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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0729, A07-1578**

NeoNetworks, Inc.,
Appellant,

vs.

Mark U. Cree, et al.,
Respondents,

Cisco Systems, Inc.,
a California corporation,
Respondent,

John Does 1-50, et al.,
Defendants (A07-729).

**Filed May 20, 2008
Affirmed
Klaphake, Judge**

Hennepin County District Court
File No. 27-CV-02-005927

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Considered and decided by Klaphake, Presiding Judge; Wright, Judge; and Muehlberg, Judge.*

UNPUBLISHED OPINION

KLAPHAKE, Judge

Appellant NeoNetworks, Inc., sued respondents Mark U. Cree, W. Clinton Jurgens, and Cisco Systems, Inc., alleging multiple causes of action, including breaches of fiduciary duty, loyalty, and employment contracts, usurpation of corporate opportunity, and successor liability. The district court, hearing the matter without a jury, granted respondents' rule 41 motion for involuntary dismissal at the close of NeoNetworks' case and later awarded respondents \$650,998.06 in costs and disbursements. NeoNetworks appeals the district court's orders.

Because the district court's findings are not clearly erroneous, NeoNetworks failed to show as a matter of law that it was entitled to relief, and the district court did not abuse its discretion in the costs and disbursements award, we affirm.

FACTS

NeoNetworks was founded in 1996 to develop a high-speed Gigabit Ethernet IP router. An IP router takes packets of data from one point to another on an IP Ethernet network, rather like an electronic regional post office that receives an addressed envelope and forwards it for additional processing to a local post office. NeoNetworks had a complicated financial structure, with more than 250 shareholders and monthly

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

expenditures of between \$750,000 and \$1 million. In May 1999, NeoNetworks was functionally insolvent, but it obtained additional financing of \$4.95 million through notes issued to board members and 28 other individuals and institutions.

NeoNetworks laid off all of its employees, ceased functioning on December 10, 1999, and defaulted on all of its notes on or before their due date of December 31, 1999. All of NeoNetworks assets were transferred to pay off note holders. By the end, NeoNetworks had not yet fully developed or sold a product. In April 2000, the board of directors resigned, thus formally terminating the company. In February 2002, the board of directors was reconstituted for the purpose of pursuing this action.

NeoNetworks hired respondent Cree as Vice President of Marketing in 1997; his employment was terminated as of November 3, 1999. During his tenure, Cree entered into three contracts with NeoNetworks: (1) a non-compete agreement, signed five months after he began working; (2) an executive employment agreement, signed in February 1999; and (3) a consulting and separation agreement, signed on his last day of employment, November 3, 1999.

In summary, the non-compete agreement prevented Cree from competing with NeoNetworks for one year after termination of his employment, and the executive employment agreement required Cree to disclose and assign to NeoNetworks any discoveries, inventions, products, or designs developed by Cree during company time or using company equipment, facilities, or supplies, that related to NeoNetworks' business or research. The separation agreement released Cree from the non-compete agreement and terminated the executive employment agreement, but it required Cree to avoid

disclosure of confidential information, interference with NeoNetworks employees or business relationships, or making damaging remarks about the company.

NeoNetworks hired respondent Jurgens as a consultant in 1997 and offered him the job of Director of OEM sales, which he began in January 1998. Jurgens reported to Cree. He was promoted to Vice President of Business Development in July 1998, and was demoted in November 1998 to Product Manager. NeoNetworks terminated his employment on November 3, 1999.

Before he began work at NeoNetworks, Jurgens attempted to establish two businesses, both involving shared storage access. Jurgens showed his business plans to executives of NeoNetworks, who showed little interest.

Both Cree and Jurgens needed new jobs after their terminations on November 3, 1999. Jurgens mentioned to Cree the possibility of creating a start-up involving shared storage access on November 3. Cree interviewed for another job on November 4 and discovered that the company with which he interviewed was developing a shared storage product. Cree decided that Jurgens' plan might be viable, and the two began discussing the idea. They began working on the start-up concept on November 5, 1999, after their terminations by NeoNetworks, and their actions led to the founding of a new company, NuSpeed.

NeoNetworks presented evidence of alleged activity on the NuSpeed start-up that occurred during Cree's and Jurgens' employment. The district court considered, discussed, and discounted this evidence, concluding that Cree and Jurgens used no NeoNetworks ideas or protectable intellectual property in setting up NuSpeed and that

their work on NuSpeed began only after NeoNetworks terminated their employment. The court also found that NuSpeed's product, a storage router, was different from the high speed router under development at NeoNetworks and that NeoNetworks indicated no interest in developing a storage router.

NuSpeed was incorporated on November 18, 1999, and opened on January 3, 2000. NeoNetworks argued that the timing of NuSpeed's start-up showed that Cree and Jurgens necessarily spent time on NuSpeed during their employment, but the court discounted this allegation, noting that NuSpeed's business plan was very similar to the business plans drawn up by Jurgens before his employment at NeoNetworks.

NuSpeed originally planned to develop a product called the MTU Optimizer, which would improve the operation and efficiency of servers using remote storage devices. The district court found that this was unrelated to NeoNetworks' core technology and would have represented a radical departure from its business plan; NeoNetworks did not have the background, expertise, or financial capacity to efficiently convert to a storage router product.

NuSpeed's MTU Optimizer proved to be unviable, but shortly after NuSpeed opened for business, the computer industry adopted a new protocol, called iSCSI, which facilitated easier access to stored information. This protocol was not a new development, but NuSpeed recognized that it could be used to fill a gap in technology and developed an iSCSI device. The district court found that NuSpeed's iSCSI device was not related to, or was only tangentially related to, the MTU Optimizer. Cisco became interested in

NuSpeed because it was one of only a handful of companies that worked on the iSCSI technology. In 2000, Cisco purchased NuSpeed for \$450,000,000.

NeoNetworks brought suit against respondents in 2002, alleging multiple causes of action. The district court began a court trial on March 2, 2006, that continued through April 13, 2006, when NeoNetworks finished presentation of its case in chief. On April 14, 2006, respondents moved for involuntary dismissal pursuant to Minn. R. Civ. P. 41.02(b). After four days of argument on the motion, the district court granted involuntary dismissal in favor of respondents. The court issued its written findings on June 16, 2006.

Respondents submitted a request for costs and disbursements; the district court administrator entered an award of \$91,959.35. Respondents appealed this award and the district court granted respondents an additional \$559,028.71 in costs and disbursements on April 16, 2007. NeoNetworks appealed from both the judgment of dismissal and the award of costs; these two appeals were consolidated by this court.

D E C I S I O N

I. Standard of Review

Minn. R. Civ. P. 41.02(b) permits a defendant to move for involuntary dismissal at the close of the plaintiff's case without waiving the right to offer evidence if the motion is denied. In the case of a bench trial, rule 41.02(b)

permit[s] the trial judge to view plaintiff's evidence in the same light that the judge would view plaintiff's evidence if the defendant rested without submitting any additional proof. In these circumstances, the trial judge, as the finder of fact,

must determine credibility, draw factual inferences, and otherwise weigh the evidence.

1A David F. Herr & Roger S. Haydock, *Civil Rules Annotated* § 41.21 (4th ed. 2003).

“If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52.01.” Minn. R. Civ. P. 41.02(b). The district court’s findings of fact are reviewed for clear error, with deference given to the district court’s opportunity to judge the credibility of the witnesses. Minn. R. Civ. P. 52.01.

II. Breaches of Fiduciary Duty and Duty of Loyalty

NeoNetworks asserts that the district court erred by combining consideration of the breaches of fiduciary duty and duty of loyalty with usurpation of corporate opportunity. Fiduciary duty and the duty of loyalty are broader in concept and not coextensive with usurpation of corporate opportunity. *See, e.g., Triple Five of Minn., Inc. v. Simon*, 280 F. Supp. 2d 895, 902-06 (D. Minn. 2003) (discussing duties of disclosure, usurpation of partnership opportunities, and belligerent conduct as subsets of fiduciary duty), *aff’d in part and rev’d in part*, 404 F.3d 1088 (8th Cir. 2005). In that sense, the concept of fiduciary duty or the duty of loyalty can cover a multitude of behaviors, and the question of whether action breaches a particular duty is one of fact. *Triple Five of Minnesota, Inc. v. Simon II*, 404 F.3d 1088, 1095 (8th Cir. 2005).

Each of these torts can be distinct from one another, given certain facts. *See, e.g., Eaton Corp. v. Giere*, 971 F.2d 136, 141 (8th Cir. 1992) (concluding that breach of duty of loyalty occurred when employee appropriated trade secrets and confidential information); *Sanitary Farm Dairies, Inc. v. Wolf*, 261 Minn. 166, 176-77, 112 N.W.2d

42, 49 (1961) (concluding that employee engaged in unfair competition against former employer by soliciting customers for his new business before quitting employment). In this instance, all of the torts are predicated on the same facts: that Cree and Jurgens became aware of a corporate opportunity, which they failed to disclose or make available to NeoNetworks.

The district court found that respondents had not used confidential information, solicited NeoNetworks' customers, or engaged in other conduct typical of these torts; in its detailed findings, the court concluded that NeoNetworks relied solely on the same facts supporting its usurpation of corporate opportunity claim. The record evidence supports the district court's findings, which are not clearly erroneous. Thus the district court did not err by analyzing the three claims together.

III. Usurpation of Corporate Opportunity

NeoNetworks further argues that the district court improperly applied the principles of *Miller v. Miller*, 301 Minn. 207, 222 N.W.2d 71 (1974), the seminal case for analyzing usurpation of corporate opportunity.¹ *Miller* sets out a two-part test for establishing a prima facie case of usurpation of corporate opportunity. *Id.* at 224, 222 N.W.2d at 81. First, the new business opportunity must be “so closely related to the

¹ NeoNetworks contends that the district court improperly used patent law principles to analyze the tort of usurpation of corporate opportunity, based on the court's oral pronouncement from the bench that it intended to grant respondents' rule 41 motion. When a district court makes a judgment on the merits under Minn. R. Civ. P. 41.02, it must make written findings. *Poured Concrete Foundations, Inc. v. Andron, Inc.*, 507 N.W.2d 888, 891 (Minn. App. 1993). If the court makes written findings, its initial oral findings are considered preliminary and nonbinding. *Larson v. Hill's Htg. & Refrig. of Bemidji*, 400 N.W.2d 777, 782 (Minn. App. 1987), *review denied* (Minn. Apr. 17, 1987).

existing or prospective activity of the corporation” that it constitutes a corporate opportunity. *Id.* at 225, 222 N.W.2d at 81. If the business opportunity is a corporate opportunity, the party acquiring the opportunity must have violated the duties of loyalty, good faith, and fair dealing toward the corporation. *Id.* at 226, 222 N.W.2d at 81.

To determine that a business opportunity is a corporate opportunity, the fact finder must consider the following: (1) whether the opportunity was one in which the corporation had an interest or expectancy growing out of a contractual right; (2) whether the opportunity was related to the corporation’s current business purposes and activities; (3) whether the opportunity represented an area of logical and natural expansion for the corporation; (4) whether the opportunity raised the specter of unfair or prospectively harmful competition; (5) whether the corporation had the financial ability and resources to acquire or implement the opportunity; and (6) whether the opportunity included activities within the fundamental knowledge, experience, facilities, personnel, equipment, and abilities of the corporation. *Id.* at 225, 222 N.W.2d at 81. When it is undisputed that a business opportunity has no “logical or reasonable relation to the existing or prospective business activities of the corporation or . . . it lacks either the financial or fundamental practical or technical ability to pursue it, then such opportunity would have to be found to be noncorporate as a matter of law.” *Id.* If the facts are disputed, this becomes a question of fact, and the party asserting usurpation of corporate opportunity bears the burden of proof. *Id.*

The district court, sitting as fact finder in considering the rule 41 motion, carefully and thoroughly analyzed all the *Miller* factors, concluding that neither NuSpeed nor its

storage router was a corporate opportunity for NeoNetworks. Specifically, the court found that (1) NeoNetworks had no contractual or legal expectation or claim to NuSpeed, because Cree had not violated any of the contractual terms by which he was bound; (2) NeoNetworks' proposed product, a high-speed, Gigabit Ethernet IP router, was unrelated to NuSpeed's proposed product, a storage router, and that the two businesses were intended to pursue different markets and customers, with products that performed different functions; (3) the storage router was not a logical or obvious outgrowth of NeoNetworks' business plan; (4) NuSpeed did not cause competitive harm to NeoNetworks, because the businesses were developing different products to perform different functions and aimed at different customers; (5) NeoNetworks was functionally insolvent by May 1999, and its complicated financial structure and high expenditures made it unlikely that NeoNetworks would have been able to take advantage of a new opportunity; and (6) NeoNetworks focused on hardware design, while NuSpeed's storage router was a software development; NeoNetworks did not have personnel who specialized in software design or in storage product development.

Once it determined as a matter of law that the storage router technology was not a corporate opportunity for NeoNetworks, the court had no obligation to analyze the second prong of the *Miller* test. *Id.* at 226, N.W.2d at 81. We conclude that the district court's findings are well-supported by the record evidence and are not clearly erroneous.

IV. Contract Claims

NeoNetworks contends that the district court also erred by misinterpreting Cree's executive employment agreement. Although NeoNetworks presents this as an issue of

contract construction, its arguments are grounded in disagreements with the court's findings of fact. We review the court's findings for clear error. Minn. R. Civ. P. 52.01.

Under the terms of the agreement, Cree agreed to disclose "each and every invention, discovery, improvement, device, design, apparatus, practice, process, method or product . . . made, developed, perfected, devised, conceived, or first reduced to practice" during his employment and for six months after. This broadly inclusive language was limited by another section eliminating the duty to disclose for developments made on Cree's own time, without use of company equipment, information, or resources, if not related to NeoNetworks' business or anticipated research, and if not developed as a result of work Cree did for NeoNetworks. This limitation is required by Minn. Stat. § 181.78, subd. 1 (2006), which voids assignment of an employee's interest in any inventions unrelated to the employer's business and created on the employee's own time. The terms of the executive employment agreement were rescinded by the separation agreement Cree signed on termination of his employment.

The district court found that the NuSpeed concept was created after the termination of Cree's employment and that it was based on ideas formulated by Jurgens before his employment with NeoNetworks. These findings are supported by record evidence and are not clearly erroneous. Minn. R. Civ. P. 52.01. Although NeoNetworks suggests that the court erred by accepting Cree and Jurgens' testimony that they developed the concept after termination of their employment, we defer to the district court's opportunity to observe witnesses and assess their credibility. *Id.* Because we

accept the district court's findings, we conclude that there was no violation of the executive employment agreement.

V. Rule 41 Hearing

NeoNetworks next argues that the district court erred by curtailing the rule 41 hearing before it could adequately address all of the issues. We review a district court's evidentiary rulings and trial management decisions for an abuse of discretion. *Lundman v. McKown*, 530 N.W.2d 807, 829 (Minn. App. 1995), *review denied* (Minn. May 31, 1995). Even when a court commits errors in its rulings, the party seeking a new trial must demonstrate prejudice. *Id.*

Here, the district court heard testimony from March 2 through April 13; after the conclusion of NeoNetworks' case, the court heard four days of oral arguments on respondents' rule 41 motion. Although the district court refused to allow arguments to continue after four days, NeoNetworks submitted written materials to the court. We observe no abuse of discretion under these circumstances.

VI. Motions for a New Trial and to Reopen Discovery

NeoNetworks moved for a new trial and to reopen discovery, claiming that it was surprised by one of respondents' exhibits, that respondents wrongfully failed to produce requested information, and that the new information could potentially change the trial outcome. At issue are two documents. The first, trial exhibit 300, is an undated letter written by Cree and soliciting funding for NuSpeed. This document was produced during discovery. The second document is the computer properties page for exhibit 300. The properties page was not sought during discovery, but it was provided by respondents in

their list of proposed trial exhibits as trial exhibit 1593. This properties page purported to show that the letter was composed after Cree's termination from employment. The district court admitted both documents into evidence. NeoNetworks now argues that the district court abused its discretion by admitting exhibit 1593, arguing that they were surprised by the exhibit, that respondents wrongfully failed to produce exhibit 1593 during discovery, and that the district court compounded this error by refusing to grant NeoNetworks' motions to reopen discovery and for a new trial.

The district court's evidentiary rulings are discretionary, and we will reverse them only for a clear abuse of discretion. *Jenson v. Touche Ross & Co.*, 335 N.W.2d 720, 725 (Minn. 1983), *superseded in part by rule on other grounds*. Before error in the admission of evidence can be used as a ground for a new trial, the complaining party must demonstrate that the evidence may reasonably have changed the outcome of the trial. *Id.* The district court concluded that NeoNetworks could have requested the information found in trial exhibit 1593 during discovery; further, it found credible Cree's testimony on the drafting date of the letter introduced as exhibit 300 and the date upon which Cree and Jurgens began work on the NuSpeed concept. Because the district court accepted this testimony, NeoNetworks has failed to show that the properties page would have changed the trial outcome. Further, NeoNetworks has not shown a reason to reopen discovery; the material was available, but NeoNetworks did not request it. We see no abuse of discretion here.

We also review the district court's ruling on a request for a new trial for an abuse of discretion. *Kroning v. State Farm Auto Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997).

Again, the complaining party must demonstrate prejudicial error. *Id.* at 46. If a party bases a new trial request on newly discovered evidence, the evidence must be more than “merely contradictory, impeaching, or cumulative.” *200 Levee Drive Ass’n v. Scott County*, 532 N.W.2d 574, 578 (Minn. 1995) (quotation omitted). If there is a question of whether the evidence could have been discovered through exercise of reasonable diligence, the district court does not abuse its discretion by denying a motion for a new trial. *Id.*

The district court concluded that exhibit 1593 could have been discovered with reasonable diligence. NeoNetworks has not asserted what evidence it reasonably expects to find if discovery is reopened or how it would affect the trial outcome. Under these circumstances, the district court did not abuse its discretion by denying NeoNetworks’ motions to reopen discovery and for a new trial.

VII. Summary Judgment

By notice of review, respondent Cisco challenges the district court’s refusal to grant summary judgment in its favor in the court’s December 16, 2005 order. A district court will grant summary judgment if the pleadings and record evidence show no genuine issue of material fact exists and a party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03.

The district court concluded that NeoNetworks raised sufficient facts to claim damages under a constructive trust theory and to claim tortious conduct on the part of NuSpeed and Cisco, as successor to NuSpeed. A party “need not show *substantial evidence* to withstand summary judgment. Instead, summary judgment is inappropriate if

the nonmoving party has the burden of proof on an issue and presents *sufficient evidence* to permit reasonable persons to draw different conclusions.” *Schroeder v. St. Louis County*, 708 N.W.2d 497, 507 (Minn. 2006). While in retrospect Cisco may claim that the court should have granted summary judgment based on the outcome, NeoNetworks presented sufficient evidence to raise a fact question to be decided at trial. The court did not err by refusing to grant summary judgment.

VIII. Costs and Disbursements

A court may award costs “as provided by statute.” Minn. R. Civ. P. 54.04. We review the district court’s award of costs and disbursements for an abuse of discretion. *Kellar v. Von Holtum*, 605 N.W.2d 696, 703 (Minn. 2000). The court must make findings that the costs and disbursements incurred were “reasonable and necessary.” *Beniek v. Textron, Inc.*, 479 N.W.2d 719, 724 (Minn. App. 1992), *review denied* (Minn. Feb. 19, 27, 1992). The parties may, as they did here, waive the right to present testimony and rely on affidavits and supporting documentation. *See Quade & Sons Refrig., Inc. v. Minnesota Mining & Mfr. Co.*, 510 N.W.2d 256, 260 (Minn. App. 1994), *review denied* (Minn. Mar. 15, 1994). Generally, the party challenging the district court’s exercise of discretion bears the burden of proving an abuse of discretion. *Patton v. Newmar Corp.*, 538 N.W.2d 116, 119 (Minn. 1995).

A. Out-of-State Subpoenas

The district court awarded respondents \$1,407 for payments to out-of-state courts for their issuance of out-of-state subpoenas compelling witness attendance at depositions or production of documents. The district court may award “reasonable disbursements

paid.” Minn. Stat. § 540.04 (2006). The district court concluded that respondents “were required to pay these fees and costs in order to defend the suit against them. Thus the costs qualify as ‘reasonable disbursements paid or incurred’ and are taxable to [NeoNetworks].” We see no abuse of discretion in this award of fees.

B. Additional Deposition Costs

The district court also awarded respondents an additional \$11,362.82 for deposition costs out of a request of \$17,060.22. The court denied the request for individuals who were neither expert witnesses nor listed as potential trial witnesses, in the amount of \$5,697.40. Minn. Stat. § 549.04 (2006) provides that the prevailing party “shall be allowed reasonable disbursements paid or incurred[.]” Minn. Stat. § 549.04; *see Romain v. Pebble Creek Partners*, 310 N.W.2d 118, 123-24 (Minn. 1981) (stating that district court has discretion to award deposition costs to prevailing party).

Even if depositions are not used at trial, a party may recover costs associated with them as long as the depositions are not cumulative or duplicative. *Stinson v. Clark Equip. Co.*, 473 N.W.2d 333, 337-38 (Minn. App. 1991), *review denied* (Minn. Sept. 13, 1991). The district court limited the recoverable costs to depositions of expert witnesses and of people identified as trial witnesses. Again, we observe no abuse of discretion.

C. Expert Witness Fees and Costs

The district court awarded respondents \$515,628.03 in expert witness costs and fees, out of a total request of \$1,097,927.18. Minn. Stat. § 357.25 (2006) permits reimbursement of fees or compensation to “any witness . . . *summoned or sworn and examined as an expert*[.]” The award may include compensation for an expert’s pretrial

preparation costs. *Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 483 (Minn. App. 2006), *review denied* (Minn. Aug. 23, 2006); *Quade*, 510 N.W.2d at 260-61. The district court concluded that respondents' experts were summoned to testify and would have testified had respondents' rule 41 motion not been granted.

Here, the district court carefully reviewed the records submitted by the expert witnesses and rejected all time claimed that was not identified as deposition preparation, deposition testimony, and trial testimony preparation. Ruling them improper for a court trial, the court further rejected outright the costs associated with an expert on law.

The court did not make specific findings about the reasonableness of the fees, but it thoroughly scrutinized the materials presented, including claimed hourly rates and time billed. *See Quade*, 510 N.W.2d at 261 (noting that although district court failed to make findings as to normal hourly charges of expert, court knew amount of time billed and total cost, "upon which the trial court could and did decide that the amounts were fair, reasonable, and necessary").

The court carefully reviewed the records and determined how much of the claimed fees were attributable to necessary trial preparation. We conclude that the district court did not abuse its discretion in determining expert witness fee awards.

D. Statutory Witness Fees

The district court awarded \$4,242 in statutory witness fees and costs for witnesses who did not testify at trial. The district court determined that these fees were statutorily mandated, because Minn. Stat. § 357.22 (2006) requires a subpoenaing party to advance a

witness a one-day fee of \$20 and in-state mileage of \$0.28 per mile. This fee is required when a person is subpoenaed to appear at trial or at deposition. *Id.* The court did not abuse its discretion.

E. Rule 45.03(d) Fees

The district court awarded \$13,427.15 in costs under Minn. R. Civ. P. 45.03(d), which provides that a witness who is not a party or an employee of a party, and who is required to give testimony or produce documents relating to a profession, business, or trade, is entitled to compensation for the cost of preparing the testimony or documents. Although this cost is not specifically taxed to the non-prevailing party, the district court concluded that because it was a mandated cost, it was reasonable to assess NeoNetworks for that cost. *See* Minn. Stat. § 549.04 (giving district court discretion to tax “reasonable disbursements” against non-prevailing party).

Respondents provided 26 pages of documentation describing the assembly of records or testimony preparation by various witnesses, who were not expert witnesses, but who were to give testimony or produce documents. Given the district court’s wide discretion, this cost award is reasonable.

IX. Trial Exhibits Costs

NeoNetworks contests the district court’s award of \$12,961.61 to cover the cost of trial exhibits. NeoNetworks asserts that this award was improper because the exhibits were not submitted into evidence and respondents made five copies of each exhibit.

Minn. Stat. § 357.315 (2006) provides that “the reasonable cost of exhibits shall be allowed in the taxation of costs[.]” The district court relied on this provision, stating that

although respondents' exhibits were not used at trial because the court dismissed the action at the close of NeoNetworks' case, respondents should not be penalized for "winning too soon."

The district court's February 8, 2006 order required each counsel to provide a hard copy of each exhibit to the court and for the jury; presumably, this also included copies for the other two parties and the witness, making the five copies of each exhibit a reasonable request. We see no abuse of discretion in this award.

Having reviewed the record and the district court's findings of fact and conclusions of law, we conclude that the court properly granted respondents' rule 41 motion and did not abuse its discretion in its costs and disbursements award. The district court did not err by refusing to grant respondent Cisco's earlier summary judgment motion.

Affirmed.