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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1525**

ACCAP-HUD Homes Tax Credit Limited Partnership, et al.,
Appellants,

vs.

Minnesota Counties Intergovernmental Trust,
Respondent.

**Filed April 8, 2013
Affirmed
Kirk, Judge**

Ramsey County District Court
File No. 62-CV-10-11253

John M. Colosimo, Adam J. Licari, Mitchell J. Brunfelt, Colosimo, Patchin, Kearney & Brunfelt, Ltd., Virginia, Minnesota (for appellants)

Scott T. Anderson, Rupp, Anderson, Squires & Waldspurger, P.A., Minneapolis, Minnesota; and Timothy A. Sullivan, Scott E. Schraut, Ratwik, Roszak & Maloney, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Hudson, Presiding Judge; Stoneburner, Judge; and Kirk, Judge.

UNPUBLISHED OPINION

KIRK, Judge

Appellants challenge the district court's taxation of \$15,000 in fees for respondent's expert witness, arguing that the district court abused its discretion by

awarding such fees and failing to hold an evidentiary hearing. By notice of related appeal, respondent argues that the district court abused its discretion by finding that only a portion of the claimed expert-witness fees is reasonable. We affirm.

FACTS

Appellants ACCAP-HUD Homes Tax Credit Limited Partnership, et al. (the agencies) are 13 community-action agencies and 4 limited partnerships in which a community-action agency is the sole general partner. Respondent Minnesota Counties Intergovernmental Trust (MCIT) is a self-insurance pool which provides group insurance coverage to various governmental entities and political subdivisions. The agencies were all members of MCIT until MCIT terminated the agencies' memberships.

In November 2010, the agencies filed a complaint against MCIT alleging claims for breach of fiduciary duty and promissory estoppel and seeking declaratory and injunctive relief. In December, the district court enjoined MCIT from terminating the agencies' memberships until the end of the 2011 program year. In August 2011, the parties stipulated to the termination of the agencies' membership class effective at the end of 2011. The agencies subsequently filed an amended complaint alleging breach of fiduciary duty, creation of a constructive trust or equitable lien, unjust enrichment, and promissory estoppel, and seeking reimbursement and the payment of dividends.

MCIT moved for summary judgment, and the district court granted summary judgment to MCIT on all claims. This court affirmed. *ACCAP-HUD Homes Tax Credit Limited Partnership, et al. v. Minn. Cntys. Intergovernmental Trust*, No. A12-0864 (Minn. App. Nov. 19, 2012), *review denied* (Minn. Jan. 29, 2013).

In April 2012, MCIT applied for \$69,702.50 in costs and disbursements, including \$68,152 in expert-witness fees. In support of its application, MCIT attached an affidavit from its expert, Mark Doepke, and six invoices from Doepke's actuarial firm, spanning the time period from March 1, 2011, to April 11, 2012. In his affidavit, Doepke explained that he is the president of, and a consulting actuary for, Actuarial Advisors, Inc. He has performed actuarial services for MCIT since 1989 and has been MCIT's primary actuarial consultant since 1991. Doepke stated that, in spring 2011, MCIT asked him to testify as an expert about the actuarial analyses he has performed for MCIT and to analyze the agencies' financial performance during their membership in MCIT. Doepke explained that, in assessing the agencies' claims that they are entitled to damages, his firm was required to perform complex calculations that they had not previously done, organize historical financial data in new ways, and create financial models of the cash flow of individual members from 1991 through 2010. Doepke stated that the calculations his firm performed required a significant amount of time and effort, in part due to the number of agencies involved and the fact that the majority of them had been members of MCIT since 1995. He concluded that "[t]he \$68,152.00 charged by my firm for expert witness fees in this litigation is fair and reasonable, given the amount of time required to perform the necessary calculations, the sheer volume of data required to make the calculations, and the nature of the actuarial work required to analyze [the agencies'] claims."

After the agencies filed an objection to the amount of expert-witness fees MCIT requested, the court administrator's office awarded \$2,425.50 in costs and disbursements

to MCIT, including \$1,000 in expert-witness fees. MCIT appealed to the district court, seeking the full amount of expert-witness fees it had requested.

Without holding a hearing, the district court determined that the amount of expert-witness fees that MCIT claimed is “unreasonable and beyond that which might have been necessary in [MCIT’s] summary judgment submissions to the [c]ourt.” The district court stated that, “[b]ased on Mr. Doepke’s affidavit, it appears he has been the actuary for [MCIT] since 1989 and as such, his investigation into the records should have been less tedious than it would have been for someone unfamiliar with [MCIT].” The district court also noted its belief that some of the fees claimed were for time spent exploring possible counterclaims against the agencies. As a result, the district court found “that the sum of \$15,000.00 is reasonable and adequate for the expert fees claimed” and awarded MCIT total costs and disbursements in the amount of \$16,425.50. This appeal and related appeal follows.

D E C I S I O N

Under Minn. Stat. § 549.04, subd. 1 (2012), the prevailing party in every district court action “shall be allowed reasonable disbursements paid or incurred.” The district court may award fees or compensation for expert witnesses as long as they are “just and reasonable.” Minn. Stat. § 357.25 (2012); *see also* Minn. R. Gen. Pract. 127 (providing that a district court may award expert-witness fees “in such amount as is deemed reasonable for such services in the community where the trial occurred and in the field of endeavor in which the witness has qualified as an expert”). It is not within the discretion of the district court “to deny costs and disbursements to the prevailing party.” *Quade &*

Sons Refrigeration, Inc. v. Minn. Mining & Mfg. Co., 510 N.W.2d 256, 260 (Minn. App. 1994), *review denied* (Minn. Mar. 15, 1994). However, the determination of what costs are reasonable is within the district court’s discretion, and we will not reverse absent an abuse of discretion. *Id.* “A district court abuses its discretion when its findings are not supported by the record or it misapplies the law.” *Minneapolis Grand, LLC v. Galt Funding LLC*, 791 N.W.2d 549, 556 (Minn. App. 2010).

I.

The agencies argue that the district court abused its discretion by awarding expert-witness fees to MCIT, contending that MCIT’s expert performed only pretrial preparation work and the costs asserted lacked sufficient detail, and were unnecessary, duplicative, and excessive. The agencies also assert that the district court erred by failing to hold an evidentiary hearing and made insufficient findings.

A. **The district court did not abuse its discretion by awarding expert-witness fees to MCIT for pretrial preparation work.**

The agencies first argue that the district court abused its discretion by awarding expert-witness fees to MCIT because MCIT’s expert completed only pretrial preparation work and did not testify or submit to a deposition. It is well established in Minnesota that it is within the district court’s discretion to award expert-witness fees to the prevailing party for pretrial preparation time. *Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 483 (Minn. App. 2006), *review denied* (Minn. Aug. 23, 2006); *Quade*, 510 N.W.2d at 260-61. And this court has previously held that a district court may award costs for pretrial preparation time even if no trial was held.

Buscher v. Montag Dev., Inc., 770 N.W.2d 199, 209-10 (Minn. App. 2009). In *Buscher*, the district court granted summary judgment to the remodeling contractors and awarded them expert-witness fees totaling almost \$40,000. *Id.* at 203-04, 209. In doing so, the district court found that the experts' fees were reasonable and that the contractors "were required to do investigative trial preparation in order to make dispositive motions and it would be 'misplaced' to deny these costs because the matter was resolved by summary judgment." *Id.* at 209-10. On appeal, this court concluded that the district court's findings provided an adequate factual basis to support the expert-witness fees it awarded. *Id.* at 210.

Similarly, no trial was held in this matter because the district court granted summary judgment to MCIT. As a result, all of the expert-witness fees that MCIT requested were for pretrial work that Doepke's firm completed. The district court did not abuse its discretion by awarding expert-witness fees to MCIT merely because the case was resolved by summary judgment.

B. The district court did not abuse its discretion by awarding MCIT expert-witness fees.

The agencies also argue that the district court abused its discretion by awarding MCIT expert-witness fees because: (1) the application for costs and disbursements lacked sufficient detail; (2) the costs claimed were unnecessary or irrelevant; (3) the rates charged were excessive; (4) the costs claimed should not have included work performed by the other actuaries in Doepke's firm; and (5) they already paid for Doepke's services through their premiums.

1. Sufficient detail in application.

The agencies contend that the evidence MCIT provided in support of its application for taxation of costs and disbursements lacked sufficient detail to enable the district court to make adequate findings. To recover costs and disbursements, the prevailing party “must serve and file a detailed sworn application.” Minn. R. Civ. P. 54.04(b). If the prevailing party requests expert-witness fees, it must file an accompanying affidavit in support of the application and include details such as the expert’s hourly rate and the hours the expert spent at trial or in preparation for testimony. *Stinson v. Clark Equip. Co.*, 473 N.W.2d 333, 337 (Minn. App. 1991), *review denied* (Minn. Sept. 13, 1991); *see also Quade*, 510 N.W.2d at 258, 261.

Here, MCIT submitted Doepke’s affidavit and invoices from his actuarial firm with its application for costs and disbursements. In the affidavit, Doepke described his qualifications, his history of working with MCIT, the work that he performed in preparation for trial, the amount that his firm billed to MCIT for work related to the lawsuit, and the hourly rates of his firm’s actuaries. He opined that \$68,152 in fees was fair and reasonable, noting that another firm would have required more hours to complete the work. MCIT complied with Minn. R. Civ. P. 54.04 by submitting a detailed application and an affidavit verifying its contents.

2. Necessity or relevancy of costs.

The agencies contend that the expert-witness fees MCIT claimed were unnecessary or irrelevant because Doepke had already completed much of the work prior to the commencement of this litigation due to his firm’s prior relationship with MCIT.

However, the district court's findings reflect that it carefully considered Doepke's firm's prior relationship with MCIT before awarding expert-witness fees and, in fact, the district court found that some of the requested fees were unnecessary because of that relationship.

3. Expert's rates.

The agencies argue that Doepke's actuarial firm's rates are excessive and out of line with the conservative history of Minn. R. Gen. Pract. 127. Prior to its amendment in 2010, rule 127 included a \$300 limit on expert-witness fees. Minn. R. Gen. Pract. 127 2010 amend. cmt. However, the agencies fail to acknowledge that while the previous version of rule 127 limited the amount that a court administrator could tax, it never limited the amount that the district court could tax. *See Quade*, 510 N.W.2d at 260.

In support of its argument that Doepke's fees are excessive, the agencies cite a United States Bureau of Labor Statistics report that provides the mean hourly wage of actuaries in the Twin Cities area. But, as MCIT argues, statistics about the mean hourly wage of all actuaries in a particular area are irrelevant to determining the reasonableness of the hourly rate charged by an expert witness who completes work in preparation for trial. Under Minn. R. Gen. Pract. 127, the relevant consideration is what constitutes a reasonable expert-witness fee "in the community where the trial occurred and in the field of endeavor in which the witness has qualified as an expert."

Here, Doepke's affidavit set forth his qualifications, the hourly rate of all the members of his actuarial firm, and the amount of hours the firm worked on this matter. This information was sufficient for the district court to rely on in order to determine the

reasonableness of the requested expert-witness fees. *See Quade*, 510 N.W.2d at 261 (noting that the affidavit specified “the amount of time the expert billed and the total cost,” and stating that the district “court also knew the expert’s qualifications through his testimony, and thus could determine the reasonableness of the fees”).

4. Other employees of the actuarial firm.

The agencies next contend that the expert-witness fees awarded to MCIT include fees for work that Doepke’s employees completed. This was not improper. In addition to requesting Doepke’s expert testimony, MCIT hired Doepke’s firm to conduct an actuarial analysis in preparation for trial. And Doepke’s utilization of the other actuaries in the firm to perform the analysis likely resulted in a reduction in expert-witness fees because of their lower hourly rates.

5. Premium payments.

Finally, the agencies argue that they already paid for Doepke’s services when they paid premiums as members of MCIT. The agencies do not cite any legal authority in support of this argument. The plain language of Minn. Stat. § 549.04 permits the prevailing party in a district court action to recover reasonable costs and disbursements resulting from the action. Minn. Stat. § 549.04, subd. 1; *see* Minn. Stat. §§ 549.02-.04 (2012) (defining costs); 2 David F. Herr & Roger S. Haydock, *Minnesota Practice* § 54.22 (5th ed. 2011) (“Disbursements generally relate to out-of-pocket expenses paid or incurred by a party and allowed if necessary to the action.”). The fact that the agencies paid premiums to MCIT while they were members of MCIT is irrelevant to determining the reasonable amount of costs and disbursements that arose from the litigation.

C. The district court did not abuse its discretion by not holding an evidentiary hearing.

The agencies argue that the district court abused its discretion by failing to hold an evidentiary hearing and made insufficient findings. While Minn. R. Civ. P. 54.04 does not expressly require that the district court conduct an evidentiary hearing before determining whether the prevailing party's claimed costs and disbursements are reasonable and necessary, this court has previously held that the district court must take oral testimony and allow an opportunity for direct and cross-examination in order to ensure that a complete record is available for appellate review. See *Ill. Farmers Ins. Co. v. Brekke Fireplace Shoppe, Inc.*, 495 N.W.2d 216, 222 (Minn. App. 1993). However, in *Buller v. A.O. Smith Harvestore Prods., Inc.*, 518 N.W.2d 537, 543 (Minn. 1994), the Minnesota Supreme Court affirmed the district court's decision not to hold an evidentiary hearing. While the supreme court did not expressly overrule prior decisions requiring a hearing, it concluded "that the [district] court's findings were amply supported by the record and the [district] court was not required to conduct an evidentiary hearing." *Buller*, 518 N.W.2d at 543.

Here, the agencies waived any objection to the district court's failure to conduct a hearing because they never requested a hearing. See 2 David F. Herr & Roger S. Haydock, *Minnesota Practice* § 54.27 (5th ed. 2011) (stating that "[i]n the majority of cases, costs are heard without hearing because none of the parties requests a hearing, thereby waiving" the requirement of a hearing); cf. *Buller*, 518 N.W.2d at 543 (affirming the district court's failure to grant the respondents' request for an evidentiary hearing).

Regardless, because the district court's findings in this matter are supported by the record, the district court did not abuse its discretion by awarding expert-witness fees without holding an evidentiary hearing.

II.

MCIT argues that the district court abused its discretion by not awarding MCIT the full amount of expert-witness fees claimed, contending that the record establishes that the costs it claimed were reasonable and necessary for the litigation. Under Minn. Stat. § 357.25, the district court may award expert-witness fees in an amount that is “just and reasonable.” In determining whether fees claimed are reasonable, the district court may consider factors such as the community where the case arose, the expert's field, the expert's qualifications and experience, and the complexity of the litigation. See Minn. R. Gen. Pract. 127; *Quade*, 510 N.W.2d at 261 (“The [district] court also knew the expert's qualifications through his testimony, and thus could determine the reasonableness of the fees.”); *Johnson v. S. Minn. Mach. Sales, Inc.*, 460 N.W.2d 68, 73 (Minn. App. 1990) (“Considering the complexity of the litigation and the difficulty of proving a design defect claim, the taxed costs are modest.”); *Mohwinkel v. City of N. St. Paul*, 357 N.W.2d 174, 177 (Minn. App. 1984) (“Respondents real estate appraiser was trained, experienced, and well-acquainted with real estate in the North St. Paul area.”), *review denied* (Minn. Feb. 19, 1985).

In making its costs determination, the district court considered information about Doepke's experience and qualifications, hourly rate, the amount of hours his actuarial firm worked on this matter, the work that the firm completed, and written arguments from

both parties. Based on all of the information before it, the district court determined that only a portion of the claimed expert-witness fees is reasonable, and specifically explained why it reached that conclusion. The district court did not abuse its discretion by not awarding the full amount of expert-witness fees requested.

Affirmed.