STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0878

Daniel E. Olean,
Appellant,

vs.

James E. Pomroy, et al.,
Respondents.

Filed March 3, 2009
Affirmed in part, reversed in part, and remanded
Stoneburner, Judge

Pine County District Court
File No. 58C603000846

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Considered and decided by Shumaker, Presiding Judge; Stoneburner, Judge; and Collins, Judge.*

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

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

STONEBURNER, Judge

The district court found in favor of respondent on appellant's claims for injunctive relief and for damages allegedly caused by improvements to a driveway on respondents' property that resulted in the flooding of a portion of appellant's land. Appellant challenges the denial of his motion for relief from judgment or a new trial, arguing that the district court's findings of fact are not supported by the record and that the district court erred or abused its discretion in (1) denying his request for a jury trial; (2) finding that respondents' use of property was reasonable; (3) dismissing appellant's claim under the Minnesota Environmental Rights Act; (4) denying appellant's motion to add a claim of punitive damages; (5) denying appellant's posttrial submission of additional evidence; and (6) awarding certain disbursements. We affirm the district court's judgment for respondents but reverse the award of disbursements and remand for additional findings relating to some of the claimed disbursements.

FACTS

Appellant Daniel E. Olean owns property in section 28 of Pine County that has been in his family for more than 100 years. A portion of the property is wetland. In 1999, respondents Lori Pomroy and Jim Pomroy (Pomroy) bought property that includes wetland north of and adjacent to Olean's wetland. Pomroy bought the property to use as recreational property. Surface water flows north through the wetland and eventually into Bremer Creek, a public waterway.

The building site on Pomroy's property is accessed by an east-west driveway that crosses the wetland. Pomroy's predecessor placed a culvert covered with eight to ten inches of rock and gravel in the lowest portion of the driveway. In wet conditions, or if the culvert became plugged, water flowed across the driveway, making access to the building site by vehicle difficult or impossible at times. In 2001, Pomroy decided to raise the driveway.

Representatives of the Pine County Soil and Water Conservation District visited the site and determined that Pomroy's proposed driveway improvement, which involved placing fill primarily on the traveled portion of the driveway rather than in the wetlands, would fall within a "de minimis" exception to the Wetlands Conservation Act and would not require a wetland replacement plan.

Pomroy contracted with Dean Pogatchnik, a local bridge builder, to raise the level of the driveway and install a 12-inch culvert with a Clemson leveler (a device designed to keep the culvert from clogging). Neither Pomroy nor Pogatchnik consulted with anyone concerning the effect that elevating the driveway would have on the water flow. Olean contends, but Pomroy denies, that Olean told Pomroy that the planned improvement to the driveway would flood Olean's property.

Pogatchnik raised the driveway in the winter of 2001 when the ground was frozen. Pogatchnik trenched the sides of the driveway to create a shoulder, put in the 12-inch culvert "close to the top of the old road" and added 30 ten-cubic-yard loads of fill from nearby higher ground and a layer of gravel to the driveway surface.

In April 2002, Olean discovered that the elevated driveway was acting as a dam, causing water to be impounded two feet higher on the south side of the driveway and flooding approximately 29 acres of Olean's land that had not previously had standing water. Olean notified Pomroy, who discovered that the Clemson leveler in the 12-inch culvert was plugged with debris due, in part, to the fact that the Clemson leveler had been installed backward. Pomroy immediately contacted Pogatchnik, who, within two days, cut a trench in the driveway to drain the water then installed a 32-inch culvert and reinstalled the 12-inch culvert. The Clemson leveler was badly damaged when it was removed from the 12-inch culvert, but what remained was reinstalled correctly in the 12-inch culvert. An additional 16-inch pipe was also installed through the driveway. Since that time, the water has remained level on both sides of the driveway, but at a higher level than before the driveway was raised.

There are beaver dams on Pomroy's property north (downstream) of the driveway. Olean, who asserts that Pomroy told him that the purpose of raising the driveway was to create a lake on Pomroy's property, contends that Pomroy also altered the height of the beaver dams to facilitate creation of a lake. Pomroy, who denies that he ever intended to create a lake, admits having altered the beaver dam or dams, but asserts that all alterations were attempts to keep water flowing through the dams rather than to raise the height of the dams to impound water. The first beaver dam downstream of the driveway washed out in 2003, but the beaver raised the height of downstream "coffer dams," raising the water level on the subject properties. Pomroy and his witnesses testified, and the district court found, that these natural beaver dams plus unnaturally high amounts of

rainfall, rather than the driveway, have caused water to remain on Olean's property. Pomroy will not permit the beaver dams to be destroyed or lowered.

Olean continues to have standing water on portions of his property that had not had standing water for at least 80 years prior to the driveway improvements. Olean and his witnesses testified that the standing water has damaged and killed trees on his property, and Olean testified that the land can no longer be used for hunting. He sued Pomroy in June 2003, seeking injunctive relief to restore his property to its pre-driveway-improvement condition and for damages.[1]

The case was set for a jury trial to begin on November 15, 2004, but was removed from the calendar pending resolution of discovery motions and Olean's motion to amend the complaint. Those motions were resolved in mid-January 2005, after which Olean amended the complaint to add a claim for injunctive relief under the Minnesota Environmental Rights Act (MERA), Minn. Stat. § 116B.03 (2004).

Counsel for the parties participated in an unreported telephone scheduling conference on January 24, 2005, that resulted in an amended scheduling order setting the matter for a court trial on May 4, 2005. The order states that "the parties have waived a

[1] The parties dispute the measure of damages applicable to Olean's claims. Olean sued for treble damages for the value of damaged trees plus costs of replanting. Pomroy asserted that the only measure of damages applicable is the diminution, if any, in the value of the affected land. At one point in this lengthy litigation, Pomroy sought to extend discovery deadlines to obtain an appraisal of the affected land. Olean objected. The district court denied the motion based on the parties' acknowledgement that the applicable measure of damages is a matter of law for the court. The record does not reflect that the district court ever ruled on the issue, and the applicable measure of damages is not before us in this appeal.

jury trial."[2] The case was called for trial on May 4, but was continued because a child-protection trial had priority. According to an affidavit of Pomroy's attorney, the jury waiver was discussed on May 4, and Olean's attorney conferred with Olean about the waiver, after which both parties confirmed to the district court that a jury was waived. The matter was rescheduled for a court trial in September 2005.

Trial was again delayed by military deployment of Olean's original attorney. Another telephone scheduling conference took place on October 14, 2005, in which Olean was represented by his current attorney. An amended scheduling order was issued the same day, setting the matter for a court trial on March 6, 2006.

On January 31, 2006, Olean moved for a jury trial, a stay, and for an order compelling discovery. The request for a stay was based on the request for a jury trial and on the fact that Olean was severely injured in an explosion and would not be able to participate in the trial as scheduled. The motions were not heard as scheduled because the parties stipulated to a continuance. In September 2006, Olean renewed his motion for a jury trial and to compel discovery. Pomroy objected to the request for a jury trial, asserting the prior waiver of a jury trial and prejudice from any further delay. The district court denied Olean's request for a jury trial based on the waiver. The matter was again scheduled for a court trial. Olean moved to add a claim for punitive damages. The motion was denied.

[2] A footnote to findings of fact in the district court's order denying Olean's motion for a new trial states: "This waiver of a jury trial is noted in [presiding judge's] handwritten hearing notes of January 24, 2005." But the referenced notes are not part of the record.

The matter was tried to the district court over three days in August 2007. The record was held open until September 21, 2007, for submission of written arguments. On September 21, Olean sought to introduce additional documentary evidence, but the district court declined to accept additional evidence. In November 2007, the district court issued its opinion concluding that Olean failed to show that Pomroy had caused water damage to Olean's land and trees and dismissing all of Olean's claims. Pomroy petitioned for costs and disbursements. Olean objected to some of the claimed disbursements and moved for judgment as a matter of law or a new trial. The district court denied Olean's motions and ordered him to pay Pomroy $12,174.62 in costs and disbursements within 60 days of the order. This appeal followed.

D E C I S I O N

The district court has the discretion to grant a new trial, and we will not disturb the decision absent a clear abuse of that discretion. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990).

I. The district court did not abuse its discretion by denying Olean's request for a jury trial

Olean argues that he is entitled to a new trial because he was denied his right to a jury trial. Minn. R. Civ. P. 38.02 provides, in relevant part, that with permission of the district court, a party may waive a jury trial by "oral consent in open court, entered in the minutes." Pomroy argues that Olean, through counsel, waived a jury trial in the first unreported telephone scheduling conference and again in court on May 4, 2005. But it is doubtful that a telephone conference constitutes "open court." *See Black's Law*

Dictionary 1118 (7th ed. 1999) (noting that "open court" usually refers to a proceeding in which formal entries are made on the record, and defining the term, in part, as "[a] court session that the public is free to attend"). And the record does not reflect that a jury-trial waiver was entered in the minutes at either proceeding. On this record, we cannot conclude that Olean validly waived a jury trial under rule 38.02.

We have previously reversed the denial of a motion for a new trial where a party was entitled to a jury trial and the record did not demonstrate a waiver in any manner specified under rule 38.02. *Peterson v. Steinmaus*, 393 N.W.2d 693, 694 (Minn. App. 1986). But we conclude that Olean is not entitled to a new trial in this case because the record reflects a valid waiver of a jury trial by means other than rule 38.02, and Olean was not constitutionally entitled to a jury trial in this matter.

Prior to the January 1, 1952 effective date of the Rules of Civil Procedure, waiver of a civil jury trial was governed by Minn. Stat. § 546.26 (1952). The supreme court held that the statutory methods of waiver, which are identical to those contained in rule 38.02, are not exclusive if the intention to waive a jury trial by another method is clear and unequivocal. *Roske v. Ilykanyics*, 232 Minn. 383, 390, 45 N.W.2d 769, 774 (1951). Because waiver under the rule is identical to waiver under the superseded statute, we conclude that likewise, rule 38.02 is not the exclusive method of waiver. In this case, the district court issued two scheduling orders setting the matter for a court trial and one of the orders recites the parties' waiver of a jury trial. Olean's failure to object to either of these orders evinces a clear and unequivocal intention to waive a jury trial. The district court did not err in concluding that Olean effectively waived a jury trial.

Olean argues that if there was an effective waiver, the district court abused its discretion by failing to allow him to withdraw the waiver. *See Blenda Life Corp. v. Blenda Life, Inc.*, 293 Minn. 448, 451, 196 N.W.2d 925, 926 (1972) (stating that the district court has discretion whether or not to grant a motion to withdraw a jury-trial waiver). But Olean never moved the district court to withdraw his waiver. And based on Pomroy's objection to Olean's later request for a jury trial asserting that he would be prejudiced by further delay in the already protracted litigation, we cannot conclude that denial of a motion to withdraw the waiver would have constituted an abuse of discretion.

Pomroy first questioned Olean's right to a jury trial in opposition to Olean's motion for a new trial. The district court did not address Olean's right to a jury trial, but both parties have briefed the issue on appeal. Where consideration of an issue is required in the interest of justice, the parties have had adequate briefing time, and the issues were implied in the district court, we make an exception to the general rule that we do not address issues that were not fully argued to and considered by the district court. *Tischendorf v. Tischendorf*, 321 N.W.2d 405, 410 (Minn. 1982); *see* Minn. R. Civ. App. P. 103.04 (allowing appellate courts to address issues in the interests of justice). We conclude that the requisite conditions exist to permit review of Olean's right to a jury trial in this appeal.

Pomroy relies on the holding in *Koeper v. Town of Louisville* to argue that, in an action for both equitable and legal relief, neither party is entitled to a jury trial as a matter of right. 109 Minn. 519, 124 N.W. 218 (1910). The facts in *Koeper* are very similar to this case. Koeper sued to compel a town to close an opening it made in a lake bank

during a highway improvement. Koeper claimed that the opening caused flooding on his land. *Id.* at 520, 124 N.W. at 218. Koeper sought both injunctive relief and damages. *Id.* at 521, 124 N.W. at 218. The district court denied Koeper's request for a jury trial and found for the town. *Id.* Koeper appealed, claiming that he was wrongfully denied a jury trial. *Id.*

The supreme court stated that whether Koeper was entitled to a jury trial depends on the character of his cause of action, noting that a party has a constitutional right to a trial by a jury of a legal cause of action, even if an equitable cause of action is asserted as a counterclaim. *Id.* (citing *Lace v. Fixen*, 39 Minn. 46, 38 N.W. 762 (1888)). But the supreme court stated:

> There is a clear distinction between cases . . . where two causes of action, one legal and the other equitable, are united in the same action, and those where the cause of action is an equitable one, in which equitable relief is sought, and also legal relief as an incident to the equitable cause of action; for example, a claim for damages growing out of the facts upon which the equitable relief depends. The rule in cases of this kind is that in an action not of a strictly legal nature, where the plaintiff seeks both equitable and legal relief, neither party is entitled to a jury trial as a matter of right.

Koeper, 109 Minn. at 521–22, 124 N.W. at 218–19. We conclude that Olean's cause of action is not distinguishable from the cause of action involved in *Koeper*; that Olean, like Koeper, was not entitled to a jury trial as a matter of right; and, therefore, Olean is not entitled to a new trial based on the district court's denial of his request for a jury trial.

II. The district court correctly applied the doctrine of reasonable use

On appeal, Olean asserts that this case involves impoundment of a natural water course rather than diversion of surface waters, making it "questionable as to whether or not the doctrine of reasonable use even applies to this situation."

> In determining liability for the obstruction or diversion of minor natural and artificial drainways or channels for the drainage of waters this court has uniformly applied the law relating to surface waters . . . .
>
> "Each possessor (of land) is legally privileged to make a reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others. He incurs liability only when his harmful interference with the flow of surface water is unreasonable. The issue of reasonableness or unreasonableness is a question of fact to be determined in each case upon a consideration of all the relevant circumstances, including such factors as the amount of harm caused, the foreseeability of the harm on the part of the possessor making the alteration in the flow, the purpose or motive with which he acted, and others."

Collins v. Wickland, 251 Minn. 419, 425, 88 N.W.2d 83, 87-88 (1958) (citing Stanley V. Kinyon & Robert C. McClure, *Interferences with Surface Waters*, 24 Minn. L. Rev. 891, 904 (1940)).

There is ample evidence in the record to support the district court's conclusion that this case involves drainage of surface waters rather than alteration of a natural water course. The district court did not err in applying the doctrine of reasonable use.

III. There is evidence in the record supporting the district court's findings on reasonable use and causation

The parties presented conflicting evidence about why and how the driveway was raised and who or what caused water to be impounded on Olean's property. "It is not the province of this court to reconcile conflicting evidence. On appeal, a trial court's

findings are given great deference, and shall not be set aside unless clearly erroneous . . . . If there is reasonable evidence to support the trial court's findings of fact, a reviewing court should not disturb those findings." *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999).

Olean presented evidence that (1) Pomroy raised the driveway as much as four feet, intending to create a lake on his property deep enough to maintain fish through the winter; (2) the bottom of the culverts in the raised driveway are higher than the level of the original driveway surface such that water cannot begin to drain until the water is at a higher level than was possible when water could flow over the original driveway; (3) the culverts are too few and too small to permit the volume of flow necessary to drain Olean's land at the same rate that was permitted by the original driveway, causing water to stand longer and at higher levels on Olean's property; (4) 29 acres of Olean's previously dry land are under water due to Pomroy's driveway improvements; (5) Pomroy has directly or indirectly increased the height of downstream beaver dams, which also caused water to be impounded on Olean's property; and (6) the high water caused by Pomroy has killed trees on Olean's property and destroyed hunting land.

The district court plainly rejected Olean's evidence and credited Pomroy's evidence that (1) the only purpose of raising the driveway was to make his land consistently accessible by vehicle; (2) the driveway was raised only about 21 inches from the old driveway surface and culverts were installed to permit drainage at the same level and volume as before the driveway was raised; (3) Pomroy did not directly or indirectly

raise the height of downstream beaver dams; and (4) higher-than-average rainfall and beaver activity are the sole causes of increased water on Olean's property.

Based on Pomroy's evidence, the district court found that (1) raising the driveway had no appreciable effect on the water level on Olean's property after May 2002; (2) Olean's tree damage was caused solely by high levels of precipitation between 2001 and 2003 combined with beaver activity; (3) raising the driveway constituted reasonable use of Pomroy's property; and (4) Pomroy could not reasonably have foreseen any substantial harm that would result from the manner in which the driveway was raised.

Because there is evidence in the record to support the district court's findings and the findings are not manifestly and palpably contrary to the evidence as a whole, we will not disturb these findings on appeal, even though we might have found the facts to be different if we had the fact-finding function. *See Grant v. Malkerson Sales, Inc.*, 259 Minn. 419, 425–26, 108 N.W.2d 347, 351 (1961).

IV. The district court did not err in dismissing Olean's MERA claims

The MERA provides, in relevant part, that a person may maintain a civil action for equitable relief to protect natural resources from impairment or destruction. Minn. Stat. § 116B.03, subd. 1 (2008). The district court dismissed all of Olean's claims without specifically addressing the MERA claim.

Pomroy asserts that Olean's MERA claim was properly dismissed as without merit and as untimely,[3] noting that Olean did not serve the attorney general and the Minnesota

[3] The parties do not dispute that the two-year statute of limitations for improvements to real property applies to the MERA claim in this case. *See* Minn. Stat. § 541.051 (2004).

Pollution Control Agency, as required by the MERA, until 2007. Olean argues that because his amended complaint relates back to his original complaint, the action was timely. Neither party has briefed or argued the effect of late service on the relation-back doctrine, but we need not reach this issue. Because we are affirming the district court's findings that Pomroy's acts are not the cause of any of the environmental effects asserted by Olean and had no appreciable effect on the public waters of Minnesota, Olean failed to make a prima facie case under the MERA. *See* Minn. Stat. § 116B.04 (2008) (stating that a plaintiff under the MERA has the burden to make a prima facie showing that the defendant's conduct "has, or is likely to cause the pollution, impairment, or destruction of the air, water, land or other natural resource located within the state"). Therefore, the district court did not err by dismissing Olean's MERA claims.

V. The district court did not abuse its discretion by rejecting posttrial evidence

Olean argues that the district court should have permitted him to supplement the trial record with "newly discovered" evidence from the county soil and water conservation district. We review denials of motions to consider new evidence under an abuse-of-discretion standard. *Zander v. Zander*, 720 N.W.2d 360, 364 (Minn. App. 2006), *review denied* (Minn. Nov. 14, 2006). The district court found that all of the documents that Olean sought to introduce were available to him before trial. *See* Minn. R. Civ. P. 59.01(d) (describing newly discovered evidence as "[m]aterial evidence newly discovered, which with reasonable diligence could not have been found and produced at the trial"); *Bruno v. Belmonte*, 252 Minn. 497, 503, 90 N.W.2d 899, 903 (1958) (stating that for newly discovered evidence to be considered, the moving party must show that it

exercised "proper diligence" to discover it before trial). Olean asserts that he had requested the documents but they were withheld and only turned over when the county attorney became involved after the trial. But Olean never attempted to depose anyone who could have produced these documents or to subpoena these documents during the years of discovery that preceded the trial. On this record, the district court did not abuse its discretion in rejecting Olean's posttrial evidence.

VI. The issue of punitive damages is moot

Olean argues that he established a sufficient basis to support a claim for punitive damages under Minn. Stat. § 549.20, subd. 1 (2008), and the district court abused its discretion by denying his motion to add a claim for punitive damages. Because we are affirming dismissal of Olean's action, the issue of punitive damages is moot. *See Obermoller v. Federal Land Bank of St. Paul*, 409 N.W.2d 229, 230–31 (Minn. App. 1987) (stating that an issue is moot when a determination is sought on a matter, which, when made, will not have any practical effect or will make no difference with respect to the controversy on the merits), *review denied* (Minn. Sept. 18, 1987).

VII. The district court's award of disbursements is not supported by sufficient findings or authority

The district court awarded Pomroy $12,174.62 in costs and disbursements, over Olean's objections, without a hearing.[4] The prevailing party in a district court action "shall" be allowed costs and "reasonable disbursements." Minn. Stat. §§ 549.02, .04

[4] Olean does not challenge the award of costs under Minn. Stat. § 549.02 (2008). His challenge is to certain disbursements awarded under Minn. Stat. § 549.04 (2008). Many cases improvidently use the phrase "costs and disbursements" in discussing disbursements under section 549.04.

(2008). The amount of disbursements awarded is within the district court's discretion and will not be reversed on appeal unless there is an abuse of discretion. *Stinson v. Clark Equip. Co.*, 473 N.W.2d 333, 336 (Minn. App. 1991), *review denied* (Minn. Sept. 13, 1991). When reviewing a request for disbursements, the district court must make sufficient findings that the disbursements were reasonable and necessary disbursements. *Id.* at 338.

In *Beniek v. Textron, Inc.*, we quoted *Stinson* for the proposition that to make the required findings, the district court must "take oral testimony of all [disbursements] with full opportunity for both direct and cross-examination so a full record is available for review." 479 N.W.2d 719, 724 (Minn. App. 1992) (citation omitted), *reviews denied* (Minn. Feb. 19, 27, 1992). In *Buller v. A. O. Smith Harvestore Prods. Inc.*, 518 N.W.2d 537, 543 (Minn. 1994), the supreme court noted that Minn. R. Civ. P. 54.04 does not require the trial court to conduct a hearing to determine the reasonableness of alleged disbursements. But, in this case, Pomroy's claimed disbursements are sparingly documented, and Olean had no opportunity to challenge the request. The district court made only one conclusory finding that all amounts claimed were reasonable. On this record, we conclude that the district court erred in this case by failing to conduct a hearing on Olean's objections.

It is undisputed that the procedures set out in Minn. R. Civ. P. 54.04 and Minn. R. Gen. Pract. 127 were not followed in this case. Nothing in the record explains why the rules were not followed. Pomroy filed notice of taxation and Olean objected, but the court administrator failed to take any action and the matter was unresolved until the

district court, in its order denying Olean's posttrial motion, made a conclusory finding that the "costs and disbursement records as submitted by [Pomroy] [are] a fair and reasonable taxation of costs to be paid by [Olean]" and ordered Olean to pay the full amount awarded within 60 days.[5] Because the procedure employed deprived Olean of the opportunity to meaningfully challenge the amounts claimed and the district court failed to provide adequate findings to support the award, we reverse the award of disbursements and remand for further proceedings to determine the reasonableness and necessity of disbursements authorized by law, consistent with this opinion.

a. Lost vacation time and mileage for counsel and parties are not recognized disbursements

The district court awarded Pomroy $3,090.00 for "lost vacation time for mandatory court appearances." There is no documentation supporting this "loss" or how it was calculated, and there is no explanation of how this claim constitutes a reasonable disbursement "paid or incurred" under Minn. Stat. § 549.04. We conclude that such an award is, as a matter of law, not a disbursement contemplated by the statute and reverse the award for "lost vacation time."

The district court awarded $1,441.40 for mileage for Pomroy and his attorney. There is no recognized practice in Minnesota of awarding mileage to a party or a party's counsel as a disbursement under section 549.04. Taxation of section 357.22 witness fees,

[5] Pomroy claimed $12,311.62 in costs and disbursements. Despite the court's finding that the records Pomroy submitted represented fair and reasonable costs and disbursements, the court awarded Pomroy only $12,174.62. Our analysis uses the amount Pomroy claimed for each particular disbursement because the court's findings are devoid of information regarding how much of the total award was allotted for each particular disbursement.

which caps travel expenses at .28 cents per mile, is a recognized practice in Minnesota, but there is no authority for awarding witness fees to parties appearing on their own behalf or to their counsel. *See Barry v. McGrade*, 14 Minn. 286, 14 Gil. 214, 215, (1869) (noting that an attorney is not entitled to fees for attending hearings as a witness, and a party is entitled to witness fees only when it appears that the party is acting solely as a witness for co-parties). We conclude that mileage expenses for parties and counsel are not disbursements under section 549.04 and reverse the mileage award for Pomroy and his attorney.

b. Expert witness fees

The district court awarded Pomroy $4,882.91 in expert-witness fees based solely on an attachment to counsel's affidavit showing that this amount was paid by Pomroy's insurer to Pomroy's expert witness. Olean objected to the amount claimed as excessive and unsubstantiated.

The judge of any court of record may allow expert-witness fees or compensation "as may be just and reasonable." Minn. Stat. § 357.25 (2008). Allocation of expert-witness fees to the prevailing party in an award of costs and disbursements has long been recognized practice in Minnesota. *See Kundiger v. Metro. Life Ins. Co.*, 218 Minn. 273, 286, 15 N.W.2d 487, 495 (1944) (noting that allowance of expert-witness fees to prevailing party "was made by order of the trial court . . . according to recognized practice"). Minn. R. Gen. Pract. 127 permits the court administrator, on appropriate affidavit, to award up to $300 per day for expert-witness fees, subject to increase or decrease by the judge. But the limitation on the amount and the exclusion from a court

administrator's award of costs for an expert witness's preparation or experiments outside the court room, do not apply to an award by the judge. *Quade & Sons Refrigeration Inc. v. 3M*, 510 N.W.2d 256, 260 (Minn. App. 1994) (noting that section 357.25 permits a judge to allow expert-witness fees "as may be just and reasonable"), *review denied* (Minn. Mar. 15, 1994).

In this case, the district court made no findings concerning the expert-witness fees. On remand, we instruct the district court to reopen the record to permit direct and cross-examination on the reasonableness and necessity of the claim and to make appropriate findings based on the record established.

c. Miscellaneous expenses

Over Olean's objections, Pomroy was awarded $340.00 in motion and fax fees, $299.80 in subpoena-service fees, and $20.00 in parking fees. Minn. Stat. § 357.09, subd. 1(1), permits the sheriff to charge and collect fees established by the county board for serving subpoenas, and Minn. Stat. § 549.04, subd. 1, specifically includes fees for service of process as a taxable disbursement. But in this case the documentation provided to support the service fees does not match the amount requested. On remand, the district court must make findings supported by the record on the reasonable amount of such fees.

The district court has discretion to award miscellaneous costs, including photocopying, long-distance telephone calls, fax charges, parking, and courier services. *Stinson*, 473 N.W.2d at 338. Again, a request for such disbursements must be supported with evidence of the disbursement. Here, Pomroy's attorney submitted a bill that lists fax

fees but no documentation about what was faxed to whom. Olean should be given an opportunity to challenge reasonableness of miscellaneous expenses claimed, Pomroy should have an opportunity to respond to Olean's objections, and the district court must make findings specific to each challenged request.

Affirmed in part, reversed in part, and remanded.