STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0650

Kyle Wendell Else,
Appellant,

vs.

Auto-Owners Insurance Company,
Respondent.

Filed January 27, 2020
Affirmed in part and remanded
Cochran, Judge

Blue Earth County District Court
File No. 07-CV-17-460

Jacob M. Birkholz, Michelle K. Olsen, Birkholz & Associates, LLC, Mankato, Minnesota (for appellant)

Brock P. Alton, Timothy P. Tobin, Gislason & Hunter LLP, Minneapolis, Minnesota (for respondent)

Considered and decided by Reilly, Presiding Judge; Bjorkman, Judge; and Cochran, Judge.

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

COCHRAN, Judge

In this insurance-coverage dispute regarding fire damage to appellant-insured Kyle Wendell Else's dwelling and personal property, Else appeals following a jury trial and the district court's denial of his motion for a new trial. Else argues that the district

court (1) erred as a matter of law in requiring expert testimony to prove that the dwelling was a total loss; (2) erred in granting judgment as a matter of law to respondent-insurer Auto-Owners Insurance Company (Auto-Owners) as to his claim for damages to the dwelling; (3) erred as a matter of law in determining that Auto-Owners did not admit, in its answer, that the dwelling was a total loss and in denying on that basis his motion for judgment as a matter of law; (4) abused its discretion in denying his motion for a new trial based on alleged irregularities in the proceedings that prejudiced him; (5) erred as a matter of law by offsetting the jury's award of personal property damages by amounts already paid; (6) abused its discretion by reducing his award of costs and disbursements; and (7) erred as a matter of law by failing to award prejudgment interest. We affirm in part and remand to the district court to make a determination regarding prejudgment interest.

FACTS

Kyle Wendell Else had an insurance policy with Auto-Owners effective from January 1, 2015, until July 18, 2015. The policy covered Else's dwelling and personal property. On February 11, 2015, there was a fire at Else's property that caused damage to Else's dwelling. A week later, on February 18, 2015, there was a second fire that destroyed a significant portion of the dwelling.[1] Fire investigators determined that the second fire was intentionally set. With some exceptions discussed in more detail below, Auto-Owners did not pay policy benefits that would have applied had the fires been accidental.

[1] The dwelling was never repaired or replaced, and in fact was destroyed in a third fire that Else admittedly set.

The state charged Else with arson. Else was ultimately acquitted of the criminal charge after a jury trial in November 2016. Despite the acquittal, Auto-Owners maintained its position that Else was involved with starting the fires and still refused to pay Else policy benefits.

In January 2017, Else served a summons and complaint on Auto-Owners. The complaint sought a declaratory judgment acknowledging that Else was entitled to coverage under the insurance policy. The complaint also alleged a claim of breach of contract based on Auto-Owners' failure to pay for covered losses under the policy, and a claim of breach of the implied covenant of good faith and fair dealing.

In anticipation of a June 2018 trial date, Auto-Owners filed a trial memorandum that, among other topics, asserted that Else had the burden to prove the nature and extent of his damages. The parties also each filed proposed special verdict forms which contemplated that the jury would determine the extent of damages. The jury trial was continued to September 2018.

At a pretrial hearing the week before the September trial, the issue of damages was raised as the parties discussed proposed jury instructions. Auto-Owners asserted that, even if the jury concluded that Else was not involved in starting the fires, Else would be unable to prove damages to the dwelling because he failed to disclose any expert witnesses to testify to the extent of the damages to the dwelling caused by either fire. Else's attorney responded that he did not believe any testimony as to the damages to the dwelling was necessary because, in his view, Auto-Owners had previously agreed that the second fire resulted in a total loss of the dwelling and as a result, Auto-Owners was required to pay the

full amount of the policy limit with respect to the dwelling. Else's attorney stated that he came to that understanding based on extrajudicial discussions that he previously had with Auto-Owners' attorney. But Else's attorney conceded that Auto-Owners had not stipulated to the fact that the fires resulted in a total loss. Else's attorney also represented that one of the witnesses on his witness list could testify to dwelling damages because the witness had expertise in fire restoration.

Later that week, Auto-Owners filed a "Memorandum of Law Regarding Plaintiff's Failure to Prove Damages." In the memorandum, Auto-Owners asserted that Else could prove damages under the policy in one of two ways: (1) prove that the dwelling was a total loss, or (2) prove the replacement cost of the property damaged by the fires. Auto-Owners asserted that both theories of damages required expert witness testimony. Auto-Owners also noted that, under the policy, Auto-Owners would only pay the replacement cost of damaged property once the residence had actually been repaired or replaced. If the property was not repaired or replaced, the insured could recover the "actual cash value" of the damaged property. The policy defined "actual cash value" as "the cost to replace damaged property with new property of similar quality and features reduced by the amount of depreciation[2] applicable to the damaged property immediately prior to the loss." (Emphasis omitted). The memorandum asserted that Else had not properly disclosed any expert witnesses as required by the Rules of Civil Procedure and the district court's scheduling order. The memorandum further asserted Auto-Owners' belief that Else might

[2] "Depreciation" is defined in the policy as "a decrease in value because of age, wear, obsolescence or market value."

attempt to introduce expert testimony despite the lack of expert disclosures. Auto-Owners requested that the district court preclude any expert testimony by Else's witnesses regarding damages based on Else's failure to make expert disclosures required under the Rules of Civil Procedure.

The district court held a hearing. Auto-Owners reiterated its position that Else should not be allowed to call any expert witnesses because no expert disclosures were made. Else explained his position that Auto-Owners' attorney "essentially conceded," but admittedly had "not legally conceded," the issue of total loss. The district court later issued a written order precluding Else's witnesses from providing expert testimony. The order also precluded Else himself from testifying to replacement cost less depreciation—the "actual cash value" as defined by the policy—because he was not qualified as an expert.

After trial began, the district court ruled that Auto-Owners was entitled to judgment as a matter of law on the issue of total loss because expert testimony was required to prove that the dwelling was a total loss. The district court, however, reconsidered its pretrial ruling that Else himself was precluded from testifying to replacement cost or depreciation, and indicated that Else was allowed to testify to the "repair [or] replacement value" of the property damaged by the fire. The district court also ruled that Else could give his opinion on depreciation and the "actual cash value" of the damaged property.

A significant amount of the evidence introduced at trial was dedicated to the issue of whether the fires were caused by, or at the direction of, Else with the intent to cause a loss. The jury ultimately found that they were not—a finding that is not contested on appeal.

The issues that Else contests on appeal relate to the evidence that Else submitted to prove damages resulting from the fires. Else presented evidence to support his claim for damages to his dwelling, for damages related to his personal property, and for additional living expenses caused by the necessity of living elsewhere after the fires. The policy includes coverage for each of these categories.

With regard to his dwelling, Else attempted to prove the "actual cash value" and replacement cost of his dwelling—alternative coverage amounts provided for under the insurance policy where there is no total loss. Photographs of the dwelling after the fires were admitted. The photographs showed that the dwelling was significantly damaged but not entirely destroyed. Else testified that the "value" of his house (including the first floor, second floor, basement, and breezeway) was $305,000. He testified that it would cost this same amount to replace the entire house. He also testified to the "value" and replacement cost of the patio, deck, and attached garage. Else did not provide an estimate of the cost to repair or replace only the fire-damaged portions of the dwelling. Nor did he provide any testimony as to depreciation.

Before the case was submitted to the jury, Auto-Owners moved for judgment as a matter of law on the issue of damages to the dwelling. Auto-Owners argued that the policy provided coverage only for the damaged portions of the dwelling and that Else failed to provide evidence that would support a jury's finding on that question. The district court agreed and granted the motion for a directed verdict as to the dwelling. The district court concluded that a reasonable jury could not make a finding as to the replacement cost or "actual cash value" of the damaged *portion* of the dwelling.

During trial, Else also presented evidence showing the extent of damage to his personal property from the fires. Two companies—ServiceMaster and Evans Garment Restoration—separately took items of personal property damaged in the first fire and restored them. Else testified that the value of the items restored by ServiceMaster was approximately $12,500 and that the value of the items restored by Evans Garment Restoration was $33,000. Else also testified that the items that these companies serviced were not adequately restored. After the second fire, a company called Enservio created a report that itemized the remaining items of personal property at Else's dwelling (which did not include the ServiceMaster or Evans Garment Restoration items) and estimated both the "actual cash value" and the replacement cost of the lost or damaged items. Else introduced the Enservio report and presented testimony from an Enservio representative regarding how the report was created. The special verdict question form asked the jury to determine the "actual cash value" and the replacement cost of the personal property damaged in both fires. The jury returned special verdict answers finding that the total "actual cash value" of the personal property lost or damaged during both fires was $122,713.19 and that the replacement cost of the property was $153,667.70.

Else also presented evidence of additional living expenses—defined in the policy as "the reasonable increase in [Else's] living expenses necessary to maintain [his] normal standard of living while [he] live[s] elsewhere." The jury determined that the reasonable amount of additional living expenses that Else incurred as a result of the fires was $10,988.32.

After trial, the parties filed several postverdict motions. Else filed a motion for judgment as a matter of law on the issue of damages for the dwelling—arguing for the first time that Auto-Owners conceded in its answer to the complaint that the fires resulted in a total loss of the dwelling and that Auto-Owners was bound by the admission. Else maintained that as a result, he was entitled to damages for the total loss of his dwelling. Else also sought a new trial under Minn. R. Civ. P. 59.01 on several bases. Auto-Owners filed a motion for a new trial, arguing that the district court erred by excluding evidence purportedly relevant to whether Else started the fires. The district court denied all postverdict motions.

Auto-Owners then filed proposed findings and a proposed order for judgment that reduced the amounts reflected in the jury's special verdict answers by amounts that Auto-Owners previously paid directly to Else, ServiceMaster, Evans Garment Restoration, and another company called ALE Solutions, Inc. Else opposed the offset, arguing that the jury's special verdict answers already reflected the payments. The district court's judgment offset the prior payments as Auto-Owners requested.

Else also requested prejudgment interest and certain costs and disbursements. The district court did not address the request for prejudgment interest. It awarded costs and disbursements to Else as the prevailing party, but reduced some of the costs sought as unreasonable.

Else appeals.

D E C I S I O N

Else asserts a number of errors by the district court. He contends that the district court erroneously granted judgment as a matter of law in Auto-Owners' favor on the issue of dwelling damages and also argues that the district court erred in failing to grant judgment as a matter of law in his favor on this same issue. He maintains that the district court erred in its evidentiary rulings and abused its discretion by failing to grant a motion for a new trial based on those errors. He asserts that the district court erred by offsetting the jury's special verdict answers by amounts that Auto-Owners previously paid to Else in relation to the fires. Else argues that the district court abused its discretion by reducing certain costs and disbursements that he sought after trial. Finally, Else contends that the district court erred by failing to include an award of prejudgment interest in its final judgment. We address each issue in turn.

I. The district court did not err by granting judgment as a matter of law in favor of Auto-Owners on the issue of damages to the dwelling.

As the plaintiff, Else had the burden of proving damages at trial. *N. State. Power Co. v. Fidelity and Cas. Co. of New York*, 523 N.W.2d 657, 664 (Minn. 1994). There were two measures of damage at issue in the trial. The first was "total loss"—a term defined by Minnesota case law which, if proved, would require Auto-Owners to pay the limit of the insurance policy. *See* Minn. Stat. § 65A.08, subd. 2(a) (2018). The second was the amount that would be owed under the insurance policy if the loss was not a total loss. The district court granted judgment as a matter of law on both measures and did not submit the issue to the jury. The district court concluded that expert testimony was required to prove total

loss, and that Else's failure to introduce expert testimony was fatal to his efforts to prove total loss. The district court also concluded that the evidence that Else submitted to prove the benefits owed under the policy relating to the dwelling was insufficient to support a finding on damages because the evidence could only prove the cost to replace the entire dwelling, which was not an appropriate measure of damages under the policy. Moreover, the district court concluded that Else's evidence failed to establish the cost to repair or replace the damaged property with "equivalent construction for equivalent use." We are not persuaded that the district court erred in granting judgment as a matter of law.

A. Total Loss

Else first argues that the district court erred in concluding that expert testimony was required to prove a claim of total loss to the dwelling and that Else presented insufficient evidence on the issue to submit it to the jury. Thus, he argues that the district court erred by granting judgment as a matter of law based on the lack of expert testimony. We conclude that expert testimony was required to prove total loss in this case and that judgment as a matter of law was appropriate.

If a party has been fully heard on an issue and there is "no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue," the district court may grant judgment as a matter of law against that party with respect to a claim. Minn. R. Civ. P. 50.01(a). Appellate courts review de novo a district court's decision regarding whether to grant judgment as a matter of law, viewing the evidence in a light most favorable to the non-moving party. *Overocker v. Solie*, 597 N.W.2d 579, 581 (Minn. App. 1999).

The legislature has enacted a standard fire insurance policy known as the "Minnesota standard fire insurance policy." Minn. Stat. § 65A.01 (2018). All fire insurance policies in Minnesota must conform to the specified coverages and provisions of the Minnesota standard fire insurance policy. *Id.*, subd. 1. The legislature has also provided that if a fire results in a total loss of a covered building, the insurer must pay "the whole amount mentioned in the policy." Minn. Stat. § 65A.08, subd. 2(a). The supreme court has defined "total loss":

> A building is not a total loss . . . unless it has been *so far destroyed by the fire that no substantial part or portion of it above ground remains in place capable of being safely utilized in restoring the building to the condition in which it was before the fire*. . . . There can be no total loss of a building so long as the remnant of the structure left standing above the ground is reasonably and safely adapted for use (without being taken down) as a basis upon which to restore the building to the condition in which it was immediately before the fire; and whether it is so adapted depends upon the question [of] whether a reasonably prudent owner of the building, uninsured, desiring such a structure as the one in question was before the fire, would, in proceeding to restore the building, utilize such standing remnant as such basis. If he would, then the loss is not total.

Auto-Owners Ins. Co. v. Second Chance Invs. LLC, 827 N.W.2d 766, 770 (Minn. 2013) (emphasis added) (quoting *Nw. Mut. Life Ins. Co. v. Rochester German Ins. Co.*, 88 N.W. 265, 267 (Minn. 1901)). "In applying this standard, we have said that it is necessary to adopt a standard of human conduct, and that is, what would a prudent person do under such circumstances?" *Id.* (quotation omitted).

The district court granted judgment as a matter of law on the issue of total loss in Auto-Owners' favor, concluding that Else did not prove total loss because he did not

introduce expert testimony to support a finding that the fires resulted in a total loss. Expert testimony is required when a matter is "outside the common knowledge of the jury." *Bauer v. Friedland*, 394 N.W.2d 549, 555 (Minn. App. 1986).

To determine whether the fires resulted in a total loss to Else's dwelling, the jury was required to determine both whether the still-standing portions of the dwelling could be "reasonably and safely adapted for use (without being taken down) as a basis upon which to restore the building to the condition in which it was immediately before the fire," and "whether a reasonably prudent owner of the building, uninsured, desiring such a structure as the one in question was before the fire, would, in proceeding to restore the building, utilize such standing remnant as such basis." *Second Chance Investments*, 827 N.W.2d at 770 (quoting *Nw. Mut. Life Ins. Co.*, 88 N.W. at 267).

Else argues that the district court erred by concluding that expert testimony was required to prove total loss, and asserts that he submitted sufficient evidence to prove total loss. He maintains that the photographs of the damage and his own testimony regarding the features of his home and his own estimated cost to replace the entire home were sufficient to establish total loss and preclude judgment as a matter of law. We are not persuaded on either point.

While there may be cases in which a jury can determine whether a fire resulted in a total loss without the assistance of expert testimony, perhaps because the damage is so extensive, we agree with the district court that this is not such a case. Photographs of Else's dwelling introduced at trial showed that significant portions of the house remained standing after the second fire. Whether or not the remaining portions of Else's dwelling could be

safely utilized to rebuild the structure is not within the "common knowledge of the jury" given the fire damage to the house. *Bauer*, 394 N.W.2d at 555. To determine this issue, the jury would need expertise in the structural integrity of buildings damaged by fire and expertise in fire restoration. In the absence of expert testimony, we conclude that judgment as a matter of law on the issue of total loss was appropriate because there was no legally sufficient evidentiary basis for a reasonable jury to find that the fires resulted in a total loss to Else's dwelling.

B. Benefits Owed Under the Policy

The second possible measure of damages in this case was the amount owed under the terms of the policy in absence of a total loss. Generally, the insurance policy provides that Auto-Owners must pay (1) the full cost to repair or replace the damaged property if the insured actually repairs or replaces the damaged property, and if not, (2) the "actual cash value" of the damaged property at the time of a covered loss. As noted above, "actual cash value" is defined in the policy to mean "the cost to replace damaged property with new property of similar quality and feature reduced by the amount of depreciation applicable to the damaged property immediately prior to the loss." (Emphasis omitted).

At the close of the evidence, the district court granted judgment as a matter of law on the issue of this measure of damages, concluding that Else failed to present evidence of the "actual cash value" or the replacement or repair cost of the damaged portions of the dwelling. The district court noted that Else had only presented evidence regarding the cost to replace the dwelling *entirely*, and not just the damaged parts of the dwelling. Because the evidence presented by Else could only prove the replacement cost of the entire dwelling

and there was no evidence regarding the "actual cash value" or replacement cost of the damaged parts of the dwelling, the district court granted judgment as a matter of law on the issue of damages with respect to Else's dwelling in Auto-Owners' favor.

Else argues that the district court's decision to grant judgment as a matter of law on this issue was erroneous because he presented testimony about the "value" of his house and the "value" of the garage, deck, and patio.[3] But, according to the evidence introduced at trial, Else's dwelling was significantly damaged but was not entirely destroyed. And, Else did not present any testimony on the total cost to replace or repair only the damaged portions of the dwelling. Nor did he present any testimony on depreciation. We agree with the district court's conclusion that given the evidence presented at trial, the jury would be unable to find the replacement cost or the "actual cash value" of the damaged portion of the dwelling without speculation. Even considering the evidence introduced at trial in the light most favorable to Else, we conclude that there is no legally sufficient evidentiary basis for a reasonable jury to find for Else on the issue of the damages to the dwelling because Else's testimony was insufficient to prove either the replacement cost or the "actual cash value" of the damaged portions of his dwelling.

[3] Relying on *Wilcox v. State Farm Fire & Cas. Co.*, 874 N.W.2d 780, 784 (Minn. 2016), and *Brooks Realty, Inc. v. Aetna Ins. Co.*, 149 N.W.2d 494, 500-01 (Minn. 1967), Else argues that the "broad evidence rule" adopted by the Minnesota Supreme Court to determine actual cash value of damaged property compels the conclusion that there was sufficient evidence to establish "actual cash value" in this case. But *Wilcox* made clear that "insurers have the option of identifying methods of calculating actual cash value . . . in the plain language of their policies." 874 N.W.2d at 785. Here, the policy at issue did define "actual cash value," and consequently, the contract definition of "actual cash value"—replacement cost less depreciation—controlled.

II. The district court did not err in denying Else's posttrial motion for judgment as a matter of law on the issue of total loss based on the theory that Auto-Owners admitted to a total loss in its answer to the complaint.

Else next argues that the district court erred in denying his post-trial motion for judgment as a matter of law on the issue of total loss. Else maintains that Auto-Owners made a legally binding admission in its answer to the complaint that the second fire resulted in a total loss. We are not persuaded.

"Once a matter is deemed admitted, it is established for purposes for the proceeding. Any effort to submit adverse evidence on the matter or to attempt to contradict an admitted fact would be irrelevant because the issue is no longer [in] dispute." *In re Welfare of J.W.*, 391 N.W.2d 791, 796 (Minn. 1986); *see also Sclawr v. City of St. Paul*, 156 N.W. 283, 284 (Minn. 1916) ("The defendant, having admitted the ultimate facts pleaded in the complaint, cannot insist that the plaintiff must either plead or prove the subsidiary matters which go to make up the ultimate facts."). But, "[a] statement is not conclusive as a judicial admission upon the party making it unless it is intentionally made as a waiver of the requirement that the other party submit proof on that point." *Kelmar Corp. v. Dist. Ct. of Fourth Judicial Dist., Hennepin Cty.*, 130 N.W.2d 228, 233 (Minn. 1964). And, "[a] party's extrajudicial admissions, absent an estoppel to deny their truth . . . are not conclusive against him and may be explained, limited, qualified and contradicted." *Aide v. Taylor*, 7 N.W.2d 757, 759-60 (Minn. 1943).

Else argues that Auto-Owners' answer to the complaint contained a binding admission to the issue of total loss. Else filed his complaint in January 2017, almost two years after the fires in question. Paragraph 35 of Else's complaint reads, "[b]ased on the

second fire, the home is a 'total loss' under the policy as the replacement cost exceeds the limits of the policy." In its answer, Auto-Owners stated that it "[a]dmits that the insured premises *currently* constitutes a 'total loss,' but otherwise denies the allegations contained in Paragraph 35 of such Complaint." (Emphasis added). Auto-Owners' answer did not admit that the second fire caused a total loss. Auto-Owners' answer only admitted that the dwelling was "currently"—i.e., two years after the second fire—a total loss, but denied any other allegation in the paragraph. Thus, Auto-Owners denied that the total loss was "[b]ased on the second fire" and that "the replacement cost exceeds the limits of the policy."

Else cites to several extrajudicial representations by Auto-Owners' attorney during this litigation to further support his argument that Auto-Owners is bound by an admission that the second fire resulted in a total loss to the dwelling. But these extrajudicial admissions "are not conclusive" and may be "explained, limited, qualified and contradicted." *Id.* at 759-60. And Auto-Owners reiterated its denial that the second fire resulted in a total loss in subsequent filings. For example, during discovery, Else requested that Auto-Owners admit that the second fire resulted in a total loss. Auto-Owners declined to make the admission. Based on the filings and pleadings in the record, we conclude that the district court did not err by denying Else's motion for judgment as a matter of law on this theory.[4]

[4] Because we conclude that Auto-Owners did not admit that the second fire resulted in a total loss of Else's dwelling, we do not reach Else's argument that the district court erred by concluding, alternatively, that the parties litigated total loss by consent under Minn. R. Civ. P. 15.02.

III. The district court did not err by excluding evidence of debris removal and "mileage" expenses incurred while Else was living elsewhere.

Else further contends that the district court erred by excluding (1) evidence that Else paid $9,000 to remove debris from his property after the fires, and (2) evidence regarding the mileage that Else incurred on his father's vehicle, which he borrowed while he lived elsewhere after the fires. Else sought to introduce the evidence to prove expenses covered by the policy. The policy provided that Auto-Owners would "pay reasonable necessary expenses [Else] incur[red] to remove debris of covered property following a loss caused by a peril [Auto-Owners] insure[d] against." The policy also provided that Auto-Owners would pay "the reasonable increase in [Else's] living expenses necessary to maintain [his] normal standard of living while [he] live[d] elsewhere" in the event that a covered loss made Else's residence uninhabitable. The district court excluded the evidence because Else did not remove the debris until late 2017, following a third fire that Else admittedly started. The district court excluded evidence of the mileage incurred on Else's father's vehicle because the claim was "vague"—in that it was unclear how the claim related to the insurance policy—and because the claim was based, in part, on a claim that Auto-Owners did not timely pay for damage to Else's vehicle under a different policy that covered the vehicles.

"Evidentiary rulings concerning materiality, foundation, remoteness, relevancy, or the cumulative nature of the evidence are within the [district] court's sound discretion and will only be reversed when that discretion has been clearly abused." *Johnson v. Washington County*, 518 N.W.2d 594, 601 (Minn. 1994) (quotation omitted).

Evidence is relevant if it "logically tends to prove or disprove a material fact in issue." *Boland v. Morrill*, 132 N.W.2d 711, 719 (Minn. 1965). "Damages which are remote and speculative cannot be recovered. There is no general test of remote and speculative damages, and such matters should usually be left to the judgment of the [district] court." *Jackson v. Reiling*, 249 N.W.2d 896, 897 (Minn. 1977) (citations omitted).

We discern no abuse of discretion in the district court's evidentiary rulings. Given that the debris removal occurred nearly two years after the 2015 fires at issue, and after a third fire not at issue, evidence of the debris removal does not appear to be relevant to the dispute over the 2015 fires. The district court's exclusion of evidence of the mileage incurred on Else's father's vehicle was also within its discretion. We agree with the district court that the claim for "mileage" or depreciation to Else's father's vehicle was not relevant to this insurance policy.

IV. The district court did not abuse its discretion in denying Else's motion for a new trial.

Else next argues that the district court abused its discretion by denying his motion for a new trial under Minn. R. Civ. P. 59.01. Else moved for a new trial based on an alleged irregularity in the procedure by which expert testimony was excluded and an alleged irregularity in the evidentiary rulings made at trial. The district court denied the motion.

A new trial may be granted based on "[i]rregularity in the proceedings of the court . . . whereby the moving party was deprived of a fair trial." Minn. R. Civ. P. 59.01(a). To obtain a new trial based on a procedural irregularity, the movant must demonstrate "(1) an irregularity occurred and (2) they were deprived a fair trial." *Boschee v. Duevel*,

530 N.W.2d 834, 840 (Minn. App. 1995), *review denied* (Minn. June 14, 1995). "An irregularity is a failure to adhere to a prescribed rule or method of procedure not amounting to an error in a ruling on a matter of law." *Id.* (quotation omitted). This court reviews the district court's decision on whether to grant a new trial for an abuse of discretion. *Id.*

Else argues that a new trial is warranted because the district court granted Auto-Owners' request to exclude expert testimony without requiring Auto-Owners to comply with Minn. R. Civ. P. 7.02. Rule 7.02 requires all motions made outside of a hearing or trial to be submitted in writing, and further requires written notice to the other party and a hearing before an order can issue. We need not decide whether the manner in which Auto-Owners sought the exclusion of expert testimony constituted an irregularity because Else failed to demonstrate that the alleged irregularity deprived him of a fair trial. Else makes no argument that the district court's substantive decision to exclude the expert testimony was erroneous,[5] or that the district court would have reached a different conclusion on the issue of expert testimony had the request complied with Rule 7.02. Thus, we conclude that any procedural irregularity relating to the exclusion of Else's expert testimony did not deprive Else of a fair trial and is therefore harmless error. *See Palladium Holdings, LLC v. Zuni Mortg. Loan Trust 2006—OA1*, 775 N.W.2d 168, 178 (Minn.

[5] At oral argument, Else claimed that he raised a direct challenge to the district court's decision to exclude expert testimony. But Else's appellate brief does not directly challenge the decision. At best, the issue is tangentially raised in connection to other challenges to district court decisions and is inadequately briefed. An issue that is inadequately briefed on appeal is waived. *See State Dep't. of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997).

App. 2009) ("An appealing party bears the burden of demonstrating both error and prejudice."), *review denied* (Minn. Jan. 27, 2010).

On appeal, Else also argues that the district court's evidentiary rulings concerning debris removal and mileage constitute irregularities warranting a new trial. But as discussed above, we discern no abuse of discretion in the district court's evidentiary rulings. Therefore, we also conclude that the district court did not abuse its discretion in denying the motion for a new trial on these grounds.

V. The district court did not err by deducting amounts that Auto-Owners previously paid to Else from the jury's special verdict answer.

Else next maintains that the district court erred by entering judgment that deducted amounts that Auto-Owners previously paid to, or on behalf of, Else from the jury's special verdict answers relating to personal property damaged in the fires and additional living expenses caused by the fires.

At trial, Else submitted proof of three distinct groups of personal property damaged by the fires: (1) items not properly restored after the first fire by ServiceMaster, (2) items not properly restored after the first fire by Evans Garment Restoration, and (3) items damaged or destroyed by the second fire. After the first fire, Auto-Owners paid ServiceMaster and Evans Garment Restoration to remove items of personal property from Else's dwelling to restore them. The items were eventually restored and returned to Else, but Else claimed at trial that the items were still damaged when they were returned to him. Else claimed that the ServiceMaster items that were damaged and not properly restored were worth approximately $12,500. He testified that the Evans Garment Restoration items

that were damaged and not properly restored were worth $33,000. After the second fire, a company called Enservio went to Else's dwelling and created an itemized list of items damaged or destroyed in the fire and estimated the replacement cost and "actual cash value" of all of the items. The report was introduced in its entirety and a representative from Enservio testified to the method of creating the report. The Enservio property is the third group of personal property. Else also introduced evidence to prove additional living expenses incurred as a result of the fires.

The special verdict questions asked the jury to determine the reasonable cost to repair or replace Else's personal property that was damaged in the fires. The special verdict form asked the jury to provide an "actual cash value" and a replacement cost value for the property. The jury found that the "actual cash value" of the personal property destroyed in both fires was $122,713.19 and that the replacement cost of the same was $153,667.70.

The district court ultimately entered a judgment that reduced the amounts reflected in the jury's special verdict by amounts that Auto-Owners had already paid to, or on behalf of, Else. As discussed above, Auto-Owners paid ServiceMaster and Evans Garment Restoration to have Else's property restored. Auto-Owners also paid Else a $10,000 advance following the first fire. And Auto-Owners paid a company called ALE Solutions Inc. in relation to additional living expenses incurred by Else. The total amount that Auto-Owners paid to or on behalf of Else was $23,287.85.

Else argues on appeal that the district court erred as a matter of law by reducing the special verdict by the amounts Auto-Owners previously paid. He asserts that the jury took

those payments into account in determining its answers to the special verdict questions and that no reduction is necessary. We conclude that the district court did not err.

To prevent double recovery, this court has endorsed the application of Restatement (Second) of Torts, 920A(1) (1979), which provides that "[a] payment made by a tortfeasor or by a person acting for him to a person whom he has injured is credited against his tort liability, as are payments made by another who is, or believes he is, subject to the same tort liability." *Leamington Co. v. Nonprofits' Ins. Ass'n*, 661 N.W.2d 674, 679 (Minn. App. 2003); *see also VanLandschoot v. Walsh*, 660 N.W.2d 152, 155 (Minn. App. 2003).

Here, the special verdict form clearly asked the jury to determine the "actual cash value" and replacement cost of all of the personal property damaged in the fires. Although evidence of Auto-Owners' payments to Else, ServiceMaster, and Evans Garment Restoration were introduced at trial, the special verdict instructions did not ask the jury to consider payments that Auto-Owners made to, or on behalf of, Else. A special verdict constitutes a conclusion of fact as established by the evidence. Minn. Stat. § 546.19 (2018). Because the special verdict questions unambiguously did not contemplate payments made by Auto-Owners, we cannot speculate that the jury's answers to the questions reflect the prior payments.[6] Consequently, it was appropriate for the district court to credit

[6] In his appellate brief, Else argues that the jury necessarily considered the payments in its special verdict answer because the sum of the amounts he claimed for the Evans Garment Restoration items, the "ServiceMaster bill," and the "Enservio bill," add up precisely to the deficiency between his total claim and the jury's special verdict answer. We do not find this argument persuasive because there is nothing in the record to support the existence of an "Enservio bill" for the amount claimed by Else. Thus, the figures Else uses to make this argument lack factual support in the record.

Auto-Owners for undisputed payments it made. We discern no grounds to reverse the district court on this basis.

VI. The district court did not abuse its discretion by reducing Else's claim for costs and disbursements without first conducting a hearing.

Else next argues that the district court erred by awarding only a portion of his claim for costs and disbursements without first holding a hearing. As the prevailing party, Else submitted a request for costs and disbursements incurred in bringing this lawsuit after the trial was complete. The costs sought included, among other items, the cost of service, expert witness travel expenses and fees, and the costs of reproducing trial exhibits. Without first conducting a hearing, the district court reduced or denied some of the costs that Else sought because it found that they were unreasonably expensive.

A prevailing party is entitled to "reasonable disbursements paid or incurred, including fees and mileage paid for service of process by the sheriff or by a private person." Minn. Stat. § 549.04, subd. 1 (2018); *see also* Minn. R. Civ. P. 54.04(a) ("Costs and disbursements shall be allowed as provided by law."). The district court must award costs and disbursements, but a determination of what costs and disbursements are reasonable "is left to the discretion of the [district] court." *Quade & Sons Refrigeration, Inc. v. Minn. Mining & Mfg. Co.*, 510 N.W.2d 256, 260 (Minn. App. 1994), *review denied* (Minn. Mar. 15, 1994). A district court abuses its discretion "when its decision is against logic and facts on the record." *Posey v. Fossen*, 707 N.W.2d 712, 714 (Minn. App. 2006). A district court also abuses its discretion if its decision is "arbitrary or unreasonable or without evidentiary support." *Smith v. Smith*, 163 N.W.2d 852, 856 (Minn. 1968).

It is often appropriate for the district court to conduct a hearing to allow the parties to present evidence supporting or opposing the prevailing party's application for costs or disbursements. *See Quade*, 510 N.W.2d at 260. But our supreme court has held that a hearing is not required if the district court's findings and conclusions are based on sufficient evidence in the record. *Buller v. A.O. Smith Harvestore Prods. Inc.*, 518 N.W.2d 537, 543 (Minn. 1994).

Here, the district court considered the supporting documentation that Else filed and determined that the costs were unreasonably expensive. Based on the finding that the costs were unreasonably expensive, the district court reduced or excluded the unreasonably high costs and therefore reduced the overall costs and disbursements award. The district court's factual findings related to the costs and disbursements are supported in the record and the findings support the district court's determination that the costs were unreasonably high. Consequently, we conclude that the district court did not abuse its discretion in awarding Else only the reasonable amount of costs and disbursements sought.

VII. We remand to the district court to make a determination on the issue of prejudgment interest.

Finally, Else maintains that the district court erred by failing to award prejudgment interest under Minn. Stat. § 549.09 (2018), which he requested. Auto-Owners conceded to the district court and in its appellate brief that Else is entitled to prejudgment interest. But the district court did not address the request for prejudgment interest.

On appeal, the parties agree that Else is entitled to some prejudgment interest, but disagree over whether the district court may award prejudgment interest that exceeds the

liability limits of the insurance policy at issue. Because we agree with the parties that prejudgment interest is appropriate and that the district court appears to have overlooked the issue in entering judgment, we remand to the district court for a determination of the appropriate amount of prejudgment interest to award to Else. "[A]n undecided question is not usually amendable to appellate review." *Hoyt Inv. Co. v. Bloomington Commerce & Trade Ctr. Assocs.*, 418 N.W.2d 173, 175 (Minn. 1988). Consequently, we do not reach the parties' dispute over whether prejudgment interest may exceed the policy limits in this case.

Affirmed in part and remanded.