**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A12-0879**
**A12-1547**

Brandon V. Lawhead, et al.,
Appellants,

vs.

Bradley Nixa,
Respondent,

Edina Realty, Inc., et al.,
Respondents.

**Filed April 29, 2013**
**Affirmed**
**Harten, Judge**[*]

Olmsted County District Court
File No. 55-CV-11-5609

Donaldson V. Lawhead, Lawhead Law Offices, Austin, Minnesota (for appellants)

Steven J. Hovey, Hoversten, Johnson, Beckmann & Hovey, LLP, Austin, Minnesota (for respondent Bradley Nixa)

Stanford P. Hill, Bassford Remele, P.A., Minneapolis, Minnesota (for respondents Edina Realty, Inc., et al.)

Considered and decided by Rodenberg, Presiding Judge; Larkin, Judge; and Harten, Judge.

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

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

**HARTEN**, Judge

Appellants challenge the district court's dismissal of their breach of contract and intentional misrepresentation claims, finding that appellants' acceptance of earnest money from respondents operated as an election of remedies or, alternatively, an accord and satisfaction; they also challenge the imposition of attorney fees as a sanction. Because we see no error in the dismissal of the claims and no abuse of discretion in the imposition of the sanction, we affirm.

## FACTS

In July 2008, appellants Brandon and Jennifer Lawhead (the sellers), acting through appellant real estate broker Tammy Lawhead Homes Inc. (TLH),[1] agreed to sell their home (the property) to respondent Bradley Nixa, who was acting through respondent Edina Realty and its agent, respondent Scott Ulland. Nixa wrote a personal check for $500 to TLH as earnest money; TLH deposited it in a trust account.

By September 2008, Nixa had decided he did not want to purchase the property. He signed and served on appellants a Cancellation of Purchase Agreement. It provided: "The undersigned hereby agree that a Purchase Agreement . . . relating to [the property] is hereby cancelled and terminated." Nixa indicated by placing an X in the appropriate box that "[t]he Earnest Money in connection with said Agreement is to be . . . RETAINED BY SELLERS." The cancellation also provided, "Buyer releases all rights

[1] Tammy Lawhead is the mother of Brandon Lawhead, an attorney who practices with Donaldson Lawhead, Tammy's husband and Brandon's father. Donaldson Lawhead represents appellants.

in the property. Seller has no further obligation to sell under said Agreement nor Buyer to purchase."

After receiving the cancellation agreement, the sellers placed the property back on the market and sold it to a third party, using a purchase agreement that indicated the sale was "NOT subject to cancellation of a previously written purchase agreement . . . ." In January 2011, after the property was sold, appellants received and cashed a $500 check from the TLH trust account.

In March 2011, appellants, acting through attorney Donaldson Lawhead, brought this action against respondents, alleging breach of contract and intentional misrepresentation and seeking TLH's brokerage commission on the sale of the property, although there was no written agreement between Tammy Lawhead and respondents.[2]

In May 2011, respondents were informed that Donaldson Lawhead was having surgery.[3] Brandon Lawhead's deposition was then noticed for 21 July. This date was unacceptable to appellants, and the deposition was noticed a third time for 29 July. On 14 July, Brandon Lawhead contacted respondents' counsel directly to say that Donaldson Lawhead had surgery and was unable to respond and that he himself would not be available for a deposition on 29 July. Brandon Lawhead agreed with respondents' counsel that his deposition could be taken on 9 August, and, on 18 July, respondents duly served Donaldson Lawhead with notice of the 9 August deposition.

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[2] *See* Minn. Stat. § 82.85, subd. 2 (2012) (providing that a licensed real estate broker may not "bring or maintain any action in the courts for any commission . . . with respect to the . . . sale . . . of real property . . . unless there is a written agreement . . .").

[3] *See Lawhead v. Nixa*, No. A12-0879 (Minn. App. 19 March 2013) (order op.).

On 1 August, Donaldson Lawhead notified respondents of his medical condition, saying that the Mayo Clinic informed him that he was unable to work and that the 9 August depositions were impossible. He suggested 12 September as the date for depositions of Brandon, Tammy, and Jennifer Lawhead, but said that Jennifer Lawhead would not be available until 6:00 p.m. that day. On 3 August, respondents' counsel replied that because he would have to travel two and a half hours to and from the depositions in appellants' law office, he could not start a deposition at 6:00 p.m. On 10 August, respondents' counsel again wrote to Donaldson Lawhead, telling him that, although Donaldson Lawson had provided medical records saying that he had been off work since 26 May, he had in fact been at his office, written several letters postponing scheduled depositions, filed the case with the court, and scheduled the depositions he would be taking to occur before the depositions respondents' attorney would be taking, to which respondents' attorney objected. Brandon Lawhead's deposition did not actually occur until November 2011, after having been noticed four times.

In September 2011, respondents served on Donaldson Lawhead a motion for dismissal of the complaint with prejudice and for attorney fees.[4] In a letter accompanying the motion, respondents described the specific conduct of Donaldson Lawhead alleged to violate Minn. Stat. § 549.211 and Minn. R. Civ. P. 11, to-wit, representing both Tammy Lawhead, who dispersed funds from the trust account and thereby cancelled the purchase agreement, and Brandon and Jennifer Lawhead, who claimed the purchase agreement was not cancelled.

[4] Nixa did not join in the motion for sanctions brought by Edina Realty and Ulland.

On 12 December 2011, both parties moved for summary judgment. Respondents argued that appellants' claims were barred by election of remedies and accord and satisfaction and moved for bad-faith attorney fees. Immediately after the hearing, the district court received a letter from Donaldson Lawhead with a personal $500 check from Brandon Lawhead annotated "Nixa 55-CV-11-5609," the district court file number of the case.[5]

The district court denied appellants' motion and granted respondents' motions, concluding that: (1) appellants elected their remedy by accepting the earnest money, and their acceptance was an accord and satisfaction; (2) TLH had no claim for commission against respondents; and (3) respondents were entitled to attorney fees because appellants' attorney violated Minn. Stat. § 549.211 and Minn. R. Civ. P. 11. A hearing was scheduled on the amount of the sanctions award.

Appellants filed a notice of appeal from the summary judgment dismissing their claims and, after the district court awarded respondents a judgment of $22,720.64 against Donaldson Lawhead, a notice of appeal from that judgment. The appeals were consolidated.

Appellants argue that their acceptance of the earnest money was neither an accord and satisfaction nor an election of remedies and that the district court abused its discretion in imposing sanctions on their attorney.

[5] No further explanation was provided with the check; the district court in its memorandum described sending the check to the district court immediately after the hearing as "bizarre."

## D E C I S I O N

### 1. Accord and Satisfaction

> (a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.
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> (b) . . . [T]he claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.
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> . . . .
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> (d) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.

Minn. Stat. § 336.3-311 (2012). "Accord and satisfaction may be achieved through the use of a negotiable instrument such as a check." *Weed v. Comm'r of Revenue*, 550 N.W.2d 285, 288 (Minn. 1996) (citing Minn. Stat. § 336.3-311). "Application of a statute to the undisputed facts of a case involves a question of law, and the district court's decision is not binding on this court." *Davies v. W. Publ'g Co.*, 622 N.W.2d 836, 841 (Minn. App. 2001), *review denied* (Minn. 29 May 2001).

Nixa stated in the cancellation of the purchase agreement that the sellers were to keep the earnest money; this was in full satisfaction of claims under that agreement. The sellers obtained payment of the check for the earnest money; when they did so, their claims under the purchase agreement were satisfied.

The district court did not err in concluding that accord and satisfaction defeated appellants' claims under the purchase agreement.

**2. Election of Remedies**

> The doctrine of election of remedies requires a party to adopt one of two or more coexisting and inconsistent remedies which the law affords the same set of facts. The purpose of the doctrine is not to prevent recourse to any particular remedy but to prevent double redress for a single wrong.

*NC Properties, LLC v. Lind*, 797 N.W.2d 214, 220 (Minn. App. 2011) (quotation omitted). "Holding [the purchasers] to their obligations under the cancelled agreement would give [the seller] double redress for a single wrong." *Id.* (quotation omitted).

Here, the wrong was Nixa's decision not to purchase the property, and the remedy the sellers elected was the earnest money. They were not entitled to an additional remedy by enforcing clauses in the purchase agreement. The district court did not err in concluding that the doctrine of election of remedies defeated the sellers' claim.

Appellants rely on *Frank v. Jansen*, 303 Minn. 86, 226 N.W.2d 739 (1975), to argue that the district court's conclusion that the sellers had elected their remedy when the third-party sale closed and they received Nixa's $500 from TLH "is contrary to Minnesota Law." But appellants misread *Frank*. In that case, the purchase agreement said that the sellers had received a $2,000 downpayment from the buyers as "a guarantee of good faith," and the space for indicating how much the buyers would forfeit by not fulfilling the agreement was left blank. *Id.* at 89, 226 N.W.2d at 742. The issue was whether the $2,000 downpayment retained by the sellers constituted liquidated damages. *Id*. at 90, 226 N.W.2d at 742.

> Whether the parties have stipulated for liquidated damages must be gleaned from the contract and all of the facts pointing to the intention of the parties. Before there can be a finding of liquidated damages, there must be evidence to support a finding that the parties intended the stipulated amount to be *in lieu of compensatory damages*. There is no such evidence in this case. As a matter of fact, what evidence there is points the other way. The provision in the printed contract which was used, pertaining to a forfeiture upon failure to fulfill the conditions of the contract, was left blank by the parties. . . . There is no evidence in the record that would establish the fact that the parties ever intended the downpayment to constitute liquidated damages. Furthermore, the [district] court's holding that the downpayment was intended to be liquidated damages is inconsistent with the court's finding allowing plaintiffs to recover the abstracting fees and advertising expenses as compensatory damages. If the parties intended the downpayment to constitute liquidated damages, payment of that amount, which no one disputes, would end the matter. There cannot be both liquidated damages and compensatory damages.

*Id*. at 93-94, 226 N.W.2d at 744. On the basis of these facts, *Frank* concluded that the downpayment did not constitute liquidate damages. *Id*. at 97, 226 N.W.2d at 746.

The relevant facts in *Frank* are clearly distinguishable from the facts here. The purchase agreement provided an earnest money deposit of $500 "to be returned to Buyer if Purchase Agreement is not accepted by Seller." The sellers accepted the purchase agreement and did not return the $500. The Cancellation of the Purchase Agreement signed by Nixa provided that "the Earnest Money in connection with said Agreement" would be "RETAINED BY SELLERS"; thus, Nixa, the buyer, believed that it was liquidated damages. The purchase agreement sellers signed on 9 August 2009 with a third party buyer stated that it was "NOT subject to cancellation of a previously written purchase agreement . . . ." Thus, sellers believed that the purchase agreement with Nixa

had been cancelled when they signed this purchase agreement. There is no evidence indicating that either party believed the purchase agreement was not cancelled by sellers' acceptance and retention of the $500 earnest money.

The district court did not err in concluding that sellers elected their remedy by retaining the earnest money and are not entitled to compensatory damages under the purchase agreement.

**3. Attorney Fees**

The district court summarized appellants' attorney's conduct since bringing this action and concluded:

> By pursuing this action and engaging in the above-referenced misconduct, [he] violated [Minn. R. Civ. P.] 11.02 and Minn. Stat. § 549.211, subd. 2.
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> . . . .
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> The entire case was "infected" by [appellants'] sanctionable conduct because the lawsuit was improper from the very beginning. [Appellants] elected their remedy prior to the lawsuit being initiated, resulting in the purchase agreement with Nixa being cancelled. [Appellants] could no longer pursue actual damages under the purchase agreement. On September 15, 2011, [appellants] were served with Edina Realty and Ulland's safe harbor notice which explained why the lawsuit was unwarranted under existing law. However, [appellants] continued to pursue such claims, and by doing so, [appellants] submitted pleadings and made arguments to the court in bad faith. The law on election of remedies is clearly established and [appellants] made no argument for the extension or modification of such law. Since the lawsuit was improper from the beginning, all expenses incurred and time spent on the case by [respondents] was the result of [appellants'] improper conduct.
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> In addition, both [Donaldson and Brandon Lawhead] are well trained in the law. . . . [They] had significant knowledge of real estate law.

A court may order sanctions for violations of Minn. R. Civ. P. 11 and Minn. Stat. § 549.211 in an amount "sufficient to deter repetition of the conduct or comparable conduct by others similarly situated." Minn. Stat. § 549.211, subd. 5(a); *see* Minn. R. Civ. P. 11.03(b).

"An appellate court applies an abuse-of-discretion standard when reviewing a district court's decision to impose sanctions under Minn. R. Civ. P. 11." *Conant v. Robins, Kaplan, Miller & Ciresi, L.L.P.*, 603 N.W.2d 143, 150 (Minn. App. 1999), *review denied* (Minn. 14 Mar. 2000). Appellants argue that the district court abused its discretion in imposing sanctions for failure to attend a deposition and in selecting the amount of the sanction.[6]

**A. Deposition**

Appellants argue that sanctions may be imposed only for conduct occurring after an attorney has received from opposing counsel a safe-harbor notice specifying the conduct that violates Minn. R. Civ. P. 11. But the obligation not to file frivolous pleadings or motions does not arise only when opposing counsel objects to a pleading or motion on that basis. The purpose of the safe-harbor notice provided by Minn. R. Civ. P. 11.03(a)(1) (providing that motion for sanctions may not be filed until 21 days after service) is to give an offending attorney a "safe harbor" during which to withdraw or correct the unwarranted pleading or motion. Moreover, a court may identify Rule 11 violations sua sponte, and nothing in the rules indicates that sanctions may not be

[6] Appellants do not challenge any other aspect of the order for sanctions.

imposed for those violations because no safe-harbor notice was filed. Minn. R. Civ. P. 11.03 (a)(2).

The only case on which appellants rely for this argument is an unpublished sixth circuit decision, *Dearborn Street Bldg. Ass'n, LLC, v. Huntington Nat'l Bank*, 411 Fed. Appx. 847 (6th Cir. 2011). This case is of no precedential value and is, in any event, distinguishable. In October 2007, a creditor brought an action against a debtor, the debtor's affiliate that purchased land, and the mortgagee that financed the purchase and encumbered the land with a mortgage. *Id.* at 848. The complaint "did not accuse [the mortgagee] of specific misconduct. Instead, it . . . requested only 'such relief as is equitable with respect to the mortgage lien.'" Id. at 849. In February 2008, the mortgagee turned over to the creditor its complete file on the transaction. *Id.* The mortgagee made four unsuccessful attempts to obtain a voluntary dismissal from the action between November 2007 and June 2008, when it sent a "safe harbor" notice invoking Rule 11. *Id*. The mortgagee moved for summary judgment in September 2008 and sought voluntary dismissal a fifth time in October 2008, while that motion was pending. *Id.* The motion was granted in January 2009. *Id.* The mortgagee successfully sued the creditor for all its attorney fees. *Id*. at 849-50. The sixth circuit reversed and remanded for calculation of attorney fees incurred "after the date on which [the creditor] should have agreed to [the mortgagee's] dismissal." *Id.* at 852. The sixth circuit noted that "while . . . [the creditor's] action against [the mortgagee] may have been proper at the time of filing, . . . [the creditor] should probably have realized that its claims against [the mortgagee] were unsupportable and amended or withdrawn its complaint around

February 18, 2008, when it received [the mortgagee's] complete file on the . . . transaction, reviewed its contents, and declined to conduct further investigation or discovery." *Id.*

Here, appellants' attorney should have realized that the sellers, having accepted and cashed Nixa's earnest money check, had no claim for remedies under the purchase agreement. Unlike the creditor's claims against the mortgagee in *Dearborn*, the sellers' claims were not "proper at the time of filing." Moreover, contrary to appellants' assertion, *Dearborn* did not hold that sanctions could not be imposed for conduct occurring prior to receipt of a "safe harbor" letter: the responsibility for determining that the creditor's claims against the mortgagee were not viable was the creditor's, not the mortgagee's, and the creditor should have made the determination about four months before the mortgagee sent its "safe harbor" letter. *Id.*

Appellants also argue that the safe-harbor notice was defective because it was a letter accompanying the notice of motion. But they cite no Minnesota law supporting their view that "the specific conduct alleged to violate Rule 11.02" cannot be set out in a letter. The letter pointed out that the sellers could not pursue breach of contract or other claims after accepting the earnest money and cancelling the purchase agreement and that, if the purchase agreement was not cancelled, TLH had wrongly dispersed the earnest money. The letter also referenced *N.C. Properties*, 797 N.W.2d at 220 (holding that a seller's acceptance of earnest money constitutes an election of remedies). As the district court found, "[Respondents'] motion and letter satisfied the procedural requirements of Minnesota law."

Appellants argue that the district court erred in citing as misconduct the fact that, because of Donaldson Lawhead's medical condition, respondents had to repeatedly notice Brandon Lawhead's deposition: "it is unreasonable to sanction [Donaldson Lawhead] for following the Mayo Clinic's restrictions because of being physically unable to defend the deposition[s] . . . ." But, after Brandon Lawhead contacted respondents' counsel in July and agreed that his deposition could be taken on 9 August, Donaldson Lawson said that date was not possible, and the deposition was rescheduled two more times before it was finally taken in November 2011.

Appellants also argue that sanctions may not be imposed for the deposition rescheduling because respondents did not file the motion pursuant to Minn. R. Civ. P. 37.04 (when a party fails to appear for a deposition, "the court . . . on motion may make such orders in regard to the failure as are just"). But appellants filed a motion for sanctions under Minn. Stat. § 549.211 and Minn. R. Civ. P. 11 and specified appellants' failure to cooperate in scheduling and holding depositions as a reason for the sanctions; thus, the district court made orders in regard to that conduct "on motion."

The district court did not err in finding that "[t]he cancellation and rescheduling of depositions by [appellants] was a significant factor in such costs [of the litigation]."

**B. Amount of Fees**

The district court found:

> . . . [Respondents' attorney's] requested fees [are] $31,193 [incurred] at a rate of $200 per hour and $2,720.64 in costs. The attorney fees and costs are reasonable and not excessive given the history of the case.
> . . . .

> . . . The Court deemed a $10,000 sanction too low to have any deterrent effect and a $30,000 sanction would appear as fee-shifting. Accordingly, the Court determined that a sanction of $20,000 plus costs was an amount to make one pause before submitting a future pleading to any court of this state.
>
> . . . .
>
> In order to have a deterrent effect, [respondents] are entitled to an award of $22,720.64 against Attorney Donaldson Lawhead.[7]

Appellants argue first that Minn. R. Gen. Prac. 119.02, requiring an attorney's affidavit describing the work performed, when it was performed, who performed it, how long it took, and how much was charged per hour, was necessary for any award over $1,000 and was not provided. But this rule governs an application for attorney fees, not a sanction, and respondents moved for a sanction, not for attorney fees.[8]

Appellants then argue that the district court failed to use the "lodestar" method of calculating fees. But the district court noted that respondents' attorney fees were $31,193 and that their attorney charged an hourly fee of $200. Thus, respondents' attorney worked about 156 hours on the case, and the district court found his fee was "reasonable and not excessive." Again, appellants apply the incorrect standard in arguing that the district court should have eliminated any unnecessary or duplicative hours worked: respondents were seeking a sanction for all the hours their attorney spent because

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[7] Appellants argue that, because Donaldson Lawhead "has had no history of sanctions, a minimal sanction of $1,000.00 is appropriate." But they provide no support for the view that, regardless of the offense, a first-time sanction must be minimal or nominal.

[8] Appellants' arguments that respondents' attorney produced a "below average attorney work product" and that the depositions were unnecessary are also based on the premise that respondents were awarded attorney fees, not sanctions, and are therefore irrelevant.

appellants insisted on pursuing meritless claims, not the fees reasonably incurred in achieving a litigation result.

Finally, appellants argue that the $20,000 award is not the least severe sanction. *See Uselman v. Uselman*, 464 N.W.2d 130, 145 (Minn. 1990), *superseded on other grounds*, by Minn. Stat. § 549.21 (1990) ("The court should impose the least severe sanction necessary to effectuate the purpose of deterrence, and may also consider the presence or absence of bad faith in determining an appropriate sanction." (citation omitted)). But the district court considered a lower sanction, i.e., $10,000, and determined that it would be "too low to have any deterrent effect."[9] The district court also considered and rejected a higher sanction, the $31,193 incurred, and at least implicitly determined that it was not "the least severe sanction necessary to effectuate the purpose of deterrence." *See id.*

Finally, appellants argue that, because they spent more than the $500 they received in earnest money and had their case against respondents dismissed, they "were the 'victims' in this matter" and have already been sanctioned. But appellants' decision to pursue claims shown to have been without merit victimized respondents and was an abuse of the litigation process.

[9] This court previously determined that Donaldson and Brandon Lawhead were litigating meritless claims when representing TLH. *See Lawhead v. Ulwelling, Hollerud Schulz*, No. C7-00-1425, 2001 WL 96159 (Minn. App. 6 Feb. 2001) (affirming district court's dismissal for failure to state a claim on which relief could be granted of Tammy Lawhead's claims of breach of contract, tortious interference with contract, and misrepresentation and the district court's determination that she had alleged no basis for overturning the arbitrators' award).

The district court did not err in dismissing appellants' claims and did not abuse its discretion in awarding a sanction of $20,000 against appellants' attorney.

**Affirmed.**