**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A07-2324**

In the Matter of:
Aster M. Habtesilassie, petitioner,
Respondent,

vs.

Barnabas Araya Yohannes,
Appellant.

**Filed November 25, 2008**
**Affirmed in part and reversed in part**
**Halbrooks, Judge**

Ramsey County District Court
File No. 62-F3-07-300767

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Barnabas A. Yohannes, 2709 Maryland Avenue East, St. Paul, MN 55119 (pro se appellant)

Considered and decided by Schellhas, Presiding Judge; Halbrooks, Judge; and Harten, Judge.*

* 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

**HALBROOKS,** Judge

In this pro se appeal, appellant challenges the district court's order dismissing his motion to vacate the order for protection (OFP) and for a new trial and imposing a $750 sanction against appellant. Because we conclude that the district court did not abuse its discretion in extending the OFP or by denying appellant's motion to reopen the default judgment, we affirm in part. But because we conclude that the district court abused its discretion by imposing the sanction without first ordering appellant to show cause, we also reverse in part.

## FACTS

Appellant Barnabas Araya Yohannes and respondent Aster M. Habtesilassie were married in Eritrea, Africa in February 2001. In 2003, the parties moved to the United States. Respondent obtained an OFP against appellant on July 11, 2005, that was subsequently extended until July 11, 2007. Appellant's and respondent's marriage was dissolved on August 1, 2006.

Following the dissolution of their marriage, appellant filed a tort action against respondent. In dismissing the tort action, the district court granted respondent's motion for a sanction. The district court stated that appellant's tort action "appears to be calculated to harass [respondent] and is without merit." *Yohannes v. Habtesilassie*, No. A07-291, 2008 WL 73715, at *3 (Minn. App. Jan. 4, 2008). This court affirmed the district court, noting that appellant had previously been "admonished by the courts for abusing the judicial system in his earlier actions against [respondent]." *Id.* at *1. In a

separate matter, the district court denied appellant's motion to reopen the dissolution judgment, which this court affirmed. *Yohannes v. Habtesilassie*, No. A07-99, 2008 WL 73708, at *1 (Minn. App. Jan. 4, 2008).

On July 17, 2007, respondent petitioned to extend the OFP against appellant; the following day, the district court issued an emergency ex parte OFP for one year. In support of her application to extend the OFP, respondent filed an affidavit that contained the following allegations against appellant: (1) when respondent left work at 8:00 p.m. on July 16, 2007, she saw appellant outside her workplace; (2) appellant called respondent's family in Eritrea multiple times, and in early July 2007, appellant telephoned respondent's mother, telling her that "he will make [respondent's] life miserable if [respondent] [does] not drop the Order for Protection"; (3) while respondent and appellant were married, appellant made the same threat to respondent; (4) respondent received a death threat that she believed to be from appellant based on the mention of specific details of respondent's legal case and language unique to appellant; and (5) respondent does not feel safe and fear of appellant is always on her mind.

On August 1, 2007, appellant requested a hearing to contest the ex parte OFP. At the August 10, 2007 hearing, appellant asked for and was granted a continuance until October 8, 2007. On September 11, 2007, appellant moved the district court to dismiss the OFP, for sanctions, and to find respondent in contempt. In his motion, appellant noted that the hearing had been previously set for October 8, 2007.

On October 8, 2007, the district court convened the scheduled hearing. Respondent and her attorney were present, but appellant failed to appear. The district

court proceeded with the hearing in appellant's absence. Respondent testified that the information contained in her affidavit was true and that she was very afraid of appellant, which caused her a great amount of stress. The district court specifically found that respondent had a prior OFP against appellant, that appellant had violated that order, that he had engaged in stalking behavior and harassment, and that respondent remained reasonably in fear of appellant. The district court subsequently entered a default judgment against appellant, extending the OFP for five years and specifically prohibiting appellant from contacting respondent through her family.

On November 1, 2007, appellant moved the district court to vacate the OFP and to grant a new trial. At the hearing on this motion, appellant explained that he had mistakenly recorded the earlier hearing date as October 10 on his calendar and argued that the allegations in respondent's affidavit were false. The district court found that appellant's reason for failing to appear on October 8, 2007, did not constitute excusable neglect and denied appellant's motion. The district court then sua sponte sanctioned appellant in the amount $750, finding that it had warned appellant in October 2005 that it would not permit meritless actions and that appellant's current motion was meritless, an abuse of the legal process, and consistent with appellant's ongoing harassment of respondent. This appeal follows.

## D E C I S I O N

### I.

Appellant argues that the district court abused its discretion when it extended respondent's OFP. In support of his argument, appellant notes that respondent never

alleged any domestic abuse by appellant and that the district court never made any findings of domestic abuse as required by the Domestic Abuse Act.[1] *See* Minn. Stat. § 518B.01, subds. 1, 4 (2006). The decision whether to grant an OFP is discretionary with the district court. *Chosa ex rel. Chosa v. Tagliente*, 693 N.W.2d 487, 489 (Minn. App. 2005). A district court abuses its discretion when its findings are unsupported by the record or when it misapplies the law. *Braend ex rel. Minor Children v. Braend*, 721 N.W.2d 924, 927 (Minn. App. 2006). This court reviews the record in the light most favorable to the district court's findings and reverses only if we have the "definite and firm conviction that a mistake has been made" in reaching those findings. *Id.*

When filing an initial petition for an OFP, the Domestic Abuse Act requires that "[a] petition for relief shall allege the existence of domestic abuse." Minn. Stat. § 518B.01, subd. 4(b). But when an OFP has already been issued, a district court may extend the terms of an existing order or, if an order is no longer in effect, grant a new order on a showing that

> (1) the respondent has violated a prior or existing order for protection;
>
> (2) the petitioner is reasonably in fear of physical harm from the respondent;
>
> (3) the respondent has engaged in acts of harassment or stalking within the meaning of section 609.749, subdivision 2; or
>
> (4) the respondent is incarcerated and about to be released, or has recently been released from incarceration.

[1] In appellant's reply brief, appellant asserts for the first time an argument about the validity of the gun restriction included in the OFP. Because issues not raised or argued in appellant's brief are waived and cannot be revived in a reply brief, we do not address this issue. *See McIntire v. State*, 458 N.W.2d 714, 717 n.2 (Minn. App. 1990), *review denied* (Minn. Sept. 28, 1990).

> A petitioner does not need to show that physical harm is imminent to obtain an extension or a subsequent order under this subdivision.

Minn. Stat. § 518B.01, subd. 6a (2006); *see also McIntosh v. McIntosh*, 740 N.W.2d 1, 10 (Minn. App. 2007).

Under Minn. Stat. § 609.749, subd. 2 (2006), an individual engages in acts of harassment or stalking if, among other acts, he or she "stalks, follows, monitors, or pursues another, whether in person or through technological or other means." The record indicates that respondent had an OFP against appellant before she petitioned for an extension on July 18, 2007. Although the OFP that respondent initially had expired seven days before she filed for the extension, under Minn. Stat. § 518B.01, subd. 6a, the district court properly ordered the extension of respondent's OFP.

There is evidence in the record to support the district court's finding that appellant violated the previous OFP that prohibited him from direct or indirect contact with respondent. Respondent stated in her affidavit that she received a death threat that she believed to be from appellant and that appellant had contacted her family in Eritrea multiple times, threatening in one call to make respondent's life difficult if she did not drop the OFP.[2] In addition, respondent stated that she feared for her life and physical well-being, given the threats appellant made to her family in Eritrea and to her. Further,

[2] Appellant indirectly asserts that the district court should not have admitted hearsay evidence at the October 8, 2007 hearing. Appellant's argument is without merit. Minn. R. Gen. Pract. 117.02 provides that a party at a default hearing shall make an affidavit setting forth the facts that entitle that party to judgment and that the affidavit may contain "reliable hearsay."

there is evidence that appellant engaged in harassing behavior as defined by Minn. Stat. § 609.749, subd. 2. Respondent stated that appellant appeared at her workplace at the exact time that she was about to leave.

Appellant contends that when the district court ordered him not to contact respondent's family, the district court was creating a new OFP to protect respondent's relatives in Eritrea, which he argues is beyond the district court's jurisdiction. This argument has no merit. The OFP states in pre-printed language that "[appellant] shall have no contact, either direct or indirect, with [respondent] . . . , whether in person, with or through other persons, by telephone, letter, or in any other way." The district court added the statement "including contact with [respondent's] family" to this pre-printed form. The district court's obvious objective in doing so was to specify that appellant was also prohibited from attempting to contact respondent through her family.

Appellant also argues that the district court abused its discretion by extending the OFP for five years without making findings that support the extension. Minn. Stat. § 518B.01, subd. 6(b) (2006), provides that "[a]ny relief granted by the order for protection shall be for a fixed period not to exceed one year, except when the court determines a longer fixed period is appropriate." A similar argument was before this court in *Braend*. In that case, we affirmed the district court's extension of an OFP for a period of two years where the extension was based on both the "continuing acts of abuse and intimidation" and the previous OFPs in place. *Braend*, 721 N.W.2d at 928. This court concluded that Minn. Stat. § 518B.01, subd. 6(b), does not require a district court to make specific findings to extend an OFP beyond one year, noting that "the legislature did

not require a district court to make duration-related findings to issue an OFP for a fixed period of more than one year, and we cannot read that requirement into the statute." *Id.* Here, the district court's finding that there was good cause to extend the OFP for five years based on the parties' history and allegations by respondent was sufficient to warrant the five-year duration of the OFP. Accordingly, the district court acted within its discretion, and we affirm on this issue.

**II.**

Appellant argues that the district court abused its discretion by denying his motion to vacate the default judgment and order a new trial. We review a denial of a motion to vacate a default judgment for abuse of discretion. *In re Welfare of B.J.J.*, 476 N.W.2d 525, 526–27 (Minn. App. 1991). "Although some accommodation may be made for pro se litigants, this court has repeatedly emphasized that pro se litigants are generally held to the same standards as attorneys and must comply with court rules." *Fitzgerald v. Fitzgerald*, 629 N.W.2d 115, 119 (Minn. App. 2001).

Minn. R. Civ. P. 60.02 permits a district court to relieve a party of a final judgment and to order a new trial "as may be just" when "[m]istake, inadvertence, surprise, or excusable neglect" exists. When requesting relief under Minn. R. Civ. P. 60.02, the movant must demonstrate four factors:

> (1) a reasonable defense on the merits; (2) a reasonable excuse for his or her failure to act; (3) that he acted with due diligence after notice of the entry of judgment; and (4) that no substantial prejudice will result to the opposing party if the motion to vacate is granted.

*Nguyen v. State Farm Mut. Auto. Ins. Co.*, 558 N.W.2d 487, 490 (Minn. 1997). In order to obtain relief, the movant must satisfy all four factors. *Id.* The supreme court in *Whipple v. Mahler* stated that "mere forgetfulness is not excusable neglect." 215 Minn. 578, 583–84, 10 N.W.2d 771, 775 (1943).

Appellant explained his failure to appear for the October 8, 2007 hearing by stating that he had erred in recording the date in his calendar. But appellant's own September 11, 2007 motion to dismiss, for sanctions, and for a finding of contempt referred to the correct hearing date of October 8. Because appellant did not satisfy all four rule 60.02 factors, the district court did not abuse its discretion when it denied appellant's motion to vacate the default judgment and to grant a new trial. We therefore affirm the district court on this issue.

**III.**

Appellant's final argument is that the district court erred in imposing a $750 sanction on him because it did not have a substantive basis for the sanctions and did not follow the procedural guidelines of Minn. R. Civ. P. 11 and Minn. Stat. § 549.211 (2006). We review the issuance of a sanction for abuse of discretion. *Leonard v. Nw. Airlines, Inc.*, 605 N.W.2d 425, 432 (Minn. App. 2000), *review denied* (Minn. Apr. 18, 2000); *Cole v. Star Tribune*, 581 N.W.2d 364, 370 (Minn. App. 1998).

The district court did not indicate whether it was issuing the sanction under Minn. R. Civ. P. 11 or Minn. Stat. § 549.211. Accordingly, we will analyze the sanction under both the rule and the statute. A district court may impose sanctions if a party files a motion for an improper purpose, "such as to harass or to cause unnecessary delay or

needless increase in the cost of litigation." Minn. Stat. § 549.211, subds. 2-3; *see also* Minn. R. Civ. P. 11.02-.03 (stating the same rule). When ordering sanctions, the district court must follow the procedures set forth in Minn. Stat. § 549.211 and Minn. R. Civ. P. 11.03. A district court may only impose sanctions "after notice and a reasonable opportunity to respond" are provided to the party to be sanctioned. Minn. Stat. § 549.211, subd. 3; *see also* Minn. R. Civ. P. 11.03. When the district court orders sanctions "[o]n its own initiative, the court may enter an order describing the specific conduct . . . and directing an attorney, law firm, or party to show cause why it has not violated subdivision 2 with respect to that conduct." Minn. Stat. § 549.211, subd. 4(b); *see also* Minn. R. Civ. P. 11.03(a)(2).

The supreme court has discussed the minimal procedural requirements for sanctions. In *Uselman v. Uselman*, the supreme court stated that "the attorney or party must have fair notice of both the possibility of a sanction and the reason for its proposed imposition," and that "the attorney or party should be given an opportunity to respond to the notice of a possible Rule 11 sanction." 464 N.W.2d 130, 143–44 (Minn. 1990)[3]; *see also In re Rollins*, 738 N.W.2d 798, 804 (Minn. App. 2007) (reversing the district court's decision to impose sanctions on the ground that the district court did not follow the procedural guidelines).

[3] Although rule 11 was amended after *Uselman* was decided, the advisory comments to rule 11 state that "[c]ourts and practitioners should be guided by the *Uselman* decision." Minn. R. Civ. P. 11 (2000) advisory comm. cmts.

Here, the district court had a sufficient substantive basis to order the sanction. The district court's frustration with appellant is evident in its recitation of the procedural history of the case:

> On July 18th of 2007, this court issued an ex parte one-year order for protection on behalf of [respondent]. On August 1st of 2007, [appellant] telephoned the domestic abuse office and requested a hearing to contest that order for protection. We appeared in court on August 10th of 2007, and at that time, [appellant] made his request for an evidentiary hearing. The court issued an order that day, set the matter on for evidentiary hearing October 8th of 2007. October 8th of 2007, everyone appeared for the evidentiary hearing. [Respondent] was represented by counsel. [Appellant] did not appear for the evidentiary hearing. And, in fact, he had—in addition to the request for the evidentiary hearing, he had calendared a motion for that day. Having written it down incorrectly on the calendar is not excusable neglect. There will be no further hearings in this matter.
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> The court admonished [appellant] in October of 2005 that the court would not permit meritless actions on his part. Asking for a trial, calendaring a motion, not showing up, the court then issued an order. [Appellant] now brings the matter back to court yet again on something that has absolutely no merit.
>
> This is an abuse of legal process. I've warned you about that. The court will not be a party or complicit in your ongoing harassment of [respondent].

But the district court abused its discretion when it imposed a sanction without following the procedural guidelines. The district court imposed the sanction on its own initiative at the November 13, 2007 hearing.[4] Minn. Stat. § 549.211, subd. 4(b), and

[4] Although respondent indicated in her memorandum filed in response to appellant's motion to vacate and for a new trial that appellant had violated rule 11.02, this type of notice does not satisfy the requirements for party-initiated sanctions. Specifically, it does

Minn. R. Civ. P. 11.03(a)(2) require the district court to issue an order describing the conduct and directing an attorney or party to show cause why his conduct does not warrant a sanction. Here, the district court ordered the sanction after it found that appellant had not shown excusable neglect that could warrant vacation of the default judgment. Appellant was not given an opportunity to correct his sanctionable conduct or to explain why he should not be sanctioned.

The district court relied on the fact that it had warned appellant about the possibility of sanctions in October 2005. In October 2005, the district court held a hearing regarding an OFP that *appellant* had applied for against *respondent*.[5] At this hearing, the district court warned appellant about filing meritless claims and abusing the legal process. But this notice was specifically focused on ensuring that appellant brought witnesses to trial to support his claims. Even if the October 2005 hearing was sufficiently related to the present matter, the two-year delay between the October 2005 hearing and November 2007 hearing and the fact that appellant is pro se warranted a more specific notice of potential sanctions than the general admonition that the district court provided two years earlier. Because we conclude that the district court abused its discretion by imposing the $750 sanction on appellant without complying with Minn. Stat. § 549.211, subd. 4(b), or rule 11.03(a)(2), we reverse on this issue only.

**Affirmed in part and reversed in part.**

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not satisfy the 21-day-notice and separate-motion requirements when a party seeks to initiate sanctions against another party. *See* Minn. Stat. § 549.211, subd. 4(a); Minn. R. Civ. P. 11.03(a)(1).

[5] Appellant eventually dropped this OFP application.