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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-411**

In re the Marriage of: Rachel Andrea Fonss, petitioner,
Respondent,

vs.

Rick Donato DeMartini,
Appellant.

**Filed February 1, 2011
Affirmed in part, reversed in part, and remanded
Ross, Judge**

Redwood County District Court
File No. 64-FA-08-530

Rachel Andrea Fonss, Lambertson, Minnesota (pro se respondent)

Rick Donato DeMartini, Jr., Lambertson, Minnesota (pro se appellant)

Considered and decided by Ross, Presiding Judge; Hudson, Judge; and Schellhas,
Judge.

UNPUBLISHED OPINION

ROSS, Judge

This appeal concerns the district court's order distributing assets following the breakdown of Rick DeMartini and Rachel Fonss's marriage and their co-owned gutter-replacement and foam insulation business. DeMartini appeals from the marital dissolution judgment, claiming numerous trial and pretrial errors. Most of DeMartini's

claims are unpersuasive, so we affirm in part. But the record lacks sufficient facts to support the finding that his conduct was “extreme” under the standard for sanctions reserved for *pro se* litigants, so we reverse the \$750 award of conduct-based attorney fees against DeMartini and remand for the district court to adjust the judgment accordingly.

FACTS

Husband Rick DeMartini and wife Rachel Fonss co-owned a gutter-replacement and spray foam insulation company, “Entirely Seamless.” The company acquired a number of business assets, including vehicles, large machinery, chemicals, tools, and electronics. It employed an office manager and engaged subcontractors. DeMartini managed the business, paying bills and negotiating with creditors, while Fonss directed the advertising, often working from home.

Entirely Seamless began to suffer financially, and Fonss claims that she was unaware of the extent that it was in debt and her husband in trouble until 2006 when a federal district court incarcerated him for stealing an airplane and committing fraud against one of the company’s chemical suppliers. Fonss then assumed control of the business’s finances and operations. In the process, she found a drawer of unpaid, unopened bills and learned that the business was more than \$800,000 in debt. She attempted to work with the company’s creditors and to maintain the business, but by the end of 2007, the company had lost its contractor’s license and closed its doors. Soon, Fonss petitioned for divorce.

A year-long divorce battled ensued over the distribution of assets only, as the parties had no children and agreed that neither would pay the other spousal maintenance.

DeMartini, representing himself *pro se*, alleged that Fonss improperly sold off corporate assets while he was in prison and questioned Fonss's decision to involve another in running the business. DeMartini served numerous interrogatories and claimed that Fonss answered them untruthfully. He moved to compel more discovery, but the district court denied his motion and ordered him to pay \$750 in attorney fees for wasting the court's and Fonss's time. DeMartini participated by telephone from prison in a three-day trial in which eleven witnesses testified and hundreds of pages of exhibits were admitted.

The district court divided the parties' assets. It awarded Fonss the house and truck, but the corresponding debts exceeded their cumulative value. For example, it awarded Fonss the parties' \$40,000 house subject to various debts and a \$102,352 mortgage to her parents, along with the furniture inside. It also awarded her the parties' \$20,000 pickup truck, but it made her solely responsible for the corresponding \$12,537 debt to her father. The court's judgment released DeMartini from any legal duty to repay those debts.

The district court ordered that the parties' \$50,000 cargo van and fixtures be sold, with the parties dividing any proceeds evenly after paying off Fonss's father for his interest in the van. It ordered that the \$750 that DeMartini owed in attorney fees from the discovery sanction was to be subtracted from his share of the van proceeds, along with other costs and expenses related to the litigation. The district court also held that DeMartini was solely responsible for nearly \$75,000 of debt owed to the Department of Justice arising out of his criminal activities. It ordered all other corporate assets sold to cover the company's debt.

DeMartini appeals.

DECISION

I

We first address three procedural errors alleged by DeMartini. He claims that the district court judge held a bias against him, that the district court abused its discretion by its discovery rulings, and that he suffered from an unfair trial.

Judicial Bias

We take DeMartini's bias allegation particularly seriously because judicial impartiality is "the very foundation of the American judicial system" and is protected by both the Minnesota and United States constitutions. *Payne v. Lee*, 222 Minn. 269, 272, 277, 24 N.W.2d 259, 262, 264 (1946) (citing Minn. Const. art. I, § 8 (requiring justice "completely and without denial"); U.S. Const. amend. XIV, § 1 (requiring due process)). We consider claims of judicial bias in view of the totality of circumstances, *State v. Morgan*, 296 N.W.2d 397, 404 (Minn. 1980), and we start with a presumption that the judge discharged all judicial duties properly, *State v. Mems*, 708 N.W.2d 526, 533 (Minn. 2006). We consider "whether the trial judge considered arguments and motions made by both sides, ruled in favor of a complaining defendant on any issue, and took actions to minimize prejudice to the defendant." *Hannon v. State*, 752 N.W.2d 518, 522 (Minn. 2008); *see also Mems*, 708 N.W.2d at 533 (holding that there was no bias where the "record reflects that the district court carefully considered motions made by both sides; and the court ruled in favor of appellant on some very important motions").

DeMartini cites to multiple adverse rulings to support his claim that the district court was biased against him. For example, DeMartini asserts that the district court unfairly sanctioned him for moving to compel discovery without sanctioning Fonss for providing “evasive” and “deceptive” answers to interrogatories; that it improperly found that Fonss did not commit fraud despite “incontrovertible, documented evidence [that] strongly points [to] fraud”; and that it selectively enforced its dissipation-of-assets and appointment-of-receiver orders to provide “obvious protection” for Fonss at DeMartini’s expense. Although he cites to adverse and allegedly erroneous rulings, DeMartini does not offer any reasons to support his claim of bias. And prior adverse rulings are an insufficient basis on which to prove judicial bias. *Olson v. Olson*, 392 N.W.2d 338, 341 (Minn. App. 1986).

We have searched the record for support for DeMartini’s grave assertion that he faced trial before a partial jurist. We have found no trace of bias and are confident that the district court judge fairly and impartially considered the arguments and motions before it.

Discovery Ruling

DeMartini contends that we should reverse the judgment because the district court erroneously denied his pretrial motion to compel discovery. The district court has wide discretion to shape discovery and we will not disturb its discovery decisions unless we see an abuse of that discretion. *Kielley v. Kielley*, 674 N.W.2d 770, 780 (Minn. App. 2004). DeMartini argued to the district court that Fonss provided incomplete and dishonest answers to interrogatories. He bolstered his motion to compel discovery with a

list of “missing discovery.” But the district court found that DeMartini “failed to provide any evidence to support his claim that [Fonss’s] responses were incomplete or evasive” or to “demonstrate that [Fonss] has not complied with [DeMartini’s] discovery requests.”

The district court’s reasoning demonstrates that it addressed DeMartini’s motion within the scope of its discretion. DeMartini’s only contrary argument is a quote from an unpublished factually and analytically inapposite 2004 opinion of this court, which warrants no discussion here.

Unfair Trial

DeMartini argues that the district court failed to provide a fair and legal forum in which matters should have been heard and decided in accordance with the law. But he cites no allegedly offended rule or law, and he provides no explanation how the proceedings should have been conducted differently. In our reading of the record searching for bias, we also found no indication of unfairness of any other stripe.

II

We turn from procedure to DeMartini’s substantive challenges to the district court’s asset distribution. DeMartini contends that the district court abused its discretion by basing the property division on clearly erroneous findings, failing to account for Fonss’s improper dissipation of assets, and failing to divide the remaining assets equally. None of his contentions is convincing.

Fact Findings

DeMartini challenges the district court’s finding that Fonss did not improperly dissipate the parties’ assets. We set aside a district court’s findings of fact only if they

are clearly erroneous, and we defer to the district court's evaluation of witness credibility. *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008). A fact finding is clearly erroneous if we are left definitely and firmly convinced that the district court has made a mistake. *Id.* DeMartini has pointed to no mistakes leading us to that conviction.

The district court made two key findings regarding the dissipation of assets. First, it found that “[d]uring [DeMartini’s] incarceration, [Fonss] sold personal and corporate assets in an attempt to satisfy creditors and continue corporate operations.” DeMartini claims that this finding is clearly erroneous because it is contradicted by sworn testimony and because the evidence proves that Fonss “transferred, sold, spent or ‘buried’” assets before the divorce. But even if there may be some evidence inconsistent with the finding, it is clear to us that the finding is consistent with the testimony of Rachel and Ardelle Fonss, Steven Dingels, Daniel Hillesheim, and Cheryl Denham, who all testified that Fonss sold corporate assets to pay corporate debt.

Second, the district court found that “[w]hile [Fonss’s] methods of making certain payments via cashier’s check is concerning, [DeMartini] has failed to establish that [Fonss] used the funds for any purpose other than for payment of corporate creditors, necessary living expenses, and/or legitimate corporate operations.” During cross-examination of bank representative Dingels and Fonss, DeMartini questioned the propriety of Fonss’s process. But he never offered evidence that any of the funds Fonss acquired went to an improper purpose or that any of the sales were unnecessary. This is the sort of issue suited to the district court’s better position to find facts on competing testimony and other evidence. The record supports both of these key findings.

Fonss's Dissipation of Assets

DeMartini challenges the distribution of property on the grounds that Fonss fraudulently transferred or hid assets. DeMartini is correct that a party to a marital dissolution action may not generally dissipate assets:

If the court finds that a party to a marriage, without consent of the other party, has during the pendency of[] the current dissolution, . . . transferred, encumbered, concealed, or disposed of marital assets except in the usual course of business or for the necessities of life, the court shall compensate the other party The burden of proof under this subdivision is on the party claiming [the improper dissipation of assets].

Minn. Stat. § 518.58, subd. 1a (2010). But although the district court found that Fonss sold personal and corporate assets during DeMartini's incarceration, it also found that she did so attempting to satisfy creditors and continue business operations, and it was presented with no evidence that she used the funds for any improper purpose. It is no cause for hesitation in this case that some of the company funds may also have covered some of Fonss's necessary living expenses. The company had been the primary source of the parties' sustenance; now Fonss worked alone to salvage the quickly sinking vessel that DeMartini had apparently scuttled by neglect and abandoned by incarceration. We see no legal or factual basis to disturb the district court's distribution of assets.

Abuse of Discretion with Property Division

DeMartini next asserts that the district court failed to equitably divide the parties' assets and debts. We give a "very narrow" review of property divisions, leaving the district court's determinations intact unless we discern a "clear abuse" of its "broad discretion." *Brockman v. Brockman*, 373 N.W.2d 664, 665 (Minn. App. 1985).

The district court “awarded” Fons a \$40,000 house encumbered by a mortgage and a debt that exceeds twice its value and a \$20,000 pickup burdened by a loan of more than half its value. The combined monetary value to Fons of the house and pickup was a debt of \$54,890, while their distribution cleared DeMartini of his share of it. DeMartini was awarded one half the van proceeds and assigned debts arising out of his own illegal activities, including his \$75,000 fine. So each party left the marriage with a sizable debt far greater than the value of any tangible property. The division was not equal, but it was not inequitable. DeMartini does not suggest any alternate, fairer division, and none is apparent to us.

III

We are more persuaded by DeMartini’s challenge to the district court’s sanction of \$750 in conduct-based attorney fees issued in its order denying DeMartini’s discovery motions. The district court has the discretion to award attorney fees “against a party who unreasonably contributes to the length or expense of the proceeding.” Minn. Stat. § 518.14, subd. 1 (2010). We review the district court’s award of attorney fees for abuse of discretion. *Gully v. Gully*, 599 N.W.2d 814, 825 (Minn. 1999). We do so by determining whether the district court’s findings support the award. *See Kronick v. Kronick*, 482 N.W.2d 533, 536 (Minn. App. 1992) (“Findings are . . . needed to permit meaningful appellate review on the question whether attorney fees are appropriate because of a party’s conduct.”). But for *pro se* litigants, like DeMartini, we are reluctant to grant attorney fees absent “extreme” conduct. *Liedtke v. Fillenworth*, 372 N.W.2d 50, 52 (Minn. App. 1985), *review denied* (Minn. Sept. 13, 1985).

Although the district court's findings might support a decision to award attorney fees in represented-party cases, they do not indicate "extreme" *pro se* conduct:

[DeMartini's] motion to compel was not supported by any documents to indicate [Fonss's] responses were incomplete and [DeMartini] failed to submit any such evidence at the hearing. [DeMartini] failed to cite any court order that [Fonss] allegedly violated that would support a finding of contempt as a basis for an order to show cause. Since there is no court order that [Fonss] has violated, the Court finds there is no basis in law for [DeMartini's] motion for an order to show cause. [Fonss] was forced to incur substantial attorneys' fees to prepare for and address these motions.

This analysis implies that DeMartini's motion failed for lack of factual support. But submitting a motion with insufficient factual support is not the sort of "extreme" infraction for which a procedurally unsophisticated *pro se* party should be burdened with the legal fees of his opponent. *See, e.g., Kassan v. Kassan*, 400 N.W.2d 346, 350 (Minn. App. 1987), *review denied* (Minn. Apr. 23, 1987) (affirming attorney fees sanction against a *pro se* litigant who re-filed an already dismissed time-barred complaint regarding events that took place twenty to forty years earlier). Because the district court did not find that DeMartini's conduct was extreme and because it appears that the facts would not have supported the finding, the district court acted beyond its discretion by awarding conduct-based attorney fees. We therefore remand to the district court with instructions to amend the judgment by removing DeMartini's obligation to pay \$750 to Fonss for attorney fees.

Affirmed in part, reversed in part, and remanded.