STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2332

Enduracon Technologies, Inc.,
Appellant,

vs.

Northshore Mining Company, et al.,
Respondents.

Filed October 5, 2010
Affirmed in part, reversed in part, and remanded
Stauber, Judge

Lake County District Court
File No. 37CV0562

Daniel W. Schermer, Daniel W. Schermer, P.A., Minneapolis, Minnesota; and

Mark A. Greenman, Law Office of Mark A. Greenman, Minneapolis, Minnesota (for appellant)

Frederick A. Dudderar, Robin C. Merritt, Nathan N. LaCoursiere, Hanft Fride, P.A., Duluth, Minnesota (for respondents)

Considered and decided by Halbrooks, Presiding Judge; Stoneburner, Judge; and Stauber, Judge.

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

STAUBER, Judge

In this breach-of-contract case, appellant Enduracon Technologies, Inc. (ETI) appeals from the district court's dismissal of its claims of breach of contract and breach

of covenant of good faith and fair dealing and the district court's grant of costs and disbursements to respondent Northshore Mining Company (NSM). NSM appeals from the district court's order requiring NSM to refund to ETI profits that NSM received from ETI during 2003, when the parties had waived profit sharing under the contract. We conclude that the district court did not abuse its discretion as alleged by ETI and therefore affirm the order dismissing ETI's claims. But, because the district court abused its discretion in determining that the amount of witness fees claimed by NSM was reasonable, we reverse the posttrial order addressing costs and disbursements and remand to the district court for a determination of the amount of reasonable witness fees. And because ETI is not legally entitled to a refund of its voluntary payment to NSM, we reverse the posttrial order awarding ETI a $7,970 refund.

FACTS

ETI is a business that produces and markets concrete additives. NSM is an iron ore producer that supplies raw materials to the national steel industry. NSM's subsidiary, the Silver Bay Power Company, burns coal to generate power for NSM's taconite plant at Silver Bay. Operating at full capacity, the Silver Bay power plant generates several thousand tons of fly ash—a byproduct of coal burning—each year. Fly ash can be put to beneficial use as an additive to concrete and can replace a portion of the Portland cement used in making concrete.

In 2002, NSM and ETI entered into a contract entitled "Ash Marketing/Use Agreement" (the agreement). The agreement provided ETI the exclusive right to market all ash products produced by the Silver Bay Power Company, until December 31, 2004.

The parties agreed that NSM would charge ETI a nominal fee of $1.00 per trailer load (25 tons) of ash ETI removed from the Silver Bay Power Company ash storage site, and, in relevant part, that "the parties shall profit-share excess funds generated through the marketing and sale of the ash." The parties also agreed that "[f]or future years, the agreement between NSM & ETI shall be negotiated annually, based on this initial agreement, and per the Evergreen provision set forth in Exhibit F." Exhibit F provided, in relevant part: "NSM may . . . terminate the agreement for . . . reasons such as unethical business practice or other causes and actions that are detrimental to NSM in its sole discretion."

On November 22, 2004, ETI submitted to NSM a written 2003 profit-sharing report. The report did not completely identify the expenses that ETI incurred in connection with the sale of NSM fly ash during 2003, merely informing NSM that, for 2003, ETI's "direct expenses for testing, marketing and selling the [NSM] fly ash w[ere] $142,712." After NSM's Senior Buyer, Tim Hultman, reviewed the 2003 profit-sharing report, he suspected that ETI was depriving NSM of its fair share of profits under the profit-sharing provision in the agreement. At Hultman's request, ETI provided additional financial information in the form of an interim 2004 profit-sharing report. The report, which ETI submitted to NSM on December 14, 2004, disclosed that ETI was "prorat[ing]" expenses. Hultman did not consider ETI's use of prorated expenses to determine profits to be consistent with the agreement. Therefore, NSM announced its intention not to renew the agreement by letter to ETI dated December 27, 2004. The letter stated, in relevant part: "The purpose of this letter is to inform you that [NSM]

do[es] not wish to renew or extend the Agreement and hereby exercises its discretion under Exhibit F to terminate the Agreement due to causes and actions that have proven detrimental to [NSM]."

NSM then requested that ETI provide a full profit-sharing report for calendar year 2004, instructing that the report was to include "a report of total revenues as well as a detailed listing of expenses." ETI submitted to NSM a 2004 profit-sharing report but the report did not delineate the nature, type, and amount of operating expenses charged by ETI related to ETI's marketing and sales of NSM ash. The report simply stated: "OPERATING EXPENSES $192,186.09." ETI subsequently submitted another 2004 profit-sharing report to NSM detailing its operating expenses, but again prorating the expenses. NSM then confirmed its termination of the contract, citing as one of its reasons "an attempt by ETI to mislead NSM by allocating operating expenses that are not associated with the marketing of ash products, and the deduction of such unassociated expenses from the revenue, to the detriment of NSM." ETI was ultimately able to secure a replacement source of fly ash from Dairyland Power in Alma, Wisconsin at a cost of $15 per ton.

In 2005, ETI sued NSM, alleging breach of contract and breach of covenant of good faith and fair dealing for NSM's alleged improper termination of the agreement. NSM made counterclaims against ETI, alleging breach of contract and misrepresentation for, among other things, ETI's failure to pay NSM the 2004 profits owed it under the agreement's profit-sharing provision.

In 2009, a seven-day jury trial was held. Mike Osmundson, the NSM manager who was responsible for handling NSM's fly ash at the time the agreement was created, and Larry Nelson, ETI's owner, testified that the parties attempted to limit the expenses used to determine profit under the agreement's profit-sharing provision to only incremental or additional costs associated with marketing NSM fly ash. The expenses, for example, would not include ETI's preexisting expenses associated with its business. Nelson also testified that he was aware that the agreement required ETI to identify each of its operating expenses and profits associated with the marketing and sales of NSM fly ash, and transmit that information to NSM. And Nelson testified that he knew that the transmitted information was to be accurate and carefully prepared.

Because, as Nelson testified, he does not understand financial statements, Nelson retained Robert Haugen, a certified public accountant, to prepare the profit-sharing calculations for ETI required under the agreement. Haugen testified at trial that ETI instructed him to devise a method of calculating profit due to NSM under the agreement by allocating a percentage of ETI's total expenses to NSM based on the percentage of ETI's revenue from the sales of NSM fly ash. Based on ETI's instructions, Haugen testified that he prepared a profit-sharing calculation for 2003. The report, which was admitted into evidence at trial, detailed the operating expenses included in the calculation and disclosed the nature of the expense-allocation method (i.e., prorating expenses based on revenue). Haugen testified that he gave the report to Nelson, assuming it would later be submitted to NSM.

But the 2003 profit-sharing report that Nelson submitted to NSM on November 22, 2004, and which was also introduced into evidence at trial, was not what Haugen had prepared. Again, regarding expenses, the report merely stated that ETI's "direct expenses for testing, marketing and selling the [NSM] fly ash w[ere] $142,712." The submitted report deleted Haugen's disclosure of the prorating methodology and increased the expenses Haugen reported to Nelson by approximately $26,000.

The jury found that NSM waived profit-sharing for 2003 and that the total profit to be shared for 2004 was $98,318. The district court then issued an order reiterating the jury's findings and determining that: (1) the agreement required the parties to split the 2004 profits equally and (2) ETI did not present legally sufficient evidentiary bases for its claims of breach of contract and breach of covenant of good faith and fair dealing. The district court therefore granted NSM judgment as a matter of law (JMOL), effectively dismissing ETI's complaint, and entered judgment in favor of NSM for $49,159 (one-half of the 2004 profits as determined by the jury), together with pre-judgment interest, costs and disbursements.

At trial, after the parties had rested their cases, ETI had argued that because there was no evidence in the record that ETI owed NSM any profits for 2003, there was an additional issue that would need to be decided—which party was entitled to the $7,970 ETI paid to NSM in 2003. Therefore, after issuing its first posttrial order, the district court issued an additional order entitling ETI to judgment in the amount of $7,970, which would constitute a refund from NSM. Because both parties objected to the other party's bill of costs and disbursements submitted to the district court after trial, in another

posttrial order, the district court overruled ETI's objections to NSM's bill, determining that all of the costs and disbursements NSM claimed were reasonable, and sustained NSM's objections to ETI's bill.

Both parties appealed.

D E C I S I O N

I. The district court did not err by granting NSM judgment as a matter of law on ETI's claims.

The district court granted NSM's motion for JMOL on ETI's claims of breach of contract and breach of covenant of good faith and fair dealing, based on its determination that "[ETI] did not present a legally sufficient evidentiary basis for a reasonable jury to find for [ETI] that [ETI] sustained damages for any alleged breach of the [agreement] by [NSM]." ETI argues that the district court erred by making this determination, and therefore granting NSM's motion for JMOL, and declining to submit to the jury the issues of ETI's damages or its breach.

This court reviews de novo the district court's grant of judgment as a matter of law (JMOL). *Lohnbehn v. Schoenrock*, 727 N.W.2d 153, 159 (Minn. App. 2007). "A district court may grant a motion for [JMOL] when, as a matter of law, the evidence is insufficient to present a question of fact to the jury." *Wall v. Fairview Hosp. & Healthcare Servs.*, 584 N.W.2d 395, 405 (Minn. 1998). "[T]he district court must treat as credible all evidence from the nonmoving party and all inferences that may be reasonably drawn from that evidence." *Id.* JMOL should be granted only in those unequivocal cases when (1) in the light of the evidence as a whole, it would clearly be the duty of the trial

court to set aside a contrary verdict as being manifestly against the entire evidence or (2) it would be contrary to the law applicable to the case. *Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 816 (Minn. 2006).

A. Failure to prove U.C.C.-based damages

At trial, after both parties rested, NSM moved the district court for JMOL on ETI's claims based on ETI's failure to prove damages. ETI argued—as it does on appeal—that it would not be appropriate for the court to grant the motion, contending that that it was entitled to damages under a theory based on the Uniform Commercial Code Sales (U.C.C. Sales).

U.C.C. Sales has been officially adopted in Minnesota and codified at Minn. Stat. §§ 336.2–101 to 725(2008). U.C.C. Sales, which applies only to transactions in goods, provides that if a seller fails to make delivery or repudiates, a buyer may either "cover" and seek damages pursuant to section 336.2–712, or recover damages for nondelivery as provided in section 336.2–713. Minn. Stat. §§ 336.2-102, .2-711. "Whatever the measure of damages, the buyer must prove by credible evidence to a reasonable certainly that such damages were suffered and must prove, at least to a reasonable probability, the amount of these damages." *Jacobs v. Rosemount Dodge-Winnegbago*, 310 N.W.2d 71, 78 (Minn. 1981) (quotation omitted).

Assuming for the sake of ETI's argument that the agreement was predominantly a contract for the sale of goods—which is at least debatable on this record—ETI did not support a claim for damages under sections 336.2-712 to a reasonable certainty as a matter of law.

Section 336–712 provides:

> (1) After a breach . . . the buyer may "cover" by making in good faith without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.
>
> (2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages . . . , but less expenses saved in consequence of the seller's breach.

Nelson testified at trial that ETI was able to secure replacement fly ash from a plant in Alma, Wisconsin for $15 per ton. But ETI presented no evidence as to when it purchased the replacement fly ash and how much it bought in order to "cover" the agreement, rendering it impossible to determine the "cost of cover" required for a calculation of damages under section 336.2-712. Moreover, ETI presented no admissible evidence which would show that ETI's purchase of replacement fly ash from the Alma plant for $15 per ton, compared to the fly ash purchased for $0.04 per ton under the agreement with NSM, was a "reasonable purchase" as 336.2-712 requires. *See Teeman v. Jurek*, 312 Minn. 292, 300, 251 N.W.2d 698, 702 (1977) (stating that "[t]he test of proper cover is whether at the time and place of covering the buyer acted in good faith and in a reasonable manner").

ETI also did not support a claim for damages under section 336.2-713 to a reasonable certainty. And section 336.2-713(1) provides, in relevant part:

> Subject to the provisions of this article with respect to proof of market price (section 336.2-723), the measure of damages for nondelivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together

> with any incidental and consequential damages . . ., but less expenses saved in consequence of the seller's breach.

Under U.C.C. Sales, "[m]arket price is to be determined as of the place for tender." Minn. Stat. § 336.2–713(2). "Any damages based on market price (section 336.2-708 or section 336.2–713) shall be determined according to the price of such goods prevailing at the time when the aggrieved party learned of the repudiation." Minn. Stat. § 336.2–723(1). Alternatively,

> [i]f evidence of a price prevailing at the times or places described . . . is not readily available the price prevailing within any reasonable time before or after the time described or at any other place which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used.

Minn. Stat. § 336.2–723(2). The $15 per ton price Nelson testified to does not constitute evidence of a "market price" because ETI undisputedly failed to give notice to NSM that Nelson's testimony would be used in an attempt to establish a market price. *See* Minn. Stat. § 336.2-723(3) ("Evidence of a relevant price prevailing at a time or place other than the one described in this article offered by one party is not admissible unless and until that party has given the other party such notice as the court finds sufficient to prevent unfair surprise."). And the record is devoid of any other evidence regarding prevailing prices of fly ash.

B. Failure to prove damages based on the profit-sharing provision

ETI claims that the district court improperly prevented ETI from presenting evidence regarding damages based on the profit-sharing provision by excluding testimony favorable to ETI—namely, the expert opinion of CPA Kevin Besikof—based

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

At trial, Besikof was broadly and extensively questioned by both ETI's and NSM's attorneys about the foundation for his testimony regarding damages. Following Besikof's foundation testimony, the district court sustained NSM's objection (lack of foundation) to his expert testimony on the subject of damages.

Minn. R. Evid. 702 provides, in relevant part:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. The opinion must have foundational reliability.

Minn. R. Evid. 703(a) describes the foundational requirement for expert opinions:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular filed in forming opinions or inferences upon the subject, the facts or data need not be admissible into evidence.

Besikof's testimony that ETI sought to present to the jury was based on a report titled "Report of Neil N. Lapidus, CPA," (Lapidus/Besikof report) which was only signed by Lapidus but was jointly prepared by Besikof and Lapidus in June 2006. The Lapidus/Besikof report expressed the opinion that ETI suffered damages as measured by lost profits over approximately the next 40 years in the amount of $7,956,160. But

Besikof testified that he relied on Nelson for financial information about ETI to prepare the report. And ETI does not dispute that Nelson disqualified himself from providing reliable financial information about ETI. Nelson testified that he "do[es]n't even have a clue on anything about profit and loss or anything . . . in that regard," and confirmed that he does not understand that sales minus expenses equals profit. Besikof's reliance on the financial data Nelson provided about ETI was unreasonable. And Besikof's specialized knowledge as a CPA could not possibly have helped the jury in understanding the evidence or determining a fact in issue when his expert opinion was based on unreliable financial data.

Moreover, the opinions expressed in the Besikof/Lapidus report are based on speculative assumptions, making Besikof's proffered testimony even less helpful and reliable. Besikof conceded that, in creating the report, he assumed that NSM would continue to produce fly ash and that the demand, price, and cost of producing fly ash in 2004 would remain the same through 2044. But Osmundson testified that due to possible changes that would need to be made to the coal-burning process as a result of updated environmental regulations, it would be speculative to assume that NSM would still be producing the same fly ash twenty or thirty years into the future. And ETI acknowledged at trial in 2009 that economic conditions nationwide had changed since 2004, noting that the stock market was down, interest rates were down, and it was unclear how this was affecting the fly-ash business. "[T]he nature of the business or venture upon which . . . anticipated profits are claimed must be such as to support an inference of definite profits grounded upon a reasonably sure basis of facts." *Olson v. Aretz*, 346 N.W.2d 178, 182

(Minn. App. 1984), *review denied* (Minn. Oct. 30, 1984). ETI plainly failed to ground its inference of profits on a reasonably sure basis of facts. We conclude that the district court did not abuse its discretion by excluding Besikof's testimony on the issue of damages.

To the extent that ETI argues that the district court committed procedural errors by not allowing Besikof to testify regarding damages, the alleged errors were harmless and therefore do not require reversal in this case. *See Midway Ctr. Assocs. v. Midway Ctr. Inc.*, 306 Minn. 352 356, 237 N.W.2d 76, 78 (1975) (stating that to prevail on appeal, an appellant must show both error and prejudice resulting from the error); *see also* Minn. R. Civ. P. 61 (providing that harmless error is to be ignored)

C. ETI was required to prove damages

"Under Minnesota law, every contract includes an implied covenant of good faith and fair dealing requiring that one party not unjustifiably hinder the other party's performance of the contract." *In re Hennepin Cnty. 1986 Recycling Bond Litigation*, 540 N.W.2d 494, 502 (Minn. 1995) (quotation omitted). But, according to the Minnesota Supreme Court, "the implied covenant of good faith and fair dealing does not extend to actions beyond the scope of the underlying contract." *Id.* at 503. Therefore, Minnesota law does not recognize a cause of action for breach of implied covenant separate from an underlying breach of contract. *Medtronic, Inc. v. ConvaCare, Inc.*, 17 F.3d 252, 256 (8th Cir. 1994) (applying Minnesota law to conclude that no separate cause of action under the implied covenant may be maintained). To prevail on a breach-of-contract claim, the plaintiff must prove damages. *Christians v. Grant Thornton, LLP*, 773 N.W.2d 803, 808

(Minn. App. 2007), *review denied* (Minn. Sept. 18, 2007). Because we conclude that ETI failed to provide adequate evidentiary support for any amount of damages, a jury verdict in favor of ETI on its claims of breach of contract and breach of covenant of good faith and fair dealing would not have had reasonable support in fact. Therefore, the district court did not err by granting JMOL in favor of NSM on the claims.

II. The district court did not abuse its discretion by allowing the jury to find the total amount of profit to be shared.

In this case, the district court posed the following special-verdict question to the jury: "What is the total profit to be shared for 2004?" The jury answered: "$98,318.00." ETI argues that the district court erred by permitting the jury to speculate on the amount of profit sharing owed to NMS for 2004, contending that there was no evidence of profit to be shared. The district court has broad discretion regarding the form and substance of special-verdict questions. *Gravley v. Sea Gull Marine*, 269N.W.2d 896, 900 (Minn. 1978). "[A] jury's answer to a special verdict form can be set aside only if no reasonable mind could find as did the jury." *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 734 (Minn. 1997).

ETI's assertion that there was no evidence of profits owed to NMS, so that the question should not have been put to the jury, is incorrect. NSM's expert witness Jim Denney, a certified public accountant, testified that he reviewed the profit-sharing statements and financial information, which were provided by ETI and admitted into evidence; identified misrepresentations in the statements; and adjusted the statements accordingly to allow for calculation of profits under the agreement using an approach that

included only incremental expenses. Denney opined that, depending on how the parties intended to calculate profit under the agreement, ETI's profits from the sale of NSM fly ash in 2004 were either $67,943 or $143,074.

ETI's attorney vigorously cross-examined Denney regarding the assumptions underlying his opinions and his access (or lack thereof) to ETI's financial information, leading the district court to later note that ETI made "powerful arguments" during Denney's cross-examination. The jury's verdict that 2004 profits under the agreement were $98,318 indicates that perhaps ETI's cross-examination was effective in persuading the jury that Denney was incorrect regarding some of the alleged misrepresentations ETI made in its profit-sharing statements, or that the jury disagreed with Denney's approach in some respects. But based on the evidence presented at trial, the jury clearly disagreed with Haugen's testimony that ETI had a net *loss* of $1,281 for 2004. The jury's verdict is not surprising given that Haugen prorated ETI's expenses to conclude that it experienced a net loss with respect to NSM fly ash in 2004: both Osmundson's and Nelson's trial testimony indicated that the parties attempted to limit the expenses under the agreement's profit-sharing provision to only incremental or additional costs associated with marketing NSM fly ash.

ETI argues that Denney's testimony is deficient because he did not perform a full profit-loss calculation of his own and was never asked to formulate any opinions on whether ETI owed NSM a percentage of its profits under the agreement. But Denney was able to testify regarding ETI's profits without having to perform a full profit-loss calculation on his own because ETI had provided its own financial information and

profit-loss statements, which Denney was able to adjust and use to determine ETI's profits from NSM fly ash. And Denney was able to express an opinion on ETI's profits from the sale of NSM fly ash without expressing an opinion as to whether ETI owed NSM a percentage of the profits under the agreement, which, at any rate, likely would have constituted an inadmissible legal opinion on the ultimate issue to be decided by the jury. *See* Minn. R. Evid. 704 cmt. (stating the opinions involving a legal analysis or mixed questions of law and fact are not deemed to be of any use to the trier of fact); *see also In re Estate of Olson*, 176 Minn. 360, 370, 223 N.W. 677, 681 (1929) ("[I]n a will contest, the opinion of the witness . . . should not be asked as to the testator's capacity to make a valid will . . . .").

ETI briefly argues that the district court's special-verdict question "assumed that there was a profit to be shared and the only question was the amount." But, instead of finding that there were $98,318 in profits, the jury could have just as easily found that there were no profits. In fact, ETI's counsel argued at length in his closing argument that Haugen's calculation of *zero* profits (i.e., a net loss) for 2004 was correct. ETI's attorney argued to the jury: "[W]hat was the total profit to be shared for 2004? I would suggest the answer to that question is zero, based on Mr. Haugen's computation."

The district court did not abuse its discretion by allowing the jury to find the total amount of profit to be shared. When presented with the evidence that the parties in this case presented at trial, any reasonable person could have found as the jury did.

III. The district court did not commit reversible error by not explicitly submitting to the jury the issue of whether NSM properly terminated the agreement in 2004.

ETI argues that the district court abused its discretion by not allowing the jury to determine whether NSM properly terminated the agreement in 2004, contending that if the jury would have found that NSM did not properly terminate the contract in December 2004, then NSM breached the contract and ETI had no obligation to NSM regarding 2004 profit sharing. In general, when a party to a contract breaches first, that initial breach constitutes legal justification for the other party's subsequent failure to perform. *Eg.*, *Carlson Real Estate Co. v. Soltan*, 549 N.W.2d 376, 379–80 (Minn. App. 1996), *review denied* (Minn. Aug. 20, 1996). "The first breach serves as a defense against the subsequent breach." *Id*. at 380.

The only way the jury's special verdict, determining that the amount of ETI's profits in 2004 was $98,318, can be reasonably supported by the evidence is if NSM's interpretation of the agreement's profit-sharing provision that only additional or incremental expenses were to be included in the profit/loss calculation was accepted by the jury. The evidence ETI presented reflects that if ETI's interpretation (i.e., allocated expenses were to be included in the profit/loss calculation) were employed, the result would be a net loss for 2004. If the jury agreed with ETI's interpretation, it would have found ETI's profits in 2004 to be zero.

ETI's only apparent theory to support its claim that NSM breached the contract in 2004 was that NSM improperly terminated the contract based on its interpretation of the profit-sharing provision, which ETI argues was a pretext, disguising the fact that NSM

merely wanted to "get a better deal" than it had under the agreement. But the jury clearly agreed with NSM's rather than ETI's interpretation of the agreement's profit-sharing provision. Therefore, the jury also implicitly disagreed with ETI's claim that NSM breached the agreement by improperly terminating it, and ETI's claim must fail. On this record, we conclude that the district court implicitly submitted to the jury the issue of whether NSM properly terminated the agreement in 2004. And even if the court erred by doing so, the error was harmless and does not warrant reversal.

IV. The district court abused its discretion by ordering NSM to refund ETI $7,970.

NSM argues that the district court erred by ordering it to refund $7,970 that ETI paid to NSM voluntarily in 2003 despite NSM's waiver of profit-sharing for 2003. "When reviewing mixed questions of law and fact, 'we will correct erroneous applications of law, but accord the [district] court discretion in its ultimate conclusions and review such conclusions under an abuse of discretion standard.'" *Langford Tool & Drill Co. v. Phenix Biocomposites, LLC*, 668 N.W.2d 438, 442 (Minn. App. 2003) (quoting *Rhen v. Fischley*, 557 N.W.2d 328, 333 (Minn. 1997)).

Although ETI failed to plead a claim for a refund of the $7,970 that ETI paid to NSM in 2003, "[i]ssues litigated by either express or implied consent are treated as if they had been raised in the pleadings." *Roberge v. Cambridge Co-op. Creamery Co.*, 243 Minn. 230, 234, 67 N.W.2d 400, 403 (1954) (citing Minn. R. Civ. P. 15.02, which currently states that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been

raised in the pleadings"). "Consent is commonly implied either where the party fails to object to evidence outside the issues raised by the pleadings or where he puts in his own evidence relating to such issues." *Id.*

A careful review of the record in this case reflects that to the extent ETI, through Nelson's testimony, raised evidence outside the issues already properly raised by the parties and which related to the refund issue, NSM objected to the evidence. But the record also demonstrates that NSM later introduced its own evidence on the refund issue by eliciting additional testimony from Nelson. Therefore, we conclude that the refund issue was litigated by consent and the district court did not err by treating the refund issue as though it had been raised in the pleadings and, therefore, ruling on it.

NSM argues that the district court erred by ordering it to refund ETI $7,970 because the payment was made voluntarily and one who makes a payment voluntarily cannot recover it on the ground that he was under no legal obligation to make the payment. NSM is correct that the voluntary payment doctrine is a long-standing doctrine that generally provides that "[o]ne who makes a payment voluntarily cannot recover it back on the ground that he was under no legal obligation to make it." *See Thomas Peebles & Co. v. Sherman*, 148 Minn. 282, 284, 181 N.W. 715, 716 (1921) (citing *De Graff v. County of Ramsey*, 46 Minn. 319, 48 N.W. 1135 (1891)).

By ordering the $7,970 refund, the district court implicitly found that ETI had made the payment involuntarily. "On appeal, a [district] court's findings of fact are given great deference, and shall not be set aside unless clearly erroneous." *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999). Findings are clearly erroneous when

they are "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 726 (Minn. 1985). In this case, the record as a whole reasonably supports ETI's argument that it *voluntarily* made the payment. Nelson testified that he did not "feel" that he was paying voluntarily. But there was no evidence presented of any circumstances suggesting that Nelson was threatened or otherwise forced to pay NSM $7,970. *See Black's Law Dictionary* 1569 (defining "voluntarily" as "[i]ntentionally; without coercion"), 252 (defining coerce as "[t]o compel by force or threat") (7th ed. 1999). And Nelson later explained that although he "knew" profit-sharing for 2003 had been waived, he made the payment anyway as a "good faith gesture."

Because the record does not support that ETI made the $7,970 payment to NSM involuntarily, under the voluntary payment doctrine ETI was not entitled to the refund and therefore we reverse the district court's order awarding ETI $7,970.

V. The district court abused its discretion by determining that witness fees claimed by NSM constituted "reasonable" costs, taxable to ETI.

A district court's award of reasonable costs is reviewed for an abuse of discretion. *Striebel v. Minn. State High Sch. League*, 321 N.W.2d 400, 403 (Minn. 1982). But legal issues regarding these rulings are reviewed de novo. *Vandenheuvel v. Wagner*, 690 N.W.2d 753, 754 (Minn. 2005).

In this case, the district court, in a posttrial order, overruled objections ETI raised to NSM's bill of costs and disbursements after trial, determining that all of the costs and disbursements claimed by NSM were reasonable. The court also sustained NSM's

objections to ETI's bill of costs and disbursements. ETI argues that the district court abused its discretion by failing to rule on ETI's bill of costs. And, although the district court's order clearly reflects that it merely ruled on the parties' objections, ETI also argues that the court abused its discretion by bypassing the court administrator to tax costs and by awarding several costs that are unauthorized by law.

ETI's first argument that the district court abused its discretion by failing to rule on ETI's bill of costs is meritless. The posttrial order dated October 27, 2009 clearly reflects that the district court sustained all of NSM's objections to ETI's bill of costs and disbursements, effectively ruling that several of ETI's claimed costs and disbursements are unreasonable. Generally, a "prevailing party" is entitled to fixed statutory costs and reasonable disbursements incurred in connection with the litigation. Minn. Stat. §§ 549.02, .04 (2008). A district court does not have discretion to deny reasonable costs and disbursements to a prevailing party, but determining what costs are reasonable is left to the district court's discretion. *Quade & Sons Refrigeration, Inc. v. Minn. Min. & Mfg. Co.*, 510 N.W.2d 256, 260 (Minn. App. 1994), *review denied* (Minn. Mar. 15, 1994). The district court also has discretion to determine who the prevailing party is for purposes of awarding statutory fees and costs under Minn. Stat. §§ 549.02, .04 in the first instance. *Posey v. Fossen*, 707 N.W.2d 712, 714 (Minn. App. 2006). Therefore, contrary to ETI's second argument, the district court had the authority to rule on the parties' motions, implicitly determining that NSM was the prevailing party and determining that all of the costs and disbursements claimed by NSM were reasonable. Minnesota Rule of Civil Procedure 54.04 outlines the procedure for taxing costs and disbursements. That rule

authorizes the *court administrator* to tax costs and disbursements. Minn. R. Civ. P. 54.04. But, the court did not erroneously "bypass the court administrator," as ETI argues, because it did not award costs and disbursements by ruling on the parties' motions.

Here, the record and caselaw support the district court's determination that NSM was the prevailing party—all of ETI's claims were dismissed, and a judgment was entered in favor of NSM in the amount of $49,159. *See Borchert v. Maloney*, 581 N.W.2d 838, 840 (Minn. 1998) ("In determining who qualifies as the prevailing party in an action, the general result should be considered, and inquiry made as to who has, in the view of the law, succeeded in the action." (quotation omitted)).

But the district court abused its discretion by determining that some of NSM's claimed costs were "reasonable," and therefore taxable to ETI. ETI argues that the "professional fee[s]" of four of NSM's witnesses for depositions "are objectionable as exceeding the $300 per day limit [pursuant to Minn. R. Gen. Pract. 127.]" The record reflects that these four witnesses were not expert witnesses, but were lay witnesses. Minn. Stat. § 357.22(1) (2008) provides that the "fees to be paid to witnesses shall be as follows: . . . for attending in any action or proceeding in any court or before any officer, person, or board authorized to take the examination of witnesses, $20 for each day." Therefore, the district court's determination that the witness fees resulting from the four lay witnesses' depositions in the amount of $845, $906.38, $2,609.69, and $811.12 were reasonable was an abuse of the district court's discretion. The fees plainly exceeded the statutory limit of $20 per witness per day.

ETI also argues that expert witness fees of an accounting firm retained by NSM are objectionable. NSM claimed "expert witness fees" totaling $16,904 for trial preparation and testimony. While Minn. R. Gen. Pract. 127 does limit the *court administrator* to taxing "$300 per day for an expert witness fee as a disbursement in a civil case," this amount is "subject to increase or decrease by a judge." Minn. Stat. § 357.25 (2008) permits the district court to award expert-witness fees as it deems "just and reasonable," including costs for pretrial preparation time. *Lake Superior Center Auth. v. Hummel, Green & Abrahamson, Inc.*, 715 N.W.2d 483, 458 (Minn. App. 2006), *review denied* (Minn. Aug. 23, 2006). Because ETI does not explain how the expert-witness fees were unjust and unreasonable, ETI has not shown that the district court abused its discretion by determining that the expert-witness fees claimed by NSM were reasonable.

ETI argues that there is no authority permitting NSM to tax the cost of "illustrative aids" for the jury. But the record reflects that these illustrative aids were exhibits used at trial. And Minn. Stat. § 357.315 (2008) allows in the taxation of costs "the reasonable cost of exhibits."

Finally, ETI argues there is no authority permitting NSM to tax the cost of photocopies of documents produced by one of the lay witnesses during his deposition. ETI is incorrect. But the awarding of deposition costs, which includes copies, is discretionary with the trial court. *See Green-Glo Turf Farms v. State*, 347 N.W.2d 491, 495 (Minn. 1984) (stating that it is within the district court's discretion to allow costs of depositions as disbursements); *see also Romain v. Pebble Creek Partners*, 310 N.W.2d

118, 124 (Minn. 1981) (stating that deposition costs may include the cost of copies of depositions taken by either the prevailing party or the losing party).

Because we conclude that the district court abused its discretion by determining that witness fees claimed by NSM constituted "reasonable" costs, we reverse the October 27 order (addressing costs and disbursements) and remand to the district court for an order limiting NSM's reasonable lay witness fees to $20 per witness per day. We otherwise affirm.

VI. ETI has failed to demonstrate a basis for removing the district court judge from this case.

ETI asks this court to remove the district court judge from this case and to assign another judge, citing concerns for "justice and fair play" as well as its assertion that the case is "riddled with errors." This matter has been litigated for more than five years (resulting in three appeals). And ETI has had ample opportunity during this time to demonstrate the district court judge's bias, if it exists, and thereby seek removal of the judge under Minn. R. Civ. P. 63.03. Yet ETI has failed to present any meaningful argument as to how the district court judge hearing this matter may have demonstrated bias other than to assert that the district court did not follow this court's instructions, which were favorable to ETI, on remand. After this court remanded this case to the district court for further proceedings to resolve certain issues, all issues we identified were, in fact, resolved in post-remand proceedings. Therefore, we conclude that the

district court followed our instructions on remand and that there is no basis to remove the district court judge in this case.

Affirmed in part, reversed in part, and remanded.