STATE OF MINNESOTA
IN COURT OF APPEALS
A19-2083

Joseph Roach, et al.,
Appellants,

vs.

County of Becker,
Defendant,

Thomas Alinder, et al.,
Respondents,

Gary Heitkamp Construction, Inc., et al.,
Respondents.

Filed July 27, 2020
Affirmed in part, reversed in part, and remanded
Frisch, Judge

Becker County District Court
File No. 03-C5-05-000667

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Considered and decided by Bjorkman, Presiding Judge; Bratvold, Judge; and Frisch, Judge.

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

FRISCH, Judge

This appeal arises from a dispute between lakeshore property owners regarding runoff from land construction activities. We have addressed the matter in three previous opinions. *Roach v. County of Becker*, No. A16-0915, 2017 WL 1316117 (Minn. App. Apr. 10, 2017) (*Roach III*); *Roach v. County of Becker*, No. A12-0132, 2012 WL 6097133 (Minn. App. Dec. 10, 2012) (*Roach II*), *review denied* (Minn. Feb. 19, 2013); *In re Decision of Becker Cty. Zoning Adm'r*, No. A07-1580, 2008 WL 4224508 (Minn. App. Sept. 16, 2008) (*Roach I*).[1] Following our decision in *Roach III*, the district court held a jury trial on damages. Appellants Joseph and Jennifer Roach now challenge posttrial orders of the district court (1) reducing the time frame during which their preverdict interest accrued; (2) denying their motion for judgment as a matter of law (JMOL) as to the liability of dismissed defendant Becker County; (3) denying their motions to add a claim for punitive damages; (4) denying their request for attorney fees under the Minnesota Watershed Law, Minn. Stat. § 103D.545 (2018); and (5) denying their motion for civil contempt. Respondents argue that the Roaches waived their right to appeal all issues by accepting a remittitur of future damages and costs and disbursements. We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

[1] In May 2020, appellants filed another appeal related to this case, assigned case number A20-0739, which is not addressed in this opinion.

FACTS

The Roaches and respondents Thomas and Sandra Alinder own adjacent shoreline properties. Initially, the Alinders' property was naturally at a lower elevation. In 2003, the Alinders contracted with respondents Gary Heitkamp and Gary Heitkamp Construction, Inc. (collectively, Heitkamp) to build a home. Construction activities included adding fill to the Alinders' property, thereby elevating the property above neighboring properties. The change in elevation diverted water runoff to the Roaches' property.

The Roaches complained to the Pelican River Watershed District (PRWD) and the Becker County zoning office. The county instructed the Alinders to work with the PRWD to develop a stormwater management plan that would retain runoff. When the Alinders eventually developed a stormwater management plan, the Roaches disputed the adequacy of that plan. The county Board of Adjustment (BOA) nonetheless granted the Alinders a land-alteration permit based on their plan, and the Roaches appealed that decision.

We addressed the adequacy of the Alinders' plan and the county's decision to grant a permit in *Roach I* and again in *Roach II*. We remanded the decision of the BOA to grant a permit in *Roach I*, but we vacated the permit in *Roach II*, emphasizing "that the zoning administrator continues to have a duty to enforce and administer the zoning ordinance and must do so." 2012 WL 6097133, at *9.

In 2013, the county instructed the Alinders to remove all fill that had been added upon construction of the new home. *Roach III*, 2017 WL 1316117, at *2-3. The parties disputed the amount of fill to be removed. The district court decided to bifurcate the

proceedings, first holding a bench trial on declaratory relief and then a separate jury trial on damages. *Id.* at *3.

The district court held the bench trial on declaratory relief in 2015. On April 8, 2016, the district court issued an order for restoration. We partially reversed the order for restoration in *Roach III*, concluding that the amount of fill to be removed had already been decided and that the district court erroneously interpreted the zoning ordinance when it decided that some of the fill was "incidental to the site permit." *Id.* at *4-6. We affirmed the restoration plan, however, which required removal of enough "net fill" to restore the Alinders' property to its preconstruction elevation. *Id.* at *7.

Following *Roach III*, the district court dismissed the county as a party due to discretionary-function immunity. The district court held a jury trial on damages in April 2019. During trial, Heitkamp requested to include the county on the special verdict form for apportionment of liability. Over the objection of the Roaches, the district court included the county on the special verdict form.

The jury awarded the Roaches the following:

- $200,000 in past compensatory damages for water damage to their cabin,
- $10,000 in past compensatory damages for damage to their lake lot,
- $50,000 in nuisance damages for their lake lot, and
- $300,000 in future damages.

The jury apportioned 20% of the fault to the county and the remaining fault equally between Heitkamp and the Alinders.

Heitkamp and the Alinders moved for a new trial, contesting the award of compensatory damages, nuisance damages, and future damages. The Roaches moved for judgment as a matter of law regarding the 20% apportionment of fault to the county, arguing that the county owed no duty and the evidence at trial did not support a finding of negligence. The Roaches also moved for attorney fees, preverdict interest, and leave to amend the complaint to add a claim for punitive damages.

The district court granted preverdict interest to the Roaches only up to the date the trial was bifurcated. The district court denied the Roaches' motions for attorney fees, punitive damages, and JMOL. The district court conditionally granted respondents' motion for a new trial "on the issue of damages . . . *unless plaintiffs accept a remittitur of the future damages award* from $300,000 to $0.00 *and of costs and disbursements* from $93,213.09 to $74,574.20, bringing the total amount (including damages, costs, disbursements, and preverdict interest) to $514,885.77." (Emphasis added.) The district court explained that, absent acceptance of the remittitur, a "new trial [would] be on all issues" because the court was "unable to determine if the 'future damages' award was attributed to the cabin or the lake lot." The district court did not expressly address the challenges to compensatory damages and nuisance damages. The Roaches accepted the remittitur.

The Roaches separately moved for civil contempt, alleging that the Alinders violated aspects of the 2016 order for restoration. The district court held an evidentiary hearing and denied the motion.

The Roaches now appeal the final judgment, as well as the denial of their contempt motion.

D E C I S I O N

I. The Roaches did not waive their right to appeal all issues by accepting a remittitur on future damages.

When finding a jury award excessive, a district court may allow the non-moving party to either accept a reduced award or submit to a new trial. *Podgorski v. Kerwin*, 179 N.W. 679, 680 (Minn. 1920). The reduced award is known as a remittitur. Because the Roaches accepted a remittitur, respondents argue that the Roaches have waived their right to appeal all issues. The Roaches contend that the remittitur only bars appeal of the subject to the remittitur: future damages and costs and disbursements.

Waiver is an equitable doctrine involving "the intentional relinquishment of a known right"; an expressed intention "not to insist upon what the law affords." *Seavey v. Erickson*, 69 N.W.2d 889, 895 (Minn. 1955). "Knowledge and intent are essential elements of waiver." *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 367 (Minn. 2009). Accordingly, the party alleging a waiver must demonstrate that the party raising the purportedly waived issue "possessed both knowledge of the right in question and the intent to waive that right." *Ill. Farmers Ins. Co. v. Glass Serv. Co.*, 683 N.W.2d 792, 798 (Minn. 2004). Thus, the appropriate inquiry is whether the Roaches' acceptance of the remittitur was a knowing and intentional relinquishment of their right to appeal the issues before us.

The record contains no evidence that the Roaches intentionally relinquished any known right to appeal. The Roaches never expressed such an intent. And although the district court's order for remittitur provides that—absent the remittitur—a "new trial

[would] be on all issues," the order did not specify that *acceptance* of the remittitur operates as a waiver of the Roaches' right to appeal other issues.

In some jurisdictions, including federal practice, it is settled law that acceptance of a remittitur bars any appeal involving the amount of the judgment. *See Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649, 97 S. Ct. 835, 836 (1977) ("A line of decisions stretching back to 1889 has firmly established that a plaintiff cannot appeal the propriety of a remittitur order to which he has agreed."). But Minnesota has never adopted this approach, either by common law, rule, or statute. Although respondents cite the Minnesota Supreme Court decision of *Jangula v. Klockek*, the issue presented there was whether a plaintiff who accepted a remittitur may raise issues on cross-appeal when the appeal was first initiated *by the defendant*. 170 N.W.2d 587, 593-94 (Minn. 1969). The court rejected the proposition that the remittitur barred the plaintiff's cross-appeal but expressly declined to address whether the outcome would differ if—as here—the *plaintiff*, or the party accepting remittitur, had been the first to initiate the appeal. *Id.* at 594 ("We need not face the issue of review if plaintiff first appeals at this time . . . ."). The rejection of a proposition does not establish acceptance of a related proposition.

Given the lack of specificity in the order of the district court and the absence of established Minnesota law conclusively establishing that an acceptance of a remittitur forecloses the right to appeal, we do not find the Roaches voluntarily relinquished their

right to appeal unrelated issues by accepting a reduced award of future damages and costs and disbursements.[2]

II. The district court erred in its calculation of preverdict interest.

The Roaches argue that the district court erred in reducing the length of time in which the Roaches' preverdict interest accrued.[3] The district court found that the Roaches were entitled to preverdict interest only from the date of the commencement of the action (April 21, 2005) through the date the trial was bifurcated (September 25, 2015).

The Roaches argue that the plain meaning of the preverdict interest statute, Minn. Stat. § 549.09, subd. 1(b) (2018), provides a mandatory time frame for the accrual of interest. We review issues of statutory interpretation de novo. *Poehler v. Cincinnati Ins. Co.*, 899 N.W.2d 135, 139 (Minn. 2017).

The preverdict interest statute provides:

> Except as otherwise . . . allowed by law, preverdict . . . interest on pecuniary damages shall be computed . . . from the time of the commencement of the action or a demand for arbitration,

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[2] The adoption of such a rule would require us to balance competing policy considerations involving the finality of judgments, judicial economy, and the correction of errors. These competing policy considerations are best addressed by statute or court rule. *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) (stating with respect to public-policy considerations that the task of extending existing laws falls to the legislature or the supreme court, not this court).

[3] The Alinders contend that the district court should not have awarded the Roaches any preverdict interest because it was error to conclude that the Roaches were the prevailing party. But the Alinders failed to file a cross-appeal. "Even if the judgment below is ultimately in its favor, a party must file a notice of review to challenge the district court's ruling on a particular issue." *City of Ramsey v. Holmberg*, 548 N.W.2d 302, 305 (Minn. App. 1996), *review denied* (Minn. Aug. 6, 1996). Consequently, we decline to address whether the Roaches were the prevailing party.

> or the time of a written notice of claim, whichever occurs first, except as provided herein.

Minn. Stat. § 549.09, subd. 1(b).

The parties dispute the meaning of the phrase "[e]xcept as otherwise . . . allowed by law." Preverdict interest was allowed only for certain claims under the common law; the statute extended preverdict interest to most claims. *See Hogenson v. Hogenson*, 852 N.W.2d 266, 272 (Minn. App. 2014). Therefore, "section 549.09 was meant to supplement, not replace, the existing law on preverdict interest." *Id.* at 273.

There is no basis in Minnesota law to support a reduction in the length of time in which preverdict interest accrues. To the contrary, we addressed this very issue in *Tate v. Scanlan Int'l, Inc.* 403 N.W.2d 666 (Minn. App. 1987), *review denied* (Minn. May 28, 1987). There, the district court similarly reduced the length of time in which preverdict interest accrued. *Id.* at 674. We reversed, holding that "the statutory award of interest is mandatory and is therefore not subject to an equitable reduction." *Id. Tate* is controlling. Accordingly, we reverse and remand to the district court to calculate preverdict interest from the date the action was commenced to the date of the verdict.

III. The district court did not err in denying the Roaches' motion for judgment as a matter of law regarding the apportionment of fault to Becker County.

All parties to the current appeal initially asserted a claim or cross-claim against Becker County. Before trial, the district court granted summary judgment to the county, finding that it enjoyed discretionary-function immunity. That decision is not before us on appeal. At trial, however, the district court granted respondents' request to include the county on the special verdict form for apportionment of fault notwithstanding the county's

immunity. The jury found the county negligent and allocated 20% of fault to the county. After trial, the Roaches moved for JMOL, arguing that the county owed no duty and the evidence at trial did not support a finding that the county was negligent.

As a threshold matter, Heitkamp argues that, because the Roaches never moved for a new trial on the liability of the county, the Roaches forfeited their right to appeal the denial of JMOL. The scope of our review "may be affected by whether proper steps have been taken to preserve issues for review on appeal, including the existence of timely and proper post-trial motions." Minn. R. Civ. App. P. 103.04. "Matters of trial procedure, evidentiary rulings, and jury instructions occurring at trial are subject to appellate review only if they are assigned as error in a motion for a new trial." *County of Hennepin v. Bhakta*, 922 N.W.2d 194, 197 (Minn. 2019). But a matter of substantive law that was properly raised during trial and fully briefed to the district court need not be raised in a motion for a new trial to preserve the right to appeal. *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 664 N.W.2d 303, 310 (Minn. 2003). Here, the parties engaged in fulsome motion practice regarding the threshold issue of the county's immunity as well as whether the county should be included on the verdict form, and the district court considered the respective positions of the parties in rendering its decisions. Accordingly, we address the Roaches' argument.

We review de novo the denial of a motion for JMOL. *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919 (Minn. 2009). We view the evidence in the light most favorable to the nonmoving party and "make[] an independent determination of whether there is sufficient evidence to present an issue of fact for the jury." *Jerry's Enters., Inc. v. Larkin*,

Hoffman, Daly & Lindgren, Ltd., 711 N.W.2d 811, 816 (Minn. 2006). If the jury verdict can be reconciled on any theory, we will not disturb the verdict. *Dunn v. Nat'l Beverage Corp.*, 745 N.W.2d 549, 555 (Minn. 2008).

From the commencement of this action, the Roaches maintained that the county failed to fulfill its duty to enforce its ordinances, only changing their position when respondents requested to include the county on the special verdict form. The Roaches do not argue that the county cannot be included on the special verdict form because of its immunity, and we do not address that issue here. Instead, the Roaches now argue that the county owed no duty, no fault should be apportioned to the county, and that the fault the jury attributed to the county should be reallocated equally to respondents.

The Roaches' position that the county owed them no duty is inconsistent with their longstanding prior advocacy to both the district court and this court. Consistent with their initial position, we emphasized in *Roach II* that the county had a duty to enforce its ordinances and that the duty of enforcement and administration of zoning ordinance is continuing. 2012 WL 6097133, at *9. After *Roach II*, the Roaches moved for summary judgment against the county, alleging that the undisputed facts demonstrated that the county "abdicated its duty to begin enforcement proceedings and failed to enforce the violations beyond merely giving notice of the violations and promising future enforcement." In *Roach III*, we recognized that the county undertook some steps to attempt to enforce its ordinances following our decision in *Roach II*. *Roach III*, 2017 WL 1316117, at *5 (acknowledging that the county "followed our directive and attempted to enforce the ordinance"). The Roaches now argue *Roach III* establishes that the county *fulfilled* any

duty it owed. We said no such thing in *Roach III*. *Roach III* only addressed the adequacy of attempted enforcement actions initiated since *Roach II*. We did not address whether such actions *satisfied* any duty that existed *throughout the course of this dispute* or whether the attempts to enforce the ordinances entirely satisfied the continuing legal obligation of the county to administer and enforce its ordinances.

As to evidence of negligence by the county at the jury trial, the following evidence was introduced to show that the county did not satisfy its continuing duty to enforce and administer its ordinances: that the Roaches sustained damage as a result of land alterations in violation of county ordinances; that the county did not enforce its ordinances by requiring a land-alteration permit; that the county did not enforce the ordinances in a timely manner; and that the county was involved in various remediation efforts that only served to worsen the condition of the Roaches' property. Viewing the evidence in the light most favorable to the nonmoving party, sufficient evidence existed to submit to the jury the issue of fault by the county and we therefore will not disturb the verdict. We see no error in the denial of the JMOL motion.

IV. The district court did not abuse its discretion by denying the Roaches' motion to amend their complaint to add punitive damages.

We review an order denying a motion to amend a complaint to add punitive damages for an abuse of discretion. *Bjerke v. Johnson*, 727 N.W.2d 183, 196 (Minn. App. 2007), *aff'd*, 742 N.W.2d 660 (Minn. 2007). When requesting to add a claim for punitive damages, "the moving party must present prima facie evidence that clearly and convincingly shows the defendant's 'deliberate disregard' for the safety of others." *Id.*

(quoting Minn. Stat. § 549.20 (2006)). "Deliberate disregard" means the defendant "has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others" and "deliberately proceeds to act" either "in conscious or intentional disregard of the high degree of probability of injury" or "with indifference to the high probability of injury." Minn. Stat. § 549.20, subd. 1(b) (2018). The movant must present "admissible, probative, and competent evidence" of these factors. *In re 3M Bair Hugger Litig.*, 924 N.W.2d 16, 24 (Minn. App. 2019), *review denied* (Minn. Mar. 27, 2019). Evidence that merely "raise[s] questions" as to the culpability of the actor is not sufficient. *See id.*

The Roaches argue that they presented clear and convincing evidence showing that respondents acted in deliberate disregard of their property rights.[4] The Roaches argue that evidence introduced during the 2015 trial showed that respondents knew they were required to obtain certain permits and did not do so. They further argue that the Alinders knew they were elevating their property above neighboring properties, which logically would cause runoff issues, and that remediation efforts visibly made the problem worse.

Although we do not condone the actions taken by the Alinders, the district court did not abuse its discretion by finding that the Roaches did not present clear and convincing evidence to establish a deliberate disregard of their rights. Even if the Alinders knew they were required to obtain additional permits, such evidence does not necessarily establish

[4] Heitkamp argues that the Roaches forfeited this issue because they did not move for a new trial on punitive damages. But the punitive-damages issue was fully briefed twice before the district court—both before and after trial—and the district court had ample time to reflect on the arguments and evidence. Accordingly, we address the issue.

that the Alinders knew with the requisite high degree of probability the damage that would result to the Roaches' property. And the fact that the remediation efforts were unsuccessful does not, alone, demonstrate by clear and convincing evidence that the Alinders acted with ill intent. We see no abuse of discretion by the district court in denying the motion to add a punitive damages claim.

V. The Minnesota Watershed Law allows the Roaches to recover reasonable attorney fees.

The Roaches challenge the denial of their request for statutory attorney fees under the Minnesota Watershed Law, arguing that the district court erred by holding that attorney fees are statutorily unavailable. Again, we review issues of statutory interpretation de novo. *Lee v. Lee*, 775 N.W.2d 631, 637 (Minn. 2009).[5]

The Minnesota Watershed Law provides, "In *any civil action* arising from or *related to a rule*, order, or stipulation agreement made or a permit issued or denied *by the managers* under this chapter, the court may award the prevailing party reasonable attorney fees and costs." Minn. Stat. § 103D.545, subd. 3 (emphasis added). The "managers" are "the board of managers of a watershed district." Minn. Stat. § 103D.011, subd. 15 (2018).

The phrase "related to" means "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with." *See Phone Recovery Servs., LLC v. Qwest Corp.*, 919 N.W.2d 315, 320 (Minn. 2018) (quoting *500, LLC v. City of Minneapolis*, 837 N.W.2d 287, 291 (Minn. 2013)) (defining "relating to"). Accordingly,

[5] Heitkamp argues that we should review a decision not to award attorney fees for abuse of discretion. But Heitkamp's substantive argument focuses entirely on the proper interpretation of the Minnesota Watershed Law, Minn. Stat. § 103D.545, subd. 3.

the statute broadly and unambiguously authorizes attorney fees in any civil action that "has a connection, association, or logical relationship to" a rule promulgated under the Minnesota Watershed Law. *See 500, LLC*, 837 N.W.2d at 291.

Heitkamp contends that all caselaw citing Minn. Stat. § 103D.545, subd. 3, involves a watershed district as a party. But these authorities do not bar application of the statute in a civil action between private parties related to a watershed-district rule. The word "any" means "[o]ne, some, every, or all without specification." *The American Heritage Dictionary of the English Language* 81 (5th ed. 2011).[6] The phrase "any civil action . . . related to a rule" is plainly not restricted to an action initiated by a watershed district.

This civil action relates to a watershed-district rule. The crux of the dispute is whether the land-alteration activities caused runoff to the Roaches' property. The rules of the PRWD required a permit before commencing any land alteration. The county zoning ordinance requires persons undertaking land-use modifications to comply with applicable watershed-district rules. *See* Becker County, Minn., Zoning Ordinance § 12, subd. 7 (2002). Although not a party, the PRWD has been directly involved throughout this dispute. The Roaches contacted the PRWD in 2004 regarding flooding on their property caused by the construction. The PRWD responded that it possessed jurisdiction over the area and would investigate accordingly. The zoning administrator also advised the Alinders that they must contact the PRWD to develop a stormwater management plan to retain runoff and submit the plan to the county and the PRWD. The Roaches disputed the

[6] The legislature enacted the attorney-fee provision of the Minnesota Watershed Law in 1992. 1992 Minn. Laws ch. 466, § 7, at 308.

adequacy of the stormwater management plan and opposed the application for a land-alteration permit because it would allow increased runoff to the Roaches' property. On appeal, we concluded that the BOA erred by approving a permit that would increase runoff to the Roaches' property. We remanded to the BOA, which eventually precipitated another appeal on the same underlying facts.

Because the Roaches' claims are "related to" the PRWD rules—which were adopted under authority of the Minnesota Watershed Law—the district court erred by concluding that attorney fees were unavailable as a matter of law. However, the statute provides that the district court "*may* award . . . reasonable attorney fees." Minn. Stat. § 103D.545, subd. 3. Accordingly, we remand to the district court to determine whether attorney fees are appropriate under the circumstances and, if so, the amount of reasonable attorney fees.

VI. The district court did not abuse its discretion by denying the motion for civil contempt.

After the jury trial, the Roaches also filed a motion for civil contempt, alleging that the Alinders brought additional fill onto their property and altered the lot line between the properties in violation of the 2016 order for restoration and *Roach III*. The district court denied the motion.

We review the decision of a district court to invoke its contempt powers for an abuse of discretion. *In re Welfare of Children of J.B.*, 782 N.W.2d 535, 538 (Minn. 2010). We consider whether the order "was arbitrary and unreasonable or whether it finds support in the record." *Gustafson v. Gustafson*, 414 N.W.2d 235, 237 (Minn. App. 1987) (quotation omitted). We reverse factual findings only if clearly erroneous. *J.B.*, 782 N.W.2d at 538.

An individual may be held in contempt "where the contemnor has acted contumaciously, in bad faith, and out of disrespect for the judicial process." *Newstrand v. Arend*, 869 N.W.2d 681, 692 (Minn. App. 2015), *review denied* (Minn. Dec. 15, 2015). The "order of a court sought to be enforced by contempt must clearly define the acts to be performed by the alleged contemnor." *Mr. Steak, Inc. v. Sandquist Steaks, Inc.*, 245 N.W.2d 837, 838 (Minn. 1976).

First, the Roaches allege that the Alinders brought additional fill onto their lot. The Alinders admit they brought a small amount of fill and vegetation onto their property. But following the contempt motion, the Alinders removed all material they added into the restoration basin. The district court therefore concluded that the fill issue was moot. On appeal, the Roaches argue the district court abused its discretion because the 2016 order "pertained to the entire Alinder lot," not just the restoration basin. But no court order expressly prohibits the Alinders from adding any amount of fill at any point in the future. Rather, we approved a restoration plan that placed the net fill of the property back to preconstruction levels. *Roach III*, 2017 WL 1316117, at *7. The district court did not abuse its discretion in finding that the Roaches did not establish a bad-faith violation of a court order.

Second, the Roaches claim that the Alinders altered the grading at the lot line. The district court found that the evidence "do[es] not suggest that the [Alinders] have altered the grading at the lot line, and that any apparent difference in lot line elevation appears to be due to differences in lawnmowing schedules." The Roaches do not dispute this finding but instead argue that *any* alteration at the lot line is prohibited, whether caused by the

Alinders or by natural causes. Because none of the orders issued in this matter require the Alinders to proactively ensure that natural causes do not affect the lot line, the district court did not abuse its discretion in denying the contempt motion.

Affirmed in part, reversed in part, and remanded.