

NO. A07-2117

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State of Minnesota  
**In Court of Appeals**

Metro Gold, Inc.,

*Plaintiff/ Appellant,*

vs.

Garrett Coin, and  
the Estate of Rex Peterson,

*Defendants/ Respondents.*

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**APPELLANT'S BRIEF AND APPENDIX**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## LEGAL ISSUES

### I.

ISSUE: DID THE TRIAL COURT ERR IN ITS APPLICATION OF THE LAW WHEN IT DENIED PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND FAILED TO AWARD PENALTIES, INTEREST OR ATTORNEY FEES TO PLAINTIFF UNDER MINN. STAT. § 604.113?

ARGUMENT: YES, THE TRIAL COURT DID ERR, AND ITS DECISION SHOULD BE REVERSED ON APPEAL.

## STATEMENT OF THE CASE AND THE FACTS

Appellant, Metro Gold, Inc., sold Respondent Rex Peterson ("Respondent") who conducted business in the name of Garrett Coin, two boxes of gold, hereinafter the "Gold," for Two Hundred Thirty-Two Thousand One Hundred Ninety-Five and 92/100 Dollars (\$232,195.92). Appellant delivered the Gold to Respondent on March 28, 2006. Respondent signed a receipt acknowledging delivery of the Gold and gave Appellant a check for Two Hundred Thirty-Two Thousand One Hundred Ninety-Five and 50/100 Dollars (\$232,195.50). Appellant accepted the check, though it was forty-two cents less than the amount due.

Respondent asked Appellant to not cash the check until Friday, March 31, 2006. Appellant had done business with Respondent in the past and, therefore, agreed to hold the check until March 31, 2006.

On March 31, 2006, the check was deposited into Appellant's bank account. On or about April 3, 2006, the check was returned to Appellant for non-sufficient funds (NSF) in Respondent's account. Appellant's bank processed the check again on April 5, 2006, and it was returned a second time for NSF. Between April 5 and April 10, 2006, Appellant's representatives made several attempts to communicate with Respondent and collect the amount due without success. During that period of time, Appellant became aware that Respondent knew the bank account on which the check issued to Appellant was drawn did not, and would not, have sufficient funds to cover the Appellant's check. Respondent knowingly issued a worthless check, committing intentional fraud, and Appellant has been damaged by Respondent's fraudulent activity.

On April 11, 2006, Appellant's attorney sent Respondent a letter via certified mail giving Respondent notice of the dishonored check, as required by Minn. Stat. §604.113, subd. 3.

On April 18, 2006, Appellant filed a Complaint seeking to recover \$232,195.50, plus interest, fees and penalties. Appellant applied for and was granted a preliminary attachment order from the Court.

Later that day, the Respondent passed away, and Respondent's sister was subsequently appointed Personal Representative of Respondent's estate, Hennepin County Probate Court File No. 27-PA-PR-06-697 ("Probate Case"). Respondent's Estate did not contest the Appellant's claim and agreed that the Appellant's claim for \$232,195.50 is valid.. As of December 20, 2006, Respondent's Estate paid Appellant \$232,195.50. Appellant and Respondent's Estate stipulated in the Probate Case that the parties' dispute over interest, attorney fees, costs and penalties due to Appellant would be determined in Civil Court and accepted as an Allowed Claim in the Probate Case.

It was necessary for Appellant to pro-actively recover the amount due to Appellant, because prior to filing the Complaint, Appellant learned that Respondent had overdrawn his account before he issued the worthless check to Appellant and that it was uncertain whether Respondent had other monies to satisfy the obligation to Appellant. Appellant also learned that Respondent had multiple other creditors and had Appellant simply waited in line to be paid, it is uncertain whether Appellant would have recovered the full amount. Furthermore, Respondent's family initially was thankful for Appellant's action in moving Respondent's inventory from his home as the family felt ill-equipped to secure it.

Appellant pursued Summary Judgment because the undisputed facts showed that Respondent issued a worthless check and that Appellant was statutorily entitled to collect penalties, interest and reasonable attorney fees from Respondent and Respondent's Estate pursuant to Minn. Stat. §604.113, subd. 2.

## ARGUMENT

### I.

#### DID THE TRIAL COURT ERR IN ITS APPLICATION OF THE LAW WHEN IT DENIED PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND FAILED TO AWARD PENALTIES, INTEREST OR ATTORNEY FEES TO PLAINTIFF UNDER MINN. STAT. § 604.113?

YES. The facts are undisputed. Appellant sold Respondent gold. In return, Respondent gave Appellant a worthless check for \$232,195.50. Appellant mailed Respondent notice of the dishonor, as required by statute, but the dishonored check was not paid within thirty (30) days. The Respondent's Estate acknowledged liability for the amount of the check and has since paid the Appellant that amount due, however Appellant did not receive full payment for the check until more than seven (7) months after the date it was issued.

Attorney fees are not recoverable in litigation unless there is a contract permitting or statute authorizing such recovery. *Barr/Nelson, Inc. v. Tonto's, Inc.*, 336 N.W.2d 46, 53 (Minn. 1983). In the case at hand, there is a statute authorizing such recovery. Minn. Stat. §604.113, subd. 2, states that the issuer of a dishonored check, regardless of his intent in issuing the check, is liable for the amount of the check, plus a civil penalty of the value of the check, interest and reasonable attorney fees if the aggregate amount of the dishonored checks is over \$1,250.00. The amount of the dishonored check that Respondent gave Appellant is \$232,195.50.

Minn. Stat. §604.113, subd. 2, allows "reasonable" attorney fees. "The test for determining the reasonableness of attorney fees is '[t]he time and labor required; the nature and difficulty of the responsibility assumed; the amount involved and the results obtained; the fees customarily charged for similar legal services; the experience, reputation, and ability of counsel; and the fee arrangement existing between counsel and the client.'" *Northfield Care Center, Inc. v. Anderson*, 707 N.W.2d 731, 736 (Minn. App. 2006), citing *State by Head v. Paulson*, 290 Minn. 371, 373, 188 N.W.2d 424, 426 (1971).

The dishonored check was given to Appellant on March 28, 2006. Appellant received repayment for the dishonored check in three intervals. Respondent's Estate paid Appellant \$140,195.50 on or about July 24, 2006, and \$60,000 on or about August 10, 2006. On or

about August 15, 2007, Respondent's Estate sent Appellant a check for the remaining principal amount due, \$32,000.00, but that money was contingent on Appellant agreeing to dismiss its case, and to file a Satisfaction of Claim in the Probate Case and a Release and Withdrawal of Demand for Notice. Because Appellant did not agree to those contingencies, on or about October 27, 2006, the \$32,000.00 was deposited with the Court. On December 22, 2006, Appellant received that \$32,000.00. Appellant's attorneys spent many hours during April through July 2006 attempting to recover the nearly quarter-million dollars owed to Appellant. Because of the difficulty of the circumstances - including the large amount of the check and the Respondent passing away in April 2006 - Appellant's attorneys were required to expend a significant amount of time and labor to recover the amount due to Appellant.

The total amount at stake was \$232,195.50 - a very large sum of money. Appellant was successful in recovering the entire amount. As a result, it was reasonable for Appellant to spend the amount it did in attorney fees to recover that amount.

Appellant paid two attorneys an hourly rate ranging from \$150-265 per hour. These rates are customary for similar legal services, specifically filing suit in District Court. Furthermore, the attorney charging Appellant \$265 per hour has 16 years of relevant experience practicing law.

Appellant incurred attorney fees and costs totaling \$19,330.59. The majority of such amount, \$14,303.71, was incurred before June 30, 2006, before Respondent made any payments to Appellant. When Appellant started receiving partial repayments from Respondent's Estate, the amount of labor and time put forth by Appellant's attorneys was significantly reduced.

The Court in *Bloomington Elec. Co. v. Freeman's, Inc.*, 394 N.W.2d 605 (Minn. App. 1986), stated that the amount of the award of attorney fees should be reasonable in relation to the amount of judgment secured. *Id.*, at 608. In *Bloomington*, the Appellate Court found \$5,000.00 to be a reasonable amount for attorney fees when the prevailing party was awarded \$12,000.00 at trial. The attorney fees there were 41.6 percent of the judgment.

Appellant's requested attorney fees in the instant case amount to only 8.3 percent of the amount due to Appellant, not including interest.

Minn. Stat. §604.113, subd. 2, also gives Appellant the right to recover interest on the dishonored check. Following the 2006 interest rate of four percent (4%) stated in Minn. Stat. §549.09, Appellant calculates interest due from Respondent as follows:

Interest on \$232,195.50 for March 31, 2006, through July 25, 2006:	\$2,912.35
Interest on \$92,000.00 for July 26, 2006, through August 11, 2006:	\$ 158.31
Interest on \$32,000.00 for August 12, 2006, through October 27, 2006:	<u>\$ 270.03</u>
Total Interest:	\$3,340.69

Though the principal amount of \$232,195.50 has been repaid to the Appellant, the Respondent's Estate is still liable for any penalties, interest and attorney fees, as directed by statute.

The Respondents disputed the above. The Trial Court found against the Appellant on attorney fees and it failed to award prejudgment interest.

Again Minn. Stat. § 604.113, subd. 1(b), provides that the issuer is "liable for...penalties, if the amount of the dishonored check is not paid within 30 days after the payee or holder has mailed notice of dishonor pursuant to section 609.535..." That statutory provision requires notice be sent "by certified mail, return receipt requested, or by regular mail..." Minn. Stat. § 609.535 subd. 3(3). Here, statutory notice was provided, as required by the statute.

The statute does not require actual notice, it only requires that the process be followed. It is quite similar to the mechanic's lien statute and its requirements for pre-lien notice. Many recent cases have addressed the notice issue, including *Eischen Cabinet Company v. Hildenbrandt*, 683 N.W.2d 813 (Minn. 2004), and *Carolina Holdings Midwest, LLC. v. Capouls*, 658 N.W.2d 236, 238 (Minn. App. 2003). Accordingly, Appellant's service of notice upon Respondent by certified mail, was "effective upon mailing," as in *Eischen*, 683 N.W.2d at 818.

Apart from the dishonored check statute, Appellant is entitled to the award of prejudgment interest on the total, as requested by Appellant in its motion, under a separate basis. Prejudgment interest is "allowable on liquidated claims," as "an element of

compensatory damages.” Peterson v. BASF Corporation, 657 N.W.2d 853, 873-874 (Minn. App. 2003), reversed and remanded on other grounds.

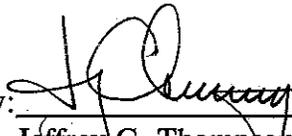
“Prejudgment interest is awarded to provide full compensation by converting time-of-demand damages into time-of-verdict damages.” Id. Accordingly, even if Appellant is not entitled to the award of interest under Minn. Stat. § 604.113, prejudgment interest, from the date of issuance of the dishonored check, until the principal amount was paid in full, is still owed to Appellant.

### CONCLUSION

Based upon the above, Appellant asserts that this Court must reverse the Trial Court’s determination, and grant Appellant its reasonable attorney fees, costs, disbursements and prejudgment interest.

Respectfully submitted,  
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