STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1611

Capacity Wireless, LLC,
Appellant,

vs.

Board of Regents of the University of Minnesota,
Respondent.

Filed July 11, 2022
Affirmed
Ross, Judge

Hennepin County District Court
File No. 27-CV-18-9683

Norman H. Pentelovitch, Arthur G. Boylan, Philip J. Kaplan, Anthony Ostlund Louwagie Dressen & Boylan P.A., Minneapolis, Minnesota (for appellant)

Timothy J. Pramas, Office of the General Counsel, University of Minnesota, Minneapolis, Minnesota; and

Peter C. Magnuson, Courtney N. Baga, Faegre Drinker Biddle & Reath LLP, Minneapolis, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Slieter, Judge.

SYLLABUS

1. A district court acts within its discretion by refusing to award a prevailing party its expert-witness fees under Minnesota Statutes section 549.04, subdivision 1 (2020), if the district court finds that the expert witness's opinion was unnecessary and that the costs therefore do not support a "just and reasonable" allowance under Minnesota Statutes section 357.25 (2020).

2. The presumption that parties share the cost of mediator services under Minnesota General Rule of Practice 114.11(b) does not prevent the defendant from recovering its share of that cost under Minnesota Rule of Civil Procedure 68.03(b).

OPINION

ROSS, Judge

This case involves a dispute between a university and a corporation with whom the university had intended to enter into a contract to build wireless telecommunications infrastructure to serve the university's wireless users. After Capacity Wireless LLC refused an $80,000 rule 68 offer to settle its alleged $28 million civil claims against the Board of Regents of the University of Minnesota, a jury found the university liable for only $52,300. Capacity appeals from the district court's award of only a fraction of its claimed prevailing-party costs, and it contests the district court order transferring to it the university's post-settlement-offer costs. Reviewing the challenges in light of the district court's broad discretion to determine what costs are reasonable and how best to allocate those costs between the parties under the controlling statutes and rules, we affirm the district court's costs-and-disbursements order.

FACTS

To enhance cellphone reception on campus, the Board of Regents of the University of Minnesota executed a memorandum of understanding with Capacity Wireless LLC, agreeing to negotiate a master licensing agreement to build a distributed antenna system (DAS) network. The arrangement would have cost the university nothing, afforded Capacity a substantial income opportunity by its exclusive right to contract for services

with the wireless carriers providing coverage, and provided the university improved coverage for wireless users on its campus. But the parties never entered into a master licensing agreement. The university instead negotiated directly with cellphone carriers to use a temporary network for improved coverage. This arrangement netted the university $52,300 in revenue.

Capacity sued the university in a February 2018 civil complaint, alleging breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment. It claimed that the university violated its exclusive-negotiation and contract rights with carriers, which, according to the complaint, would have afforded Capacity decades of substantial income. The district court issued an order for partial summary judgment, dismissing Capacity's claim for unjust enrichment and limiting some of Capacity's claims for certain damages.

In June 2019 the university offered Capacity $80,000 to settle the suit, invoking rule 68 of the Minnesota Rules of Civil Procedure. Capacity rejected the university's offer and took the case to trial where Capacity's attorney asked the jury to award it $28 million, mostly arising from profits that it allegedly lost from its opportunity to license the completed DAS network to carriers. The jury found the university liable for breaching the memorandum of understanding and the implied covenant of good faith and fair dealing, but it awarded Capacity only $52,300 in damages. In a prior appeal, we affirmed the district court's $52,300 judgment, rejecting Capacity's arguments against the district court's grant of partial summary judgment and its evidentiary and jury-instruction decisions. *Capacity*

Wireless, LLC v. Bd. of Regents, No. A20-1266, 2021 WL 2201498, at *3, *8 (Minn. App. June 1, 2021), *rev. denied* (Minn. Aug. 24, 2021).

Pending our decision in the prior appeal, the parties submitted competing applications for costs and disbursements to the district court, mostly for their expert-witness fees. The university sought $128,609 in costs incurred after its rule 68 offer, while Capacity sought $179,040 in prevailing-party costs incurred before the offer. The district court granted most of the university's costs but denied most of Capacity's. It entered an amended judgment that included its costs-and-disbursements awards.

Capacity again appeals.

ISSUES

I. Did the district court erroneously award Capacity only $12,672 of its claimed costs and disbursements?

II. Did the district court erroneously award the university $126,409 in costs and disbursements?

ANALYSIS

Capacity challenges aspects of the district court's costs-and-disbursements order, which awarded Capacity only $12,672 of its prevailing-party costs under Minnesota Statutes section 549.04 (2020) while awarding the university $126,409 of its post-settlement-offer costs under rule 68. We review these awards for an abuse of discretion. *Staffing Specifix, Inc. v. TempWorks Mgmt. Servs., Inc.*, 896 N.W.2d 115, 127 (Minn. App. 2017), *aff'd on other grounds*, 913 N.W.2d 687 (Minn. 2018). For the following reasons, we hold that the district court did not abuse its discretion.

I

We are not persuaded by Capacity's arguments challenging the district court's order granting it $12,672 in prevailing-party costs out of its requested $179,040. The prevailing party in a district court action is entitled to its "reasonable disbursements paid or incurred." Minn. Stat. § 549.04, subd. 1. The district court found Capacity to be the prevailing party. Capacity argues that the district court improperly disallowed its request to recover its expert fees and some deposition costs, and it contends that the district court improperly considered the university's untimely objections to those costs. We address each argument in turn.

Capacity's Expert-Witness Fees

The largest share of Capacity's challenge is the district court's refusal to award it $164,542 in expert-witness costs. Capacity retained three experts. William Bayne, an industry expert, testified about "the starts and stops and how we've gotten to this point, basically" and the value of the exclusive-rights opportunity under the anticipated agreement with the university. Kenneth Martin, an Altman Vilandrie & Company consultant, testified that he valued that opportunity at $28 million. Capacity's third expert, John Beck, did not testify at trial because he had opined only about the value of Capacity's out-of-pocket losses, which were no longer at issue after the district court's summary-judgment decision disposed of the claim. The district court refused to award Capacity any costs covering these experts. It implicitly found that their contributions were unnecessary to Capacity's case and expressly found that the jury had rejected the opinions offered during trial, and it concluded that it would not be just or reasonable to shift the cost to the university. Capacity asks us to reverse based on two theories.

Capacity asserts first that the controlling statute prohibits the district court from considering whether the jury adopted the prevailing party's experts' opinions. Capacity focuses on the mandatory "shall" directive in the statute, which states that "the prevailing party . . . shall be allowed reasonable disbursements paid or incurred." Minn. Stat. § 549.04, subd. 1. Capacity maintains that this directive afforded the district court no discretion to deny its request, contending that the prevailing party must recover its reasonable costs "incurred in connection with *all* issues, even those on which it did not prevail." We believe that Capacity mistakenly reads the statute's "shall" requirement without taking proper account of its discretionary "reasonable" qualifier. Capacity's argument likewise overlooks the expert-witness allowance limit included in Minnesota Statutes section 357.25 (2020), which permits a district court to "allow [expert-witness] fees or compensation as may be just and reasonable." We observe that, under either statute, the district court lacks discretion to award fees that are unreasonable. And we see no conflict between sections 549.04 and 357.25, but even if we did, we would follow the legislature's urging for us to construe the provisions to give effect to both. *See* Minn. Stat. § 645.26 (2020) ("When a general provision in a law is in conflict with a special provision in the same or another law, the two shall be construed, if possible, so that effect may be given to both."). And if we could not do that on the notion that the two are irreconcilable, we would then apply the specific provision for expert fees in section 357.25 rather than the general provision for costs in section 549.04. *Id.* (encouraging interpreting irreconcilable statutes so that "the special provision shall prevail and shall be construed as an exception

to the general provision"). But we are satisfied that the statutes are not conflicting and that the district court's decision comports with both.

The district court essentially reasoned that, because Capacity's three experts were neither necessary for nor contributed to the fraction of the case for which Capacity earned prevailing-party status, the disbursements were not reasonable under section 549.04, and it would not be "just and reasonable" to transfer the costs onto the university under section 357.25. Capacity does not persuasively argue that the fees were reasonably incurred, but even if it did, still we see no error in the district court's reasoning. The additional term, "just," informs us that a district court cannot pass expert-witness costs onto the party that was not designated as "prevailing" unless doing so is fair and equitable under the circumstances. *Cf. County of Dakota v. Cameron*, 812 N.W.2d 851, 864 (Minn. App. 2012) (recognizing that the word "just" in the Fifth Amendment "evokes ideas of fairness and equity" (quotations omitted)), *aff'd*, 839 N.W.2d 700 (Minn. 2013). And here, the district court applied this restriction by determining that it would be unfair to shift the cost of the nominally prevailing party's fruitless expert witnesses onto the party that succeeded fully against the theory proffered by those experts.

Capacity asserts second that the district court mistakenly found the expert witnesses to be unnecessary to its case, contending that the district court relied on the experts' opinions to deny in part the university's motion for summary judgment and that the jury relied on them to some degree to reach its verdict. The assertion is unavailing.

That the district court cited two of the expert opinions in partly denying the university's summary-judgment motion does not undermine its conclusion that the

opinions were irrelevant to the sliver of success Capacity achieved in the litigation. Because the district court may not weigh credibility at that early stage, even an apparently incredible expert opinion can shield a plaintiff's tissue-thin factual claims from a summary-judgment dismissal. This is because "[w]eighing the evidence and assessing credibility on summary judgment is error." *Hoyt Props., Inc. v. Prod. Res. Grp., L.L.C.*, 736 N.W.2d 313, 320 (Minn. 2007). It was Capacity's eventual nominally favorable verdict—one that afforded it less than one-fifth of one percent of the damages it sought—that led the district court to name it the prevailing party; avoiding summary judgment was not the basis of that designation. *Cf. Ernster v. Scheele*, 895 N.W.2d 262, 266 (Minn. App. 2017) ("The right to recover disbursements depends on the final result on the merits of the action, not on intermediate motions or preliminary proceedings." (quotation omitted)). The district court therefore acted within its discretion by focusing on the trial results, not the summary-judgment decision, recognizing that the jury rejected Capacity's expert opinions and awarded a judgment that Capacity could have obtained without any expert testimony.

The district court did not abuse its discretion by concluding that it would not be just and reasonable to allow Capacity to recover Altman Vilandrie & Company's $108,000 expert-witness fee arising from Martin's services. Martin testified that Capacity's losses should be measured by the substantial profit it expected from securing a master licensing agreement with the university. The district court recognized that the jury rejected that theory of damages entirely by assigning damages based on the amount the university received through its own arrangements with wireless carriers. Capacity does not persuasively explain how to otherwise interpret the jury's verdict.

The district court likewise did not abuse its discretion by concluding that it would not be just and reasonable to allow Capacity to recover Bayne's $30,187 expert-witness fee. Bayne also opined about the value of Capacity's opportunity. He testified that the value arose from Capacity's exclusive-negotiation right to engage wireless carriers and obtain profits from long-term sublicensing agreements. He also conceded, "[I]f you have no master license, you have nothing to sell." The district court reasonably inferred from the special verdict that the jury rejected Bayne's opinion by assigning no value to Capacity's lost opportunity and by awarding damages of only $52,300, the revenue the university received as licensing fees from wireless carriers. We recognize that Bayne's testimony arguably also touched on the university's liability, not just damages, but in full his opinion developed a theory supporting substantial damages that was plainly rejected by the jury.

The district court did not abuse its discretion by concluding that it would not be just and reasonable to allow Capacity to recover Beck's $26,355 expert-witness fee. The district court granted summary judgment on Capacity's claim for its out-of-pocket losses, holding, "Capacity did not incur any expenses in association with performing under the MOU." In that decision, which withstood our de novo review, we concluded that Beck's report failed to raise a genuine issue of material fact about whether Capacity had incurred any expenses. *Capacity Wireless*, 2021 WL 2201498, at *4. Capacity does not persuasively explain how to otherwise interpret the summary-judgment decision or call into doubt the district court's decision not to allow Capacity to recover Beck's fee.

In sum, Capacity paid $164,542 for expert witnesses in support of its unsuccessful theory for a $28 million judgment. None of the minimal damages awarded can be traced to

the experts' opinions. The district court did not abuse its discretion by declining to allow Capacity to recover the cost of expert testimony that was plainly unnecessary to the verdict.

Capacity's Deposition Costs

Capacity argues unconvincingly that the district court improperly awarded less than its full deposition costs. Capacity had requested $9,404 to cover its costs for seven depositions, providing six invoices related to those depositions but omitting the seventh. The district court recognized the discrepancy, observing, "The invoices submitted as Exhibit E reflect a total amount of $7,669.05 in deposition costs, not the $9,404.15 cited by Capacity." Capacity accurately argues that submitting invoices is not required to recover deposition costs as the prevailing party, citing *Staffing Specifix.*, 896 N.W.2d at 135, *aff'd*, 913 N.W.2d 687 (Minn. 2018). But the issue in *Staffing Specifix* differs from the issue we face today. In *Staffing Specifix*, we faced a statutory-interpretation question of whether the district court properly awarded a plaintiff's requested deposition costs despite the plaintiff's having failed to support the request with invoices and receipts. *Staffing Specifix*, 896 N.W.2d at 135. We affirmed the award because Minnesota Rule of Civil Procedure 54, which effectuates Minnesota Statutes section 549.04, "has no requirement that invoices and receipts be provided to support an application" for prevailing-party costs. *Id.* Here the statutory meaning is not in dispute, and Capacity contends only that the district court abused its discretion by relying on the amount requested in the submitted invoices rather than the amounts listed on Capacity's application for costs. Unlike the plaintiff in *Staffing Specifix*, Capacity did provide invoices in support of its application, and the district court therefore had to determine which of the two sources afforded the most accurate information

detailing the allowable costs. Although the district court could have relied on the data in Capacity's conflicting application, we cannot say that, when faced with the discrepancy, it acted outside its discretion by choosing instead to rely on Capacity's invoices.[1]

The University's Objections

Our decision that the district court acted within its discretion is unaffected by the untimeliness of the university's objections to Capacity's application for costs. The university's objections were due "[n]ot later than 7 days after service of the application." Minn. R. Civ. P. 54.04(c). The university filed its objections weeks after that deadline. Capacity argues that the district court improperly adopted those objections even though the district court expressly stated that it was not considering them, noting similarities between the untimely objections and the bases for the district court's order. Capacity offers nothing more than speculation from those similarities to support its accusation that the district court considered the objections when it said it did not, and it cites no authority supporting its view that the alleged infraction warrants reversal. Additionally, the argument fails to recognize that it was Capacity's burden to prove it is entitled to costs and disbursements, not the university's burden to disprove entitlement. *Romain v. Pebble Creek Partners*, 310 N.W.2d 118, 124 (Minn. 1981). And as we have discussed, the district court is bound to allow only reasonable disbursements and, conversely, to disallow any unreasonable disbursements, including any expert fees that would be unfair to transfer to the opposing party. These duties obligate the district court to make its own independent assessment of

[1] The six invoices total $7,699.05, not $7,669.05 as reflected in the district court's order. This appears to reflect a clerical error that was not raised for our review.

reasonableness. And given the significant qualitative and expansive quantitative difference between the damages Capacity sought and the damages the jury awarded, as well as the parties' sharply competing arguments about whether Capacity was really the prevailing party, we have no reason to doubt that the district court's disallowance of costs resulted from its independent view of the salient issues.

We affirm the district court's order determining Capacity's costs-and-disbursements allowance of $12,672.

II

We likewise see no abuse of discretion in the district court's awarding the university $126,409 in costs and disbursements under rule 68. The cost-shifting feature of rule 68 applies in cases like this one, where a plaintiff's verdict is less favorable than the defendant's settlement offer. Minn. R. Civ. P. 68.03(b)(1). The plaintiff's duty to pay under this provision is crafted in mandatory fashion, *id.* ("[t]he plaintiff-offeree must pay the defendant-offeror's costs and disbursements incurred in the defense of the action after service of the offer."), but it also affords the district court the discretion to "reduce the amount of the obligations to eliminate . . . undue hardship or inequity," Minn. R. Civ. P. 68.03(b)(3). Capacity does not assert any undue hardship, but it does argue that inequities require reversal. We will not reverse the district court's award unless it reflects an abuse of discretion. *Stinson v. Clark Equip. Co.*, 473 N.W.2d 333, 335 (Minn. App. 1991), *rev. denied* (Minn. Sept. 13, 1991). We address Capacity's several contentions for reversal.

The University's "Windfall"

Capacity maintains that the award is inequitable. It emphasizes that the university was not the prevailing party and asserts that the award confers a "windfall" on the university by leaving it in a more favorable position than before the trial. It also complains that "[i]t would be an inequitable result for the University to wind up better off than Capacity" because the award "eliminates the compensation Capacity was awarded by the jury." These arguments fail to appreciate the purpose of rule 68.03. The rule encourages defendants to make reasonable settlement offers and encourages plaintiffs to accept them. It is designed to ensure that "a plaintiff who rejects a Rule 68 offer [will] suffer[] dual adverse consequences: loss of the right to recover [its] costs and required payment of the defendant's costs" in the event the plaintiff persists in overestimating the merit or value of its claims. Minn. R. Civ. P. 68.03 2008 advisory comm. cmt. As one court summarized the similar federal rule, "The intent of Rule 68 is, of course, to encourage settlement by removing the incentive for the plaintiff to pursue a claim whose probable final outcome is not more than the defendant's offer." *Grosvenor v. Brienen*, 801 F.2d 944, 945 (7th Cir. 1986). A plaintiff's unsuccessful gamble against a settlement offer that the jury later confirms to have been reasonable does indeed lead to a windfall of sorts—a reimbursement to the defendant covering its cost of having to litigate a claim that turned out to be worth less than the offer that the plaintiff could have accepted to end the litigation entirely. Capacity gambled by rejecting an offer that, if accepted, would have left *it* rather than the university with the windfall: it would have gained more from the settlement than the jury later awarded it; it would have avoided incurring its own litigation costs; and it would have

avoided having to reimburse the university its costs. Considering the rule's purpose and the jury's assessment of Capacity's damages theory, we see no inequity in the district court's straightforward application of rule 68.

The University's Expert-Witness Fees

Capacity specifically contests the district court's decision to award nearly all the university's post-offer expert-witness fees. The university sought $97,008 for fees paid to two expert witnesses, and the district court awarded all but $2,199 of those costs. Capacity insists that the district court should have reduced the award under rule 68 because the award was not "just and reasonable" under Minnesota Statutes section 357.25, outlined above. Capacity urges that the amount of time the experts spent preparing for and attending the trial was excessive. As a general matter, the cost-to-risk ratio does not support Capacity's contentions. At a post-offer cost of less than $100,000, the university presented its two experts to convince the jury to reject Capacity's $28 million claims. Engaging expert witnesses at a cost of less than half of one percent of the amount of damages the university sought to avoid does not immediately suggest extravagance.

Capacity focuses on the services each expert provided. The university's two experts served to rebut each of Capacity's testifying experts. Roger Entner, the university's industry expert, rebutted Bayne's testimony and opined that Capacity could not reasonably expect to profit from the DAS network without a completed master license agreement. Accountant Joseph Kenyon rebutted Martin's $28 million damages estimate. Kenyon testified that the value of Capacity's exclusive rights could not rest on expected profits from sublicensing the network to carriers because, without the right to license the network,

those damages are too speculative. The district court determined that the jury agreed with the university's experts and disagreed with Capacity's, awarding Capacity $52,300 based on a measure of damages that none of the experts testified about. Although the jury verdict afforded Capacity a monetary award, the award was not the product of expert testimony and aligned mostly with the university's position. Capacity would have us second-guess the district court's assessment of the extent to which the university's experts' testimony influenced the jury's verdict. But we are in no position on appeal to second-guess the district court's front-row insight into the nuanced effect each expert witness had on the trial. Capacity has not convinced us that the district court's allowance for expert-witness fees constitutes an abuse of discretion.

The University's Motion Fees

Capacity asks us to reverse the district court's requirement that Capacity cover the university's costs arising from its post-offer motions. The university sought $525 in motion fees, and the district court granted $450 after eliminating a $75 fee for an unsuccessful motion in limine. We reject Capacity's contention that, because some of the motions succeeded only in part, the district court abused its discretion by allowing the cost. Even partly successful motions require a filing fee. Capacity has identified no inequity.

The University's Share of the Mediation Fee

Capacity also challenges the district court's order shifting to Capacity the university's share of the mediator's fee. The district court awarded the university $1,583.85 for its half of the parties' mediation fee, but Capacity asserts that Minnesota General Rule of Practice 114.11 and the parties' mediation agreement dictates that the university is

responsible for its half. For the following reasons, we reject the argument and conclude that, without an express waiver, rule 68 allows a party to recover the amount it incurred in mediation costs.

We recognize the seemingly competing nature of two rules. The Minnesota General Rules of Practice presume "that the parties shall split the costs of the ADR process on an equal basis." Minn. Gen. R. Prac. 114.11(b). And the parties here included this presumption in their mediation agreement, which states, "The fees and all other expenses will be paid equally by the parties, unless otherwise specified in writing." In contrast, civil procedure rule 68 includes the cost-shifting mechanism discussed above, requiring the district court in this case to order Capacity to pay the university's post-offer costs. We see no actual conflict between these rules. General practice rule 114.11 imposes a presumed cost on each party, while civil procedure rule 68 reallocates one party's incurred costs to the other. The parties' agreement includes no language to alter either the presumption or the reallocation. In it, the university agreed to be liable to pay half the mediator costs, an arrangement no different from the university agreeing to be liable for the cost of its experts, the deposition reporters, and any other vendors whose costs can be reallocated later by operation of rule 68. We do not suggest that parties cannot by agreement waive their cost-recovery rights under rule 68, but Capacity identifies no waiver in the agreement here.

The University's Other Pretrial and Trial Costs

Capacity challenges the district court's order granting the university assorted litigation expenses, including $1,398 for copying trial exhibits, $6,320 for preparing deposition designations, and $9,754 for data licensing, hosting, and storing. Capacity

argues that transferring these costs to it under rule 68 is inequitable and that the district court should have reduced them either because the university never explained why the costs were reasonable or because they were unnecessary to the university's trial presentation. We reject these cursory, conclusory contentions as undeveloped assertions lacking legal support or substantive argument. The costs relate to services that are not apparently unreasonable or inconsistent with normal trial preparation and presentation in a complex case. We see no abuse of discretion.

DECISION

The district court did not abuse its discretion by disallowing some of Capacity's prevailing-party costs under Minnesota Statutes section 549.04. The district court also did not abuse its discretion by awarding the university post-offer costs and disbursements under rule 68.03 of the Minnesota Rules of Civil Procedure.

Affirmed.