what [you are] gonna do" and that Voss responded by shoving her toward her car and said "ok get in your car. To[o] many witness[es] here." Bourke's petition recounts that she then entered her car and attempted to flee, but Voss followed her in his truck until she drove by the police station.

After the ex parte order was entered and served on Voss, he requested a hearing. A hearing date for an OFP was set for April 25, 2007. Prior to the hearing, Bourke agreed with Voss's attorney to attend a deposition. She received proper notice of her deposition but failed to appear. No explanation was provided for her nonappearance.

Voss's attorney moved the district court to compel Bourke's appearance at a deposition on a subsequent date and for reasonable expenses, including attorney fees, incurred in bringing the motion and compelling Bourke's attendance. The district court ordered Bourke to appear for a deposition on June 7, 2007, and pay \$55 for the cost of a court reporter and bringing a motion to compel discovery. The district court did not award Voss attorney fees. Bourke appeared at her next scheduled deposition.

In a written submission to the district court, Voss denied that he was at the Pizza Pub on December 19, and claimed he was at his daughter's basketball game in Mora. The district court hearing was ultimately held on July 23, 2007. Bourke was the second witness called. During cross-examination, she turned to the district court and stated, "Your honor, I can't compete with this seasoned [a]ttorney, I'm just a normal person." Bourke then voluntarily withdrew her petition, and the district court dismissed the action. Voss subsequently moved to reopen the entire OFP matter to have it vacated as frivolous and for attorney fees. The motion was denied. This appeal follows.

D E C I S I O N

I.

The first issue is whether the district court erred when it determined that Voss did not have a right to attorney fees based on Bourke's failure to attend her deposition. The general rule in Minnesota is that an award of discovery sanctions is within the district court's discretion. *See, e.g., Pryzmus v. Comm'r of Pub. Safety*, 488 N.W.2d 829, 832 (Minn. App. 1992), *review denied* (Minn. Sept. 15, 1992). However, Minn. R. Civ. P.

37.04 provides that if a party who has been served with proper notice fails to, among other things, appear for a deposition, the district court

may make such orders in regard to the failure as are just, including any action authorized in Rule 37.02(b)(1), (2), and (3). In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Minn. R. Civ. P. 37.04. The actions authorized under referenced Minn. R. Civ. P. 37.02(b)(1), (2) and (3) are non-monetary sanctions, including dismissal of the action. Rule 37.04 provides the district court *may* impose these sanctions. Rule 37.04 goes on to state that regardless of whether the district court chooses to impose non-monetary sanctions, it *shall* require payment of “reasonable expenses, including attorney fees.”

No published case from a Minnesota court has yet considered whether the “shall” language of Minn. R. Civ. P. 37.04 allows any discretion for district courts in ordering reasonable expenses. Prior to a 2007 amendment, Fed. R. Civ. P. 37(d) closely mirrored Minn. R. Civ. P. 37.04.¹ When interpreting Fed. R. Civ. P. 37(d), federal courts treat

monetary (expense shifting) and non-monetary sanctions quite differently. The Rule gives district courts a wide range of discretion in determining whether to impose non-monetary sanctions, and the type of non-monetary sanctions to be imposed. . . . In sharp contrast, expense shifting sanctions are

¹ Following the amendment effective December 1, 2007, the federal rule was broken into multiple subparts and now reads that a district court “*must*” award reasonable expenses, including attorney fees, unless the failure was substantially justified or other circumstances make an award of expenses unjust. Fed. R. Civ. P. 37(d)(3) (emphasis added).

mandatory, unless the party to be sanctioned can show that [one of the two exceptions listed in the rule applies].

7 James Wm. Moore et al., *Moore's Federal Practice* § 37.97[1], at 37-180 (3d ed. 2008). Thus, absent a showing that a party's failure to attend his/her deposition is justified or the award of expenses and fees would be unjust, federal decisions do not allow district courts discretion concerning monetary sanctions under Fed. R. Civ. P. 37(d). See *Lockette v. Am. Broad. Cos.*, 118 F.R.D. 88, 90-91 (N.D. Ill. 1987) (holding the award of fees not proper because the failure to attend was justified but recognizing that the "usual sanction" under Fed. R. Civ. P. 37(d) of expenses and attorney fees is mandatory); *Bosworth v. Record Data of Md., Inc.*, 102 F.R.D. 518, 520-21 (D. Md. 1984) (noting exceptions to sanctions but determining that if exceptions were not applicable, "[s]anctions pursuant to Federal Civil Rule 37(d) are mandatory and should be imposed by this Court . . .").

As with the federal rule, the Minnesota rule provides an exception to the monetary-sanction requirement if the district court finds that the conduct of the party subject to sanction (1) was "substantially justified," or (2) "other circumstances make an award of expenses unjust." See Minn. R. Civ. P. 37.04.

While the district court ordered Voss to pay Bourke \$55 in expenses, it did not award attorney fees. In order to refuse to grant attorney fees, the district court must determine that one of the two exceptions of Minn. R. Civ. P. 37.04 applies. The district court has already determined that Bourke's failure to attend her deposition was not justified but did not determine whether some other circumstance made an award of

expenses and fees unjust. Because the district court has not yet considered this exception, we reverse the denial of attorney fees and remand to the district court. If the district court finds that no other circumstance makes an award of attorney fees unjust, it must order reasonable expenses, including attorney fees, associated with the missed deposition in favor of Voss. Although Voss has provided billing records, appellate courts do not make factual determinations. *Kucera v. Kucera*, 275 Minn. 252, 254-55, 146 N.W.2d 181, 183 (1966). Therefore, we decline to decide the reasonable amount for attorney fees or whether the award would be unjust.

II.

The second issue is whether the district court erred when it denied Voss's "frivolous action" motion for attorney fees. Minnesota law provides two routes by which sanctions may be imposed when a party files a case without merit: Minn. Stat. § 549.211 (2006) and Minn. R. Civ. P. 11.03. The decision whether to award attorney fees and costs under either Minn. Stat. § 549.211 or Minn. R. Civ. P. 11.03 is discretionary with the district court and will not be overturned absent an abuse of that discretion. *In re Rollins*, 738 N.W.2d 798, 803 (Minn. App. 2007); *Whalen v. Whalen*, 594 N.W.2d 277, 281-82 (Minn. App. 1999).

Under both the statute and the rule, the party seeking fees must serve the opposing party with the motion, and the motion "may not be filed with or presented to the court unless, within 21 days after service of the motion, or another period as the court may prescribe, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." Minn. Stat. § 549.211, subd. 4; *see also* Minn. R.

Civ. P. 11.03(a)(1). These provisions are “intended to give the offending party time to withdraw the improper papers or otherwise rectify the situation.” *Johnson v. Johnson*, 726 N.W.2d 516, 519 (Minn. App. 2007) (quotation omitted). When Bourke voluntarily dismissed her OFP petition, she withdrew the allegedly improper claim. It was only after this withdrawal that Voss moved for fees under these rules. Thus, the motion was too late to comply with the notice provisions of Minn. Stat. § 549.211, subd. 4, or Minn. R. Civ. P. 11.03(a)(1), and fees were not available to Voss.

III.

The final issue is whether the district court’s statement that Bourke’s OFP petition was not frivolous is clearly erroneous. Voss contends this “finding” is clearly erroneous because of (1) inconsistencies in Bourke’s allegations; and (2) when Bourke withdrew her request for an OFP, the hearing was terminated before Voss had an opportunity to present his case.

Before we consider this issue on its merits, we consider whether it is moot. Mootness is appropriately considered though it is not raised by a party to this appeal. *See In re Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989) (“As a constitutional prerequisite to the exercise of jurisdiction, we must consider the mootness question even if ignored by the parties.”). “Well established in this state’s jurisprudence is the precept that the court will decide only actual controversies. If the court is unable to grant effectual relief, the issue raised is deemed to be moot resulting in dismissal of the appeal.” *Id.* “Generally, an issue may be dismissed as moot if an event occurs that resolves the issue or renders it impossible to grant effective relief.” *Isaacs v. Am. Iron & Steel Co.*, 690 N.W.2d 373,

376 (Minn. App. 2004), *review denied* (Minn. Apr. 4, 2005). Whether an issue is moot is a question of law, which we review de novo. *In re Risk Level Determination of J.V.*, 741 N.W.2d 612, 614 (Minn. App. 2007), *review denied* (Minn. Feb. 19, 2008).

We hold that the issue of whether Bourke's petition was frivolous is moot. When Bourke voluntarily dismissed the petition the district court ordered dismissal of the case, and the matter ended. A finding of frivolousness can result in no more favorable result for Voss. The only possible qualification of this conclusion is sanctions. As previously discussed, because of Voss's failure to provide notice of intent to seek attorney fees under Minn. Stat. § 549.211 or Minn. R. Civ. P. 11.03(a)(1), even if we were to conclude that Bourke's action was frivolous, we could not grant sanctions to Voss under those rules. Whether the petition is frivolous has no bearing on the question of whether the district court will award fees based upon Bourke's failure to attend her deposition.

In sum, Bourke's withdrawal of her OFP petition ended the underlying action favorably to Voss. Although we recognize that Voss is frustrated that he was not able to present his evidence to the district court, the proceeding against him has been dismissed, and we cannot grant him further relief in that regard. The issue is moot, and we do not further consider its merits.

Affirmed in part, reversed in part, and remanded.

Dated: