

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0339**

Ann Riley,
Respondent,

James Lucius,
Plaintiff,

vs.

Harris Builders, Inc.,
Appellant,

Mid State Plumbing & Heating, Inc.,
Respondent.

**Filed November 25, 2024
Affirmed
Larkin, Judge**

Dakota County District Court
File No. 19HA-CV-21-2175

Andrew L. Marshall, James C. Kovacs, Tal A. Bakke, Bassford Remele, P.A., Minneapolis,
Minnesota (for respondent Riley)

Rachel B. Beauchamp, Cousineau Malone, P.A., Minnetonka, Minnesota (for appellant)

Considered and decided by Harris, Presiding Judge; Larkin, Judge; and Smith,
Tracy M., Judge.

NONPRECEDENTIAL OPINION

LARKIN, Judge

Appellant-contractor challenges the district court's grant of respondent-homeowner's posttrial motions for prejudgment interest, costs, and disbursements. We affirm.

FACTS

Respondent Ann Riley hired appellant Harris Builders, Inc. to construct a new home. Harris subcontracted with respondent Mid State Plumbing and Heating, Inc. to install the plumbing. Shortly after Riley moved into the new home, plumbing problems were apparent: sewage repeatedly backed up into the home. The State of Minnesota became involved and required Harris and Mid State to repair the plumbing. Harris and Mid State's attempts to do so were unsuccessful.

Riley sued Harris and Mid State, claiming negligence, breach of warranty, and breach of contract. Riley made total-obligation settlement offers pursuant to Minn. R. Civ. P. 68 as follows: \$100,000 to Harris and \$150,000 to Mid State. Harris and Mid State each rejected its respective offer, and the case was scheduled for a jury trial. The parties agreed that Riley would try her claims to a jury under a single negligence theory.

The jury returned a special verdict finding negligence and attributing 60% of the negligence to Mid State and 40% to Harris. The jury awarded Riley damages of \$143,471 to "fairly and adequately compensate . . . for any damages directly caused by negligence." Later, the district court granted Riley's posttrial motions for prejudgment interest, costs, and disbursements.

Harris appeals.

DECISION

I.

Harris contends that the district court erred in awarding Riley prejudgment interest. Under Minnesota law, if a party receives a money judgment or award, “interest from the time of the verdict, award, or report until judgment is finally entered” shall be added to the judgment or award. Minn. Stat. § 549.09, subd. 1(a) (2022). Prejudgment interest “shall not be awarded on . . . judgments or awards for future damages.” Minn. Stat. § 549.09, subd. 1(b)(2) (2022).

Because the statute expressly prohibits prejudgment interest on awards for future damages, prejudgment interest is not available on an award that includes both past and future damages if the amount of future damages is not ascertainable. *See Stinson v. Clark Equip. Co.*, 473 N.W.2d 333, 336 (Minn. App. 1991) (stating that because the parties agreed to damages for personal injury in the amount of \$240,000 and the amount of future damages included in that award was unknown, “the amount of prejudgment interest [was] indeterminable” and “Minn. Stat. § 549.09 [was] inapplicable”), *rev. denied* (Minn. Sept. 13, 1991). “Preaward interest decisions are reviewed de novo.” *Elm Creek Courthouse Ass’n, Inc. v. State Farm Fire & Cas. Co.*, 971 N.W.2d 731, 739 (Minn. App. 2022) (quotation omitted), *rev. denied* (Minn. May 17, 2022).

The district court concluded that “Riley is entitled to prejudgment interest under the plain language of [Minn. Stat. § 549.09]” because “[a]ll of the damages in this case were

awarded for . . . past negligence and are related to the repair of the home. These are past damages.”

Harris argues that the district court’s determination that the jury award was for “‘past damages’ must be reversed because the jury was instructed on past and future damages, the parties argued for and against damages that are ‘future damages’ as a matter of law, and the jury’s verdict cannot now be parsed or allocated as between past or future damages.” Citing the parties’ closing arguments, Harris claims that the jury’s award of damages included two forms of future damages: in-floor-heating expenses and future expenses for temporary housing during repairs. Harris argues that because it is impossible to determine the amount of any future damages that are included in the jury’s award, prejudgment interest is not available under section 549.09. *See Stinson*, 473 N.W.2d at 336.

For us to conclude that the jury’s award included future damages and that the district court therefore erroneously awarded prejudgment interest, we would need to be satisfied that there was an evidentiary basis for an award of future damages. We are not able to do so because Harris has not provided an adequate record for appellate review. Again, Harris claims that the jury’s award included two forms of future damages: in-floor-heating expenses and temporary-housing expenses during repairs. But the purported evidence regarding those expenses came in the form of witness testimony, and Harris did not provide us a transcript of that testimony.

“[O]n appeal error is never presumed. It must be made to appear affirmatively before there can be reversal. . . . [T]he burden of showing error rests upon the one who

relies upon it.” *Loth v. Loth*, 35 N.W.2d 542, 546 (Minn. 1949). And “[a]n appellant has the burden to provide an adequate record.” *Mesenbourg v. Mesenbourg*, 538 N.W.2d 489, 494 (Minn. App. 1995). Because Harris did not provide a record showing that there was an evidentiary basis for the jury to award future damages, we cannot conclude that the jury’s award included future damages or that the district court erred by awarding prejudgment interest for those damages.

II.

Harris contends that the district court erred by awarding Riley costs and disbursements under Minn. R. Civ. P. 68.03. Harris’s argument raises an issue regarding the interpretation and application of rule 68, which we review de novo. *See Gams v. Houghton*, 884 N.W.2d 611, 616 (Minn. 2016) (“The interpretation of the Minnesota Rules of Civil Procedure is a question of law that we review de novo.”).

Rule 68 sets forth a process by which “any party may serve upon an adverse party a written damages-only or total-obligation offer to allow judgment to be entered to the effect specified in the offer or to settle the case on the terms specified in the offer.” Minn. R. Civ. P. 68.01(a). The rule has the “purpose of encouraging the settlement of litigation.” Minn. R. Civ. P. 68 2008 advisory comm. cmt. Under the rule, “[a]n unaccepted offer affects the parties’ obligations and entitlements regarding costs and disbursements.” Minn. R. Civ. P. 68.03(b). As is relevant here, the rule provides:

If the offeror is a plaintiff, and the relief awarded is less favorable to the defendant-offeree than the offer, the defendant-offeree must pay, in addition to the costs and disbursements to which the plaintiff-offeror is entitled . . . , an amount equal to the plaintiff-offeror’s costs and disbursements

incurred after service of the offer. Applicable attorney fees available to the plaintiff-offeror shall not be affected by this provision.

Minn. R. Civ. P. 68.03(b)(2).

To determine if the relief awarded is less favorable to a defendant offeree than the plaintiff's offer, "a total-obligation offer is compared with the amount of damages awarded to the plaintiff, plus applicable prejudgment interest, the plaintiff's taxable costs and disbursements, and applicable attorney fees, all as accrued to the date of the offer." Minn. R. Civ. P. 68.03(c)(2).

The district court concluded that Riley was entitled to costs and disbursements under Minn. R. Civ. P. 68 because the relief awarded to Riley was less favorable to Harris than Riley's settlement offer to Harris. In reaching that conclusion, the court compared the relief awarded to Riley (a damage award of \$143,471 plus prejudgment interest, costs, and disbursements) and the amount of Riley's settlement offer to Harris, that is, \$100,000. The district court explained:

In this case, Ms. Riley made a Rule 68 total obligation offer to Harris in the amount of \$100,000. She proceeded to trial and obtained a verdict in the amount of \$143,471. Harris is liable for that entire amount. Because Ms. Riley obtained a judgment against Harris that exceeds her Rule 68 offer, she is entitled to further recovery against Harris under Rule 68.

The district court rejected Harris's argument that when applying rule 68, the district court should have compared the relief awarded to Riley (a damage award of \$143,471 plus prejudgment interest, costs, and disbursements) and the total amount of Riley's settlement offers to Harris and Mid State, that is, \$250,000. In doing so, the district court reasoned:

“There is no language—or caselaw—setting forth that multiple offers should be combined into a single total amount. Rather, each offer made to each [d]efendant-offeree must be considered individually, as the Rule . . . explicitly states.”

As support for its position, Harris emphasizes that the jury attributed only 40% of the negligence to Harris. But given the parties’ agreement regarding how Riley’s claims would be presented to the jury and the unchallenged manner in which the district court applied the jury’s findings, that 40% allocation is immaterial. The district court found and Harris does not dispute that “the parties agreed that [Riley’s claims of] breach of warranty, breach of contract, and negligence, and the resulting damages would be put to the jury based on a single theory of negligence.” The district court stated that, “[i]n other words, the parties agreed that if the jury found [Harris and Mid State] negligent and award[ed] damages, that finding would also apply to the breach of contract and breach of warranty claims.”

Although principles of comparative fault are applied in negligence cases, “contract law has never spoken in terms of fault”; the comparative fault statute “was not intended to apply generally to contract cases.” *Lesmeister v. Dilly*, 330 N.W.2d 95, 101 (Minn. 1983). As a result of the district court’s unchallenged determination that a finding of negligence rendered Harris liable on Riley’s claims for breach of contract and warranty, the jury’s damage award applies to Riley’s breach-of-contract claim. And, Harris is responsible for the entire award of contract damages. Thus, the district court appropriately considered the entire \$143,471 damage award, plus prejudgment interest, costs, and disbursements, when comparing the “relief awarded” and “the offer” under rule 68.

As to whether the district court erred by using the amount of Riley’s offer to Harris (\$100,000) in its rule 68 comparison, instead of using the combined total of Riley’s offers to Harris and Mid State (\$250,000), we look to the plain language of rule 68. Again, a recovery is available under the rule “[i]f the offeror is a plaintiff, and the relief awarded is less favorable to the defendant-offeree than the offer.” Minn. R. Civ. P. 68.03(b)(2). That language unambiguously instructs one to compare the “relief awarded” with “the offer” to “the defendant-offeree,” which is what the district court did: the district court compared the entire \$143,471 damage award, plus prejudgment interest, costs, and disbursements, with Riley’s \$100,000 offer to Harris. Rule 68 does not address individual offers to multiple defendants, much less say that if there are individual offers to multiple defendants, the sum total of those offers must be used making the relevant comparison. *See id.*

Harris argues that a 2008 amendment to rule 68, which replaced the phrase “judgment finally entered” with “relief awarded,” supports its position that if there were individual offers to multiple defendants, the sum total of those offers must be used when comparing the “relief awarded” with “the offer” under rule 68.¹ However, nothing suggests that this word change was substantive. In fact, the words “judgment” and “relief” are used interchangeably in the advisory committee comments. For example, the advisory committee comment discussing the 2008 amendment states that “Rule 68.03(b)(2) introduces a consequence for a defendant’s rejection of a plaintiff’s Rule 68 offer if *the*

¹ Prior to the 2008 amendment, rule 68 provided: “If the judgment finally entered is not more favorable to the offeree than the offer, the offeree must pay the offeror’s costs and disbursements.”

judgment is less favorable to the defendant offeree.” Minn. R. Civ. P. 68 2008 advisory comm. cmt. (emphasis added); see Minn. R. Civ. P. 68.03(b)(2) (stating that if “*the relief awarded* is less favorable to the defendant-offeree than the offer,” the defendant must pay costs and disbursements (emphasis added)).

Harris does not cite, and we are not aware of, any precedential authority indicating that if a plaintiff makes individual offers to multiple defendants, then the sum total of those offers constitutes “the offer” for the purpose of rule 68.03(b)(2). Instead, Harris discusses at length the effects of different types of settlement offers and makes what appears to be a policy argument regarding the best way to analyze individual offers to multiple defendants when applying rule 68.

Rule 68 is a policy-based rule intended to encourage settlement. See Minn. R. Civ. P. 68 2008 advisory comm. cmt. (referring to the rule’s “purpose of encouraging the settlement of litigation”). As currently written, the plain language of the rule supports the district court’s comparison of the “relief awarded” Riley, for which Harris is individually liable, and “the offer” that Riley made to Harris. Whether to use a different approach in the event of individual offers to multiple defendants is a policy decision that should be made by the supreme court, and not this court. See *In re Welfare of D.J.F.-D.*, 3 N.W.3d 266, 278 (Minn. 2024) (“[W]e direct the Juvenile Rules Advisory Committee to propose amendments” to a Minnesota rule of juvenile delinquency procedure to “promote clear, consistent practice and procedures” based on “the applicable policy interests”). “Because this court is limited in its function to correcting errors it cannot create public policy.”

LaChapelle v. Mitten, 607 N.W.2d 151, 159 (Minn. App. 2000), *rev. denied* (Minn. May 16, 2000).

In sum, Harris fails to establish that the district court erred in applying rule 68.

III.

Harris contends that the district court abused its discretion in awarding Riley certain costs and disbursements as the prevailing party.

A party who prevails in district court “shall be allowed reasonable disbursements paid or incurred.” Minn. Stat. § 549.04, subd. 1 (2022). “Appellate courts review a district court’s determination on costs and disbursements under an abuse-of-discretion standard.” *Staffing Specifix, Inc. v. TempWorks Mgmt. Servs., Inc.*, 896 N.W.2d 115, 127 (Minn. App. 2017), *aff’d*, 913 N.W.2d 687 (Minn. 2018). “The district court abuses its discretion when its decision is against logic and facts on the record.” *Id.* (quotation omitted).

The district court concluded that Riley was the prevailing party and therefore “entitled to reasonable costs and disbursements.” The district court awarded costs and disbursements in the amount of \$30,616.98 based on Riley’s submission of invoices and other documents to the district court.

Harris argues that the district court abused its discretion by awarding Riley \$24,461.30 for expert witness fees. “The judge of any court of record, before whom any witness is summoned or sworn and examined as an expert in any profession or calling, may allow such fees or compensation as may be just and reasonable.” Minn. Stat. § 357.25 (2022). The district court also has 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), *rev. denied* (Minn. Aug. 23, 2006); *Quade & Sons Refrigeration, Inc. v. Minn. Mining & Mfg. Co.*, 510 N.W.2d 256, 260 (Minn. App. 1994), *rev. denied* (Minn. Mar. 15, 1994). In awarding expert-witness fees in this case, the district court reasonably relied on the fact that “[Harris and Mid State] disputed there were any defects with the home’s plumbing, thus necessitating [that Riley] incur expert fees to prove her claims—which she did.” We discern no abuse of discretion.

Harris also argues that the district court abused its discretion by awarding mediation costs. Specifically, Harris argues that mediation expenses are “typically” not taxable and that there is no statute or rule allowing recovery for mediation expenses. Instead, mediation fees are “paid according to the terms of the agreement with the parties, their attorney, or as ordered by the court.” Minn. R. Gen. Prac. 114.11(a). However, Harris acknowledges that this court has upheld an award of mediation fees to a prevailing party. *See Capacity Wireless, LLC v. Bd. of Regents*, 978 N.W.2d 275, 285 (Minn. App. 2022) (stating “that, without an express waiver, rule 68 allows a party to recover the amount it incurred in mediation costs”).

Harris notes that the parties here agreed that each would pay 1/3 of the mediation costs. But Harris does not assert that Riley expressly waived her ability to recover the amount it incurred in mediation costs. In addition, Harris’s argument on this point assumes Harris was the prevailing party, arguing that “Riley lost on 2/3 of the claims she brough[t] to trial.” Harris also argues that “Riley was not being reasonable at mediation” because “her recovery is less than what she was demanding” and that “forcing the other parties to pay for her unreasonable mediation stance is contrary to the purpose of taxation of costs.”

In sum, Harris asserts that “no reasonable person would agree with the decision to award the cost of mediation as a . . . taxable cost to Riley.”

Again, we review the district court’s award of mediation costs for an abuse of discretion, asking whether the decision is against logic and the facts of the case. *See Staffing Specifix*, 896 N.W.2d at 127. Although no rule or statute specifically authorizes an award of mediation expenses, no rule or statute prohibits such an award. And, this court has upheld an award of mediation expenses. Finally, although the parties agreed to the initial allocation of mediation expenses among the parties, Riley did not waive the opportunity to seek an award of mediation costs if she were to be the prevailing party. Under the circumstances, we are not persuaded that the district court abused its discretion.

Finally, Harris argues that the district court abused its discretion by awarding mileage and meal costs for Riley’s legal counsel. This court has stated:

The statute is clear [that] the prevailing party *shall* be allowed reasonable disbursements. The standard by which the court’s discretion is measured is whether expenditures are *reasonable*. Therefore, absent a specific finding that the costs were unreasonable, the court *shall* approve recovery of disbursements.

Jonsson v. Ames Const., Inc., 409 N.W.2d 560, 563 (Minn. App. 1987) (quotation omitted), *rev. denied* (Minn. Sept. 30, 1987); *see* Minn. Stat. § 549.04, subd. 1. Here, there was no specific finding that the relevant expenditures were unreasonable and, therefore, no abuse of discretion.

Affirmed.