STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1947

State of Minnesota,
by its Commissioner of Transportation, petitioner,
Respondent,

vs.

Franklin P. Kottschade, et al.,
Appellants,

Lori A. Denison, et al.,
Respondents Below.

Filed September 11, 2017
Affirmed
Bratvold, Judge

Olmsted County District Court
File No. 55-C4-03-001984

Lori Swanson, Attorney General, Stephen D. Melchionne, Jeffery S. Thompson, Assistant Attorneys General, St. Paul, Minnesota (for respondent)

Gary A. Van Cleve, Rob A. Stefonowicz, Bryan J. Huntington, Larkin Hoffman Daly & Lindgren, Ltd., Minneapolis, Minnesota (for appellants)

Considered and decided by Bratvold, Presiding Judge; Schellhas, Judge; and Jesson, Judge.

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

BRATVOLD, Judge

After a second jury trial in this condemnation action, appellant landowners argue the district court abused its discretion in (1) awarding simple rather than compound interest on the damages award, (2) declining to award attorney fees to appellants for the first trial, and (3) awarding one-fourth of appellants' claimed expert and appraisal fees for the second trial. Because the district court did not abuse its discretion, we affirm.

FACTS

Appellants Franklin and Bonnie Kottschade own a parcel of real property in Rochester, Minnesota (the property). As part of the Highway 52 improvement project, the respondent Minnesota Department of Transportation (MnDOT) installed an uncut curb across the west side of the property in 2001, physically closing two frontage-road driveways.

In August 2002, MnDOT's appraiser, Kevin Angel, interviewed Franklin Kottschade and later prepared a 30-page appraisal. Angel determined the loss of access decreased the property's value by $463,346. Franklin Kottschade later requested a copy of the Angel appraisal from MnDOT, which responded that no appraisal existed. MnDOT employees disagreed with the Angel appraisal, decided not to adopt his valuation, determined the damage to the property was "nominal," and sent a letter to the Kottschades offering $1,000 to settle their potential claim. The letter also stated, "[a] complete appraisal has not been made on this parcel as the effect of the access acquisition is relatively minor." The Kottschades declined MnDOT's offer.

About the same time, MnDOT brought a condemnation action and the Kottschades filed a mandamus action. In February 2006, the parties litigated valuation before the court-appointed commissioners, who determined damages were $648,000. The Kottschades and MnDOT appealed to the district court.

During the first jury trial in March 2009, the Kottschades presented an appraiser's testimony that the property's value had depreciated by $1.725 million as a result of the lost access. The Kottschades also introduced the commissioners' award as evidence of their damages. MnDOT offered testimony by a different appraiser, who opined that damages were $240,000. The jury determined the Kottschades were entitled to $339,960. After the trial, the district court granted the Kottschades' request for compound interest on the damages award and awarded expert witness fees, but denied their request for attorney fees under the Minnesota Equal Access to Justice Act (MEAJA). *See* Minn. Stat. § 15.472 (2016).

Throughout the proceedings leading to and including the first jury trial, no discovery request had resulted in disclosure of the Angel appraisal and Angel did not testify. But MnDOT's post-trial submissions referenced the Angel appraisal, and the district court granted the Kottschades' motion to compel production of the Angel appraisal. The Kottschades then moved for a new trial, which the district court granted on the condition that the Angel appraisal be offered as evidence in the second trial.

During the second jury trial in March 2016, the Kottschades introduced the following evidence of damages: (1) the commissioners' $648,000 award; (2) expert testimony and appraisal that damages were $1.925 million; and (3) Angel's testimony and

appraisal that damages were $463,346. MnDOT presented expert testimony and an appraisal that damages were $300,000. The jury determined the Kottschades were entitled to $650,000.

After the second trial, the Kottschades again requested compound interest on the damages award, attorney fees, and costs. The district court determined just compensation required, first, "[a]pplication of the statutory interest rate to the damages award," and, second, compound interest on the damages award from 2003 to 2008. But the district court also found "from 2009 to present, the presumptively reasonable statutory simple interest is sufficient and fair." Additionally, the district court awarded attorney fees of $41,750.70, which were incurred by the Kottschades in "compelling the State to disclose the [Angel] appraisal, moving for a [new] trial, and defending against the State's motion to reconsider." Finally, the district court awarded Angel's expert witness fee and one-fourth of the fees charged by the Kottschades' other expert witnesses. The Kottschades appeal.

D E C I S I O N

I. The district court did not abuse its discretion when it awarded simple interest from 2009 to 2016.

Minnesota courts have "long recognized that interest on a condemnation award from the time of the taking of possession until the time of payment is an element of just compensation." *State by Spannaus v. Carney*, 309 N.W.2d 775, 776 (Minn. 1981) (citing *Warren v. First Div. of the St. Paul & Pac. R.R.*, 21 Minn. 424 (1875)). Minnesota statute provides that interest on a condemnation award shall be determined under Minn. Stat. § 549.09 (2016), the "interest-on-verdict" statute. Minn. Stat. § 117.195, subd. 1 (2016).

Section 549.09 provides how the rate is determined and states that interest shall be "computed as simple interest per annum" for awards against the state or a political subdivision of the state. Minn. Stat. § 549.09, subds. 1(a), 1(c)(1)(i) (2016). But whether an interest award constitutes just compensation "is a judicial function," and therefore courts need not strictly apply the statute, but should instead determine whether a proposed interest award provides just compensation. *State by Humphrey v. Baillon Co.*, 480 N.W.2d 673, 676 (Minn. App. 1992), *review denied* (Minn. Mar. 26, 1992); *see also Carney*, 309 N.W.2d at 776 (holding that the applicable rate of interest for a condemnation award is "a judicial decision").

To avoid being awarded simple interest at the statutory rate, a landowner must rebut the presumption that the statutory rate is reasonable and affirmatively show that a different rate or compound interest "is reasonable and affords just compensation." *State by Humphrey v. Jim Lupient Oldsmobile Co.*, 509 N.W.2d 361, 364 (Minn. 1993). Accordingly, "[i]f reasonable and prudent investments would have allowed [the landowner] to earn compound interest," then the court should award compound interest. *State by Humphrey v. Briggs*, 488 N.W.2d 811, 816 (Minn. App. 1992), *review denied* (Minn. Sept. 15, 1992).

Whether an interest award affords a landowner just compensation is a mixed question of law and fact. *See id.* at 365 (Simonett, J., concurring specially) ("The proper interest rate in a particular case is a mixed question of law and fact with significant constitutional implications."). When reviewing mixed questions, we "correct erroneous applications of law, but accord the [district] court discretion in its ultimate conclusions and

review such conclusions under an abuse of discretion standard." *Porch v. Gen. Motors Acceptance Corp.*, 642 N.W.2d 473, 477 (Minn. App. 2002) (alteration in original) (quotation omitted), *review denied* (Minn. June 26, 2002).

On appeal, the Kottschades do not challenge application of the statutory interest rate, but rather, contest the district court's decision to award simple interest as just compensation for the 2009 to 2016 period. While the Kottschades could have invested the award and earned compound interest, the district court found the Kottschades had provided no evidence that they could have invested the award and earned compound interest *at the statutory rate*. The district court commented, "the available interest rates decreased [after 2008] and have remained lower than the statutory rate since 2009."

The Kottschades claim the district court abused its discretion and point to an unpublished opinion in which we affirmed a condemnation award that included compound interest. But unpublished cases are not precedential. Minn. Stat. § 480A.08, subd. 3 (2016); *Gen. Cas. Co. of Wis. v. Wozniak Travel, Inc.*, 762 N.W.2d 572, 575 n.2 (Minn. 2009). Moreover, this argument fails to account for the deferential standard of review—even if the evidence in two cases is identical, reasonable fact-finders may disagree on the outcome in fact-based disputes. *See generally State v. Blom*, 682 N.W.2d 578, 613 (Minn. 2004) (concluding that a district court did not abuse its discretion when it admitted evidence that "another district court, in the proper exercise of its discretion, may have excluded"). Additionally, we agree with the district court that the Kottschades failed to offer evidence of a fund in which their damages award, had it been invested, would have yielded

compound interest at the statutory rate.[1] Based on this record, we conclude the district court did not abuse its discretion in awarding simple statutory interest from 2009 to 2016.

II. The district court did not abuse its discretion in denying an attorney fees award for the first trial.

Under the MEAJA, if a prevailing party in a non-tort civil action "brought by or against the state, shows that the position of the state was not substantially justified, the court or administrative law judge shall award fees and other expenses to the party unless special circumstances make an award unjust." Minn. Stat. § 15.472(a). The MEAJA is an exception to the general rule that a party is not entitled to attorney fees and costs in actions against the state acting in its sovereign capacity. *Lund v. Comm'r of Pub. Safety*, 783 N.W.2d 142, 143 & n.1 (Minn. 2010). As a "limited waiver of sovereign immunity," the MEAJA must be strictly construed; the party seeking fees has the burden of proving that (a) it prevailed; and, (b) the government's position was not substantially justified. *Donovan Contracting of St. Cloud, Inc. v. Minn. Dep't of Transp.*, 469 N.W.2d 718, 720-21 (Minn. App. 1991), *review denied* (Minn. Aug. 2, 1991).

We review a district court's award of attorney fees under the MEAJA for abuse of discretion. *Id.* at 720. Here, the district court granted in part the Kottschades' motion for

[1] The Kottschades offered evidence of the investment pools utilized by the Public Employee Retirement Association, which the district court rejected as "wildly fluctuating returns" and not "very low-risk" investments, and therefore, not appropriate to calculate pre-award interest. *See Jim Lupient Oldsmobile*, 509 N.W.2d at 363 (holding the reasonable rate of interest is "what a reasonable and prudent investor would earn while investing so as to maximize the rate of return over the relevant period of time, yet guarantee safety of principal"). The Kottschades offered no other evidence that they could have received compound interest at a rate higher than the statutory rate.

attorney fees under the MEAJA, awarding the fees related to production of the Angel appraisal and to the motion for a new trial, $41,750.70. The Kottschades argue the district court should have also awarded attorney fees for the first trial.

The district court determined the Kottschades were a "*partial* prevailing party" who "unequivocally prevailed" in their motions to compel production of the Angel appraisal and for a new trial.[2] It also found MnDOT's position related to the Angel appraisal—that it was not a "complete" evaluation because it had not been approved by MnDOT—was not substantially justified. In denying the Kottschades' request for attorney fees for the first trial, the district court also determined that MnDOT's position on damages was substantially justified because it relied on an expert appraisal.

Implicit in the district court's prevailing-party analysis is the assumption that "a prevailing party" may be determined for a portion of the proceeding and does not require an analysis of the entire proceeding. The MEAJA does not appear to contemplate parsing litigation into discrete segments; rather, it requires an assessment of whether a party prevailed. But the parties do not dispute this aspect of the district court's order and therefore we do not consider it.

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[2] MnDOT contends an alternative ground on which to affirm the district court's decision is that the Kottschades are not a "party" under the MEAJA. The MEAJA defines "party" to mean corporate entities and unincorporated businesses. Minn. Stat. § 15.471, subd. 6(a) (2016). Individual persons are not within the definition. *McMains v. Comm'r of Pub. Safety*, 409 N.W.2d 911, 914-15 (Minn. App. 1987). But the definition includes "a partner, officer, shareholder, member, or owner" of an included entity. Minn. Stat. § 15.471, subd. 6(b).The district court found the Kottschades "own this commercial property as part of their real estate development business," and therefore qualify as a party. MnDOT cites no evidence suggesting the district court's factual finding was erroneous. Accordingly, the district court did not err in concluding that the Kottschades are a party under the MEAJA.

First, we review whether the district court erred when it determined the Kottschades partially prevailed. The Kottschades contend they were the prevailing party in the litigation that led to the second trial, including the first trial, because they prevailed on the motion for a new trial. MnDOT responds the Kottschades during the first trial "did not prevail on the merits of the central issue of just compensation."

The MEAJA does not define "prevailing party," and the district court generally has discretion to determine whether a party prevails. Minn. Stat. §§ 15.471-.472; *Kusniryk v. Arrowhead Reg'l Corr. Bd.*, 413 N.W.2d 182, 184 (Minn. App. 1987). Although Minnesota courts have not adopted a standard for ascertaining whether a party has prevailed, we have decided not to apply the federal standard, which states a party prevails when it "obtains a final judgment . . . the amount of which is at least as close to the highest valuation [offered by] the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government." *Baillon*, 503 N.W.2d at 804 (quotation omitted).

In *Baillon*, we held a landowner was not a prevailing party on a condemnation appeal where a jury awarded over 10% less than the commissioners' award. *Id.* at 801, 804. Similarly, the Kottschades during the first trial obtained an award significantly lower than the commissioners' award they appealed; the first jury awarded slightly more than 50% of what the commissioners had awarded. But, as the district court noted, the Kottschades "were ultimately successful in defending against the State's efforts on appeal to *reduce* damages below the level [of] the commissioners' award." The district court did not abuse its discretion in determining that the Kottschades partially prevailed.

Second, we review the district court's determination that MnDOT's position on damages during the first trial was substantially justified. Because the district court found MnDOT's position on production of the Angel appraisal was not substantially justified, the Kottschades contend that MnDOT's position on the Angel appraisal "intractably tainted" the first trial. We disagree. Damages was the central issue in the entire litigation, and "'[s]ubstantially justified' means that the state's position had a reasonable basis in law and fact." Minn. Stat. § 15.471, subd. 8 (2016). The record supports the district court's determination that MnDOT had reasonable evidence in support of its position on damages. Thus, we conclude that the district court did not abuse its discretion in denying attorney fees for the first trial.[3]

III. The district court did not abuse its discretion when it awarded expert witness fees.

After a verdict is entered in an eminent domain proceeding, the district court "may, in its discretion . . . allow as taxable costs reasonable expert witness and appraisal fees of the owner." Minn. Stat. § 117.175, subd. 2 (2016). Section 117.175 provides "reimbursement only for those out-of-pocket expenses of landowners directly incident to proof of the measure of compensation or in preparation for the actual taking of the property." *City of Maplewood v. Kavanagh*, 333 N.W.2d 857, 860 n.8 (Minn. 1983). We review an award of expert witness fees for abuse of discretion. *In re Minneapolis Cmty.*

[3] We do not consider MnDOT's argument that the Kottschades unreasonably prolonged the pendency of these proceedings and that this provides an alternate basis for affirming the district court's decision to deny attorney fees for the first trial.

Dev. Agency, 447 N.W.2d 891, 895 (Minn. App. 1989), *review denied* (Minn. Jan. 12, 1990).

The district court awarded the Kottschades all expert fees related to the Angel appraisal and related testimony because this evidence was new during the second trial. The court, however, awarded only one-fourth of the requested fees for the Kottschades' other experts who had testified during the first trial, determining that such an amount was "reasonable" because "this was a re-trial, presenting the same issue as was litigated in 2009," for which fees had already been awarded. The district court determined the requested fees were too high for a second trial on the same issues because the experts billed for "a complete workup from scratch," and repeating this work was unreasonable. We conclude the district court acted within its discretion in awarding reasonable expert fees under section 117.175, subdivision 2.

Alternatively, the Kottschades argue they were entitled to all requested expert witness fees under Minn. Stat. § 549.04, subd. 1 (2016), which provides an award of "reasonable disbursements paid or incurred" in "every action in a district court." MnDOT responds that section 549.04 does not apply, citing Minn. Stat. § 645.27. Without deciding whether section 549.04 applies, we note that it limits potential awards to "reasonable" disbursements. *See* Minn. Stat. §§ 117.175, subd. 2, 549.04, subd. 1. Although the district court did not expressly consider section 549.04, it did determine which expert fees were reasonable. For the reasons already articulated, we reject the Kottschades' alternative argument under section 549.04.

Affirmed.