414 Nicollet Mall
Minneapolis, MN 55401

March 10, 2020

—Via Electronic Filing—

Will Seuffert
Executive Secretary
Minnesota Public Utilities Commission
121 7th Place East, Suite 350
St. Paul, MN 55101-2147

RE: COMPLIANCE FILING
SHERCO UNIT 3 LITIGATION SETTLEMENT OF LAWSUIT AGAINST GE
DOCKET NO. E999/AA-18-373
DOCKET NO. E999/AA-17-492
DOCKET NO. E999/AA-16-523
DOCKET NO. E999/AA-14-579
DOCKET NO. E002/GR-13-868
DOCKET NO. E002/GR-12-961

Dear Mr. Seuffert:

Northern States Power Company, doing business as Xcel Energy, submits this filing in compliance with Order Point 3 of the April 11, 2019 ORDER AUTHORIZING SHERCO UNIT 3 RATEPAYER REFUND AMOUNT AND METHOD AND REQUIRING COMPLIANCE FILING in the above-referenced dockets.

Order Point 3 requires the Company to file status updates regarding the filing of any appeals in the Sherco Unit 3 litigation and thereafter when the Court of Appeals issues any orders related to the Appeals. Aegis Insurance Services, LTD and a number of other interested insurers and subrogees of Northern States Power Company and Southern Minnesota Municipal Power Agency filed an appeal with Minnesota Court of Appeals on April 25, 2019. The case has been docketed as A19-0640.

On February 10, 2020, the Court of Appeals issued an unpublished opinion affirming the district court's judgment in favor of General Electric following a jury trial in late 2018. The unpublished opinion is included as Attachment A. We

expect the Appellants to seek additional review by the Minnesota Supreme Court, and we will make additional compliance filings to keep the Commission apprised of further appellate proceedings.

We have electronically filed this document with the Minnesota Public Utilities Commission, and copies have been served on the parties on the attached service lists. Please contact me at ryan.j.long@xcelenergy.com or 612-215-4659 or Martha Hoschmiller at martha.e.hoschmiller@xcelenergy.com or 612-330-5973 if you have any questions regarding this filing.

Sincerely,

/s/

RYAN J. LONG
LEAD ASSISTANT GENERAL COUNSEL

c: Service List

STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0640

Aegis Insurance Services, LTD.,
and other interested insurers as subrogees of
Northern States Power Co.
and Southern Minnesota Municipal Power Agency,
Appellants,

vs.

General Electric Company, et al.,
Respondents.

Filed February 10, 2020
Affirmed
Reyes, Judge

Sherburne County District Court
File No. 71-CV-13-1472

Sam Hanson, Leah Ceee O. Boomsma, Kirsten Pagel, Taft Stettinius & Hollister LLP, Minneapolis, Minnesota; and

David S. Evinger, Daniel W. Berglund, Grotefeld, Hoffmann, Gordon, Ochoa & Evinger, LLP, Minneapolis, Minnesota (for appellants)

Timothy Schupp, William M. Hart, Robert Vaccaro, Meagher & Geer, P.L.L.P., Minneapolis, Minnesota (for respondents)

Considered and decided by Reyes, Presiding Judge; Larkin, Judge; and Slieter, Judge.

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

REYES, Judge

This is an appeal from the district court's judgment after a jury trial on appellants' negligence-based claims following a remand by this court. Appellants argue that the district court (1) improperly entered judgment for respondents despite the jury's special-verdict answers in favor of appellant on an ordinary-negligence assumed-duty claim; (2) abused its discretion by denying appellants' motion to amend its pleadings to conform to the verdict; (3) abused its discretion by denying appellants' motion for a new trial on asserted errors, including granting respondents judgment as a matter of law (JMOL) on appellants' post-sale failure-to-warn claim and summary judgment on appellants' fraudulent-concealment claim; and (4) abused its discretion by awarding respondents excessive costs. We affirm.

FACTS

Appellants Aegis Insurance Services, LTD, and other interested insurers as subrogees of Northern States Power Company[1] (collectively, "NSP") appeal from judgment for respondents General Electric Company, General Electric International, Inc., and GE Energy Services, Inc. (collectively, "GE"). NSP's claims arise from the November 2011 catastrophic failure of a low-pressure steam turbine in Unit 3 of the Sherburne County generating station, a coal-fired power-generation facility in Becker operated by Northern

[1] Northern States Power Company separately settled with respondents. Only its insurers as subrogees pursued these claims to trial.

States Power Company, due to stress corrosion cracking (SCC) in a rotor wheel. The failure (the "Unit 3 incident") caused nearly $300 million in damages.

NSP purchased the turbine from GE in 1977 under a sales contract. In 1993, GE and NSP entered into a General Conditions Agreement (GCA) that provided terms applicable to future equipment and services provided by GE to NSP. GE last performed maintenance on the turbine in 1999. GE provided occasional "technical information letters" (TILs) to its customers with new information about hazards and recommendations for inspection and care of its equipment. Neither the 1977 sales contract nor the GCA required GE to provide TILs or updated information to NSP.

In 1993, GE issued, and NSP received, TIL 1121-3AR1, which warned of SCC, explained how to inspect turbines for it, and recommended inspections after specified abnormal events or operational anomalies. SCC occurs when contaminants in steam affect components of steam-powered turbines, which can lead to turbine failures over time. In 1999, GE issued TIL 1277-2, recommending inspections for SCC in turbines with "once-through boilers" ten years into service, regardless of the occurrence of the anomalies referenced in TIL 1121-3AR1. GE did not extend this TIL to "drum boiler" units, such as the turbine in Unit 3, and it therefore did not send TIL 1277-2 to NSP. In 2013, two years after the Unit 3 incident, GE issued TIL 1886, which recommended inspection of drum-boiler units for SCC 22.5 years into service.

NSP filed this suit in November 2013. NSP stated five causes of action in its amended complaint: fraudulent concealment (count I), willful and wanton negligence (count II), gross negligence (count III), professional negligence (count IV), and post-sale

failure to warn (count V). The district court granted summary judgment to GE on all counts, based on the economic-loss doctrine.[2] NSP appealed, and we reversed and remanded. *N. States Power Co.*, 2017 WL 3013230, at *5. We concluded that the district court properly barred claims based on alleged product defects, but that the economic-loss doctrine did not bar recovery on claims that arose outside of the 1977 sales contract. *Id.* We found that the 1977 contract did not encompass "the post-sale advice and lack of advice at issues in this action" and concluded that "that alleged tortious conduct is independent of the sales contract." *Id.*

On remand, the district court granted GE summary judgment on count I, the fraudulent-concealment claim, concluding that NSP presented no evidence on an essential element of the claim. The case proceeded to trial on count II, willful and wanton negligence; count III, gross negligence; and count V, post-sale failure to warn. Before submitting the special-verdict form to the jury, the district court granted JMOL to GE on the post-sale failure-to-warn claim, finding that no evidence supported the element that NSP was unaware of the risk of harm. It denied GE's JMOL motions on the two negligence claims.

The district court created a special-verdict form on which questions 1 through 3 went to willful and wanton negligence, questions 4 through 8 went to whether GE assumed

[2] The parties agreed in their prior appeal that that the common-law economic-loss doctrine applied rather than the later codifications of it in Minn. Stat. § 604.101 (2016) or Minn. Stat. § 604.10 (1992). *See N. States Power Co. v. Gen. Elec. Co.*, No. A16-1687, 2017 WL 3013230, at *3 n.3 (Minn. App. July 17, 2017), *review denied* (Minn. Sept. 27, 2017). Under this doctrine, a party may not recover in tort for property damage that arises out of a commercial transaction. *Hapka v. Paquin Farms*, 458 N.W.2d 683, 688 (Minn. 1990).

a duty to render technical information, advice, and recommendations to NSP and whether it was grossly negligent in carrying out that duty, questions 9 and 10 asked about NSP's negligence, and question 11 went to allocation of comparative fault. The jury found that GE did not act with willful and wanton negligence. It also found that, while GE had assumed a duty to provide technical information, advice, and recommendations to NSP, it was not grossly negligent in its provision of that information. In response to the questions addressing comparative fault, it found that NSP was negligent in its operation and maintenance of Unit 3 and that GE was 52% and NSP 48% at fault. Based on these answers, the district court entered judgment for GE on the two remaining negligence claims. It denied NSP's motion for JMOL or a new trial. This appeal follows.

D E C I S I O N

I. The district court properly denied NSP's motion for JMOL and entered judgment in favor of GE.

NSP argues that the district court improperly denied its motion for JMOL because the jury found that GE acted with ordinary negligence in carrying out a duty to NSP that it assumed under Restatement (Second) of Torts § 323, and NSP therefore is entitled to judgment. We disagree.

We review a district court's decision on a motion for JMOL de novo and view the evidence in the light most favorable to the prevailing party. *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919 (Minn. 2009). A district court must "base relief on issues either raised by the pleadings or litigated by consent." *Folk v. Home Mut. Ins. Co.*, 336 N.W.2d 265, 267 (Minn. 1983); *see also Thorpe v. Cooley*, 165 N.W. 265, 266 (Minn. 1917). We

review for clear error a district court's finding of no implied consent. *See Buller v. A.O. Smith Harvestore Prod., Inc.*, 518 N.W.2d 537, 541 (Minn. 1994).

The district court determined that NSP did not plead ordinary negligence regarding an assumed duty under Restatement (Second) of Torts § 323 and "clearly abandoned" such a claim when it clarified the remaining counts in its response to GE's trial brief. The district court found that this abandonment meant that GE did not consent to an ordinary-negligence claim. It further found that the parties did not submit an ordinary-negligence claim to the jury, but rather a willful-and-wanton-negligence claim (count II) and a gross-negligence claim (count III), as well as questions to determine NSP's negligence and allocate comparative fault.

The record supports the district court's finding that the parties did not impliedly consent to try ordinary negligence and did not submit the claim to the jury. First, neither NSP's complaint nor amended complaint contained an ordinary-negligence claim. Second, NSP's response to GE's trial brief, submitted ten days before trial, explicitly stated that only three claims remained, none of which involved ordinary negligence. Third, GE's trial brief did not defend against an ordinary negligence claim. Finally, the parties did not argue ordinary negligence in their closing arguments. In NSP's closing, it argued why GE was liable for willful and wanton negligence and gross negligence, stating that each was the "only cause" of the Unit 3 incident.

NSP claims that special-verdict question 11, which called for allocation of fault between NSP and GE, combined with questions 4 through 6, comprise its ordinary-negligence assumed-duty claim. But this would leave questions 7 through 10 as

comprising a third claim, gross negligence, and NSP itself described the special-verdict questions as comprising two claims, plus a comparative-fault question.

The district court did not clearly err by finding that the parties did not litigate ordinary negligence by consent. The record also shows that NSP did not plead ordinary negligence. The district court therefore properly denied NSP's motion for JMOL and entered judgment for GE.

II. The district court did not abuse its discretion by denying NSP's motion to amend its pleadings to conform to the verdict.

NSP argues alternatively that the district court should have granted its request to amend its complaint under either Minn. R. Civ. P. 15.01 or 15.02 to include an assumed-duty claim using an ordinary-negligence standard. We are not persuaded.

We review a district court's decision to deny amendments to pleadings for an abuse of discretion. *Johns v. Harborage I, Ltd.*, 664 N.W.2d 291, 295 (Minn. 2003). Under Minn. R. Civ. P. 15.01, "a party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given," except when it would prejudice the opposing party. *See Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). Minn. R. Civ. P. 15.02 allows for posttrial amendment "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties." *See also Hohenstein v. Goergen*, 176 N.W.2d 749, 751 (Minn. 1970).

The record supports the district court's finding that allowing NSP to amend its complaint now would prejudice GE. Further, as explained previously, the parties did not consent expressly or impliedly to try this claim. The district court therefore did not abuse

its discretion by denying appellant's request to amend its pleadings under Minn. R. Civ. P. 15.01 or 15.02.

III. The district court did not abuse its discretion by denying NSP's motion for a new trial.

NSP makes several arguments as to why it is entitled to a new trial. We review each in turn.

We will not disturb a district court's decision to grant or deny a new trial absent a clear abuse of discretion. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990). When the district court bases this decision on an issue of law rather than an exercise of discretion, we review that decision de novo. *Id.*

A. The district court properly granted JMOL to GE on NSP's post-sale failure-to-warn claim.

NSP argues that it is entitled to a new trial because the district court improperly granted JMOL to GE on NSP's post-sale failure-to-warn claim before sending it to the jury because the district court used an overly broad definition of the risk of harm about which GE had a duty to warn. NSP's argument is misguided.

One element of a post-sale duty-to-warn claim is that "those to whom a warning might be provided . . . can reasonably be assumed to be unaware of the risk of harm." *Great N. Ins. Co. v. Honeywell Int'l, Inc.*, 911 N.W.2d 510, 520 (Minn. 2018) (quoting Restatement (Third) of Torts § 10 (1998)). In a comment about this element, the Restatement provides that "even if knowledge of the risk reasonably becomes available to the seller only after the original sale, if users and consumers are at that time *generally*

aware of the risk a post-sale *warning is not required*." Restatement (Third) of Torts § 10 cmt. f (1998) (emphases added).

The district court determined that "there is no basis to establish [post-sale duty to warn] because there's no way a jury could find that NSP was unaware of the risk of harm." Here, ample evidence shows NSP's general awareness of the risks of SCC unrelated to operational anomalies. For example, an NSP System Health Report stated that "[low-pressure turbines] also experience dovetail pin cracking problems, erosion damage and may suffer from an industry-wide problem with rotor wheel cracking. . . . Risks associated with wheel cracking involve wheel failure and buckets departing the rotor. Resulting collateral damage could be severe (i.e. due to mass imbalance and projectiles)."

NSP argues that, while GE informed NSP that "certain operational conditions could cause SCC to form in the finger dovetails," it did not inform NSP "that a *different, more* substantial risk was present in these turbines: the risk of catastrophic failure due to undetected SCC, unrelated to operational anomalies, caused by the mere passage of time." It argues that "GE *did* know NSP was unaware of [that] specific and substantial risk." But the relevant focus is on NSP's awareness, not whether GE did or did not know of NSP's awareness. NSP further argues that the jury's affirmative answers to questions 4 through 6 equate to a finding that NSP was unaware of the risk. But these questions again go to GE's knowledge, not NSP's. The district court properly determined that no reasonable jury could find that NSP was unaware of the general risk of SCC on Unit 3 that materialized, and NSP is not entitled to a new trial on that basis.

B. The district court did not abuse its discretion by excluding certain evidence as cumulative and confusing.

NSP argues that the district court abused its discretion by excluding as cumulative and confusing evidence about GE's prefailure knowledge of (1) SCC incidents in its turbine fleet and (2) the dangers associated with the design of and materials in its turbines. We disagree.

The district court has broad discretion to make evidentiary rulings. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997). "In the absence of some indication that the [district] court exercised its discretion arbitrarily, capriciously, or contrary to legal usage," we must affirm. *Id.* at 46.

NSP first argues that the district court's ruling limiting evidence of other SCC-caused turbine failures to those that occurred before the Unit 3 incident and to incidents involving finger-dovetail turbines, rather than tangential-entry turbines, prejudiced its negligence claims. But the district court ultimately admitted a list of other incidents of SCC on both finger-dovetail and tangential-entry turbines, notwithstanding that NSP had consistently argued that the two turbine types are materially different. The district court did not abuse its discretion by excluding additional information about SCC incidents across GE's turbine fleet, because it would be cumulative.

Second, NSP argues that the district court abused its discretion by excluding evidence of design or manufacturing defects based on the finding that NSP did not allege product-defect claims. But the jury did hear some evidence about the design of GE's turbines as it relates to the risk of SCC, and the two-week trial already included significant

amounts of highly technical information on SCC and GE's turbines. The district court's determination that additional design- and manufacturing-defect evidence would have improperly influenced the jury, and therefore should be excluded, was not an arbitrary or capricious exercise of its discretion or contrary to legal usage. *See id.* The district court therefore did not abuse its discretion by excluding this evidence.

C. The district court did not abuse its discretion by excluding certain evidence as subsequent remedial measures.

NSP next argues that the district court abused its discretion by excluding GE's research into latent SCC and related recommendations, including TIL 1886, which GE issued two years after the Unit 3 incident. We disagree.

Under Minn. R. Evid. 407, evidence of measures a party takes after an injury-causing event that "would have made the event less likely to occur" is inadmissible "to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction."

In denying NSP's motion for JMOL or for a new trial, the district court determined that it properly excluded evidence of TIL 1886 because the Unit 3 incident occurred in 2011, and GE released TIL 1886 in 2013. It found that GE decided to issue TIL 1886 only after the Unit 3 incident and concluded that "TIL 1886 is therefore a classic subsequent remedial measure barred by Rule 407 that NSP wanted to use to prove negligence." It further concluded that the Rule 407 exception for proving the feasibility of precautionary measures did not apply, because GE did not first controvert the feasibility of those measures.

NSP first argues that a pre-accident determination or "a pre-accident decision to provide a warning negates the subsequent nature of a remedy," making the subsequent measure admissible. The only Minnesota state-court case to which NSP cites in support of this theory is *Beniek v. Textron, Inc.* 479 N.W.2d 719, 723 (Minn. App. 1992), *review denied* (Minn. Feb. 19, 27, 1992), which is not applicable here. In *Beniek*, we clarified that the "event" after which Minn. R. Evid. 407 applies is the injury-causing accident, not the earlier sale of the injury-causing item. *Id.* NSP also cites to *Kociemba v. G.D. Searle & Co.*, 683 F. Supp. 1579, 1581 (D. Minn. 1988), which applied the federal analog to Minn. R. Evid. 407. In *Kociemba*, which is not binding precedent, the federal district court admitted evidence of a warning that the FDA required in rules it promulgated *one month before* the event at issue, but which did not become effective until four months after the event. *Id.* at 1580-81.

Here, the district court found that GE made the "determination" to issue TIL 1886 after the Unit 3 incident. The record supports this finding. Although GE began researching incidents of SCC on drum-boiler units before the Unit 3 incident, it did not know at that time what guidance it would provide on inspecting those units for SCC. GE's contemplation of and research toward an update was not a "determination" to issue the guidance it ultimately released in TIL 1886, unlike the FDA's promulgation of a final rule, which required nothing more from the FDA to become effective. *See id.*

NSP also argues that the district court abused its discretion by concluding that TIL 1886 did not fall under the rule 407 exception for proving the feasibility of precautionary measures. It argues that GE claimed that issuing an additional TIL was not feasible,

pointing to a footnote in GE's trial brief following this court's reversal. But in a footnote in NSP's own brief, it agrees with a statement by GE that it "does not controvert the feasibility" of a warning. Further, in GE's trial brief, it stated that it had "appropriate reasons" to not issue an additional TIL applicable to Unit 3 prior to the incident, not that doing so was infeasible. At trial, rather than controverting the feasibility of precautionary measures, former GE employee Jim Howenstein and GE employee Joshua Bird testified that GE had been recommending, prior to the Unit 3 incident, that customers with drum-boiler units periodically inspect those units. The district court did not err in finding that GE did not controvert the feasibility of remedial measures, and it therefore did not abuse its discretion by excluding TIL 1886.

D. The district court properly granted summary judgment to GE on NSP's fraudulent-concealment claim.

NSP argues that it is entitled to a new trial because the district court improperly granted summary judgment for GE on its "Count I: Fraud" claim by misconstruing the law. NSP's argument is misguided.

We review a grant of summary judgment de novo. *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017). Summary judgment is proper when the moving party shows that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03; *Sauter v. Sauter*, 70 N.W.2d 351, 351 (Minn. 1955). No genuine issue of material fact exists when "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (quotation omitted).

The district court determined that NSP "failed to provide any evidence that GE intended [NSP] to rely on a material omission." NSP argues that this determination was improper because "fraud" can be intent-based or negligence-based. But NSP did not broadly claim fraud. NSP claimed fraudulent concealment. As the district court aptly noted, "NSP attempts to now shift the fraudulent concealment claim to a general fraud claim." NSP portrayed its claims before the district court at summary judgment as fraudulent concealment. In its opposition to GE's motion for summary judgment, NSP argued the "fraudulent concealment" claim from its amended complaint. Despite its reference to elements of theories other than fraudulent concealment, NSP concluded by stating that GE's nondisclosure "establishes fraudulent concealment." A district court must base relief on issues raised in the pleadings or litigated by consent, *Folk*, 336 N.W.2d at 267, and a party cannot raise a new theory on appeal, *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

In addition to only vaguely referencing a claim of negligent misrepresentation before summary judgment, NSP ignores that negligent misrepresentation requires some *representation*. *See Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 369 (Minn. 2009) (requiring a person to "suppl[y] false information" and referring to "the person making the representation"). NSP's claim fails because it asserts no representation, but rather only an omission. The district court therefore properly granted summary judgment to GE on NSP's claim of fraudulent concealment in count I.

IV. The district court did not abuse its discretion by awarding costs and disbursements to GE.

NSP argues that the district court abused its discretion by awarding costs and disbursement to GE because (1) GE did not sufficiently detail its expenses, including expert-witness fees; (2) the lay-witness fees exceeded the statutory limit; (3) GE did not prevail on several motions; and (4) the district court failed to make findings to justify its award. We address each claim in turn.

We review a district court's judgment awarding costs and disbursements for an abuse of discretion. *Dukowitz v. Hannon Sec. Servs.*, 841 N.W.2d 147, 155 (Minn. 2014) (citation omitted). A district court abuses its discretion if its decision is "arbitrary or . . . without evidentiary support." *Smith v. Smith*, 163 N.W.2d 852, 856 (Minn. 1968). The prevailing party "shall be allowed reasonable disbursements paid or incurred" and certain costs. Minn. Stat. §§ 549.02, .04, subd. 1 (2018).

A. GE's application sufficiently detailed expenses and expert-witness fees.

NSP claims that GE failed to file (1) "a detailed application for taxation of costs and disbursements" under Minn. R. Civ. P. 54.04 and (2) the required affidavit detailing expert-witness fees. We are not persuaded.

Minn. R. Civ. P. 54.04(b) requires a party seeking costs and disbursements to "serve and file a detailed application for taxation of costs and disbursements." This does not require receipts and invoices, but rather a breakdown of "disbursements associated with experts, depositions, and other expenses." *Staffing Specifix, Inc. v. TempWorks Mgmt. Servs., Inc.*, 896 N.W.2d 115, 135 (Minn. App. 2017), *aff'd*, 913 N.W.2d 687 (Minn. 2018).

For expert-witness fees, Minn. Stat. § 357.25 (2018) gives the district court discretion to allow "fees or compensation as may be just and reasonable." *See Carpenter v. Mattison*, 219 N.W.2d 625, 631 (Minn. 1974).

GE's 200-plus pages of support for its application for costs and disbursements showed its expenses, including $145,387.95 in expert-witness fees. GE provided the amount sought and the name, date of testimony, and breakdown of time for each expert. GE's submission satisfied the requirements of Minn. R. Civ. P. 54.04 and contained sufficient evidentiary support to allow the district court to make an award.

Next, relying on *Stinson v. Clark Equip. Co.*, 473 N.W.2d 333, 336 (Minn. App. 1991), *review denied* (Minn. Sept. 13, 1991), NSP claims that GE failed to file an affidavit detailing its expert-witness fees. But *Stinson* applies an older version of Minn. R. Civ. P. 54.04, which required an affidavit prior to 2015. Here, GE detailed the time for each expert and signed its application under oath in accordance with Minn. Stat. § 358.116 (2018). The district court did not abuse its discretion.

B. The district court did not abuse its discretion by awarding other witness fees.

NSP argues that the district court violated the fee limit for any lay witness of $20 per day and 28 cents per mile for travel within Minnesota under Minn. Stat. § 357.22 (2018). We disagree.

Section 357.22 entitles witnesses to $20 per day for court proceedings and witness examinations as well as 28 cents per mile for travel within Minnesota to and from the proceedings. We may also consider a witness an expert witness when reviewing costs if

they mainly "testify from a peculiar knowledge of some art or science, a knowledge of which is requisite or of value in settling the point in issue." *State v. Alvarez*, 820 N.W.2d 601, 625 (Minn. App. 2012), *aff'd sub nom. State v. Castillo-Alvarez*, 836 N.W.2d 527 (Minn. 2013) (quotation omitted).

Without providing specific findings, the district court awarded GE its requested amount of $22,114.29 in non-expert witness expenses. GE's application listed flight, rental car, and hotel costs for three GE employees and one former GE employee, who also incurred hourly fees and nearly $17,000 of the expenses.

NSP cites to *State v. Lopez-Solis* to argue that section 357.22(2) does not allow for costs for travel outside of Minnesota. 589 N.W.2d 290, 296 (Minn. 1999). GE argues that Minn. R. Civ. P. 45 and *Alvarez* allow for its claimed costs.

Here, the witnesses testified about specific knowledge of GE's turbines, technical advice it provided to customers, and SCC, knowledge that was helpful to the jury and "of value in settling the point in issue." *See Alvarez*, 820 N.W.2d at 625. The district court reasonably could have assumed that these witnesses testified mainly as expert witnesses, beyond the scope of section 357.22. Furthermore, the testimony of the former GE employee also falls under Minn. R. Civ. P. 45.03(d), which allows for "reasonable compensation for the time and expense involved in preparing for and giving" testimony for certain non-party, non-employee, witnesses, as he gave testimony relating to knowledge and information obtained as a result of his work as an engineer. The district court did not abuse its discretion by awarding GE these witness fees.

C. The district court did not abuse its discretion by awarding costs to GE on motions on which it did not prevail.

NSP argues that the district court improperly awarded motion costs to GE for seven motions on which it did not prevail. NSP's argument is misguided.

Generally, the party that prevails on the merits of a case is entitled to costs and disbursements incurred in connection with all issues, even those on which it did not prevail. *Inland Prods. Corp. v. Donovan*, 62 N.W.2d 211, 222 (Minn. 1953); *Elsenpeter v. St. Michael Mall, Inc.*, 794 N.W.2d 667, 673 (Minn. App. 2011). Further, Minn. Stat. § 549.04, subd. 1, allows for disbursements to the "prevailing party" generally and does not specify that the party prevail on every issue or motion. NSP cites no caselaw requiring such a determination.[3] The district court therefore did not abuse its discretion by awarding GE, as the prevailing party in the case, costs for motions on which it did not prevail.

D. The district court did not abuse its discretion by not making specific findings.

NSP argues that the district court's lack of findings in approving GE's costs requires remand for findings of fact and an explanation of its decision. We are not persuaded.

Minn. R. Civ. P. 54.04(a) provides that "[c]osts and disbursements shall be allowed as provided by law." Minn. Stat. § 549.04, subd. 1, requires that the district court allow reasonable disbursements paid or incurred by the prevailing party. *See also Staffing Specifix, Inc.*, 896 N.W.2d at 134. "[A]bsent a specific finding that the costs were unreasonable, the [district] court *shall* approve recovery of disbursements." *Quade & Sons*

[3] NSP cites to an unpublished and distinguishable case in support of its position. That case is not binding. *See* Minn. Stat. § 480A.08, subd. 3 (2018).

Refrigeration, Inc. v. Minnesota Min. & Mfg. Co., 510 N.W.2d 256, 260 (Minn. App. 1994), *review denied* (Minn. Mar. 15, 1994) (quoting *Jonsson v. Ames Const., Inc.*, 409 N.W.2d 560, 563 (Minn. App. 1987), *review denied* (Minn. Sept. 30, 1987)) (emphasis in original). Here, the district court did not find GE's requested costs and disbursements unreasonable. GE submitted detailed documentation in support of its application, and the parties provided thorough briefing in response to that application. GE also revised its application following NSP's opposition memorandum, removing $24,991 in daily trial transcript costs.

Two of the cases NSP cites that remanded for specific findings involved the district court finding that claimed costs were unreasonable. *See Beniek*, 479 N.W.2d at 723-24 (remanding for more specific findings when party seeking costs appealed district court's award of only $4,384.82 of its $13,867.17); *Stinson*, 473 N.W.2d at 334, 336 (remanding for more findings when not clear if district court considered costs from other parties in award following settlement agreement, in case initially involving multiple defendants, and made no findings on denied costs). These cases are distinguishable from the facts here.

Moreover, NSP relies on *Stinson*'s statements that costs and disbursements must be "reasonable and necessary" and that district courts should take a "hard look" at them. *See Stinson*, 473 N.W.2d at 336, 338. But, for these propositions, *Stinson* quoted cases that interpreted section 549.04 before the legislature amended it in 1983 to require award of all *reasonable* disbursements and before a 2010 amendment to Minn. R. Civ. P. 54.04 clarifying the procedure for a district court administrator or district court judge to tax costs and disbursements. *See Larson v. Hill's Heating & Refrigeration of Bemidji, Inc.*, 400

N.W.2d 777, 783 (Minn. App. 1987) (discussing 1983 amendment and prior caselaw), *review denied* (Minn. Apr. 17, 1987).

NSP also relies on *Illinois Farmers Ins. Co. v. Brekke Fireplace Shoppe, Inc.*, 495 N.W.2d 216, 222 (Minn. App. 1993), in which we remanded to the district court for "a hearing and appropriate findings on the reasonableness" of challenged costs and disbursements. But Minn. R. Civ. P. 54.04(e) now precludes district court judges from considering additional evidence to review awards, *Staffing Specifix, Inc.*, 896 N.W.2d at 135, and while we have remanded for specific findings in some cases, neither section 549.04 nor Minn. R. Civ. P. 54.04 require such findings of the district court in all cases. The record here supports the district court's award, and it therefore did not abuse its discretion.

Affirmed.

CERTIFICATE OF SERVICE

I, Lynnette Sweet, hereby certify that I have this day served copies of the foregoing document on the attached list of persons.

xx by depositing a true and correct copy thereof, properly enveloped with postage paid in the United States mail at Minneapolis, Minnesota

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DOCKET NOS. E999/AA-18-373
E999/AA-17-492
E999/AA-16-523
E999/AA-14-579
E002/GR-13-868
E002/GR-12-961

Dated this 10th day of March 2020

/s/

_____

Lynnette Sweet

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