

NO. A07-2117

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State of Minnesota  
*In Court of Appeals*

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Metro Gold, Inc.,

*Plaintiff/ Appellant,*

vs.

Garrett Coin, and  
the Estate of Rex Peterson,

*Defendants/ Respondents.*

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**RESPONDENTS' BRIEF**

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**TABLE OF CONTENTS**

	<u>Page</u>
Table of Contents .....	i
Table of Authorities .....	ii
Legal Issues .....	1
Statement of the Case .....	1
Statement of the Facts .....	2
Standard of Review .....	6
Legal Argument .....	6
Discussion	
Legal Issue I .....	7
I.    The district court properly denied Appellant’s claim for attorney fees because the issuer of the worthless check died during the thirty (30) day statutory period, making it impossible for him to cure the deficiency.	
Legal Issue II .....	10
II.   Reasonableness of the Attorney Fees Claimed	
Conclusion .....	13

## TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Statutes</u>	
Minn Stat. § 604.113 (2006) .....	1, 6, 7, 8, 9, 13
 <u>Case Law</u>	
<u>Northfield Care Center, Inc. v. Anderson</u> , 707 N.W.2d 731, 735 (Minn. Ct. App. 2006) .....	9
<u>Prior Lake Am. v. Mader</u> , 642 N.W.2d 729, 735 (Minn. 2002) .....	6
<u>State by Cooper v. French</u> , 460 N.W.2d 2, 4 (Minn. 1990) .....	6
<u>Wallin v. Letourneau</u> , 534 N.W.2d 712, 715 (Minn. 1995) .....	6

## LEGAL ISSUES

1. **May the civil penalties under the worthless check statute be imposed against a check-drawer's estate when the drawer of a dishonored check died before receiving Notice of dishonor and before the statutory thirty (30) day period to cure the dishonor had run?**

The district court held in the negative.

2. **Is Plaintiff-Appellant's claim for attorney fees reasonable?**

The district court concluded Plaintiff-Appellant was not entitled to recover penalties under Minn. Stat. § 604.113, subd. 2(b), and therefore the "reasonableness" of the fees was not decided.

## STATEMENT OF THE CASE

Plaintiff-Appellant, Metro Gold, Inc. (hereinafter sometimes "Metro" or "Appellant"), brought suit to "collect" a dishonored check. The drawer of the very substantial check was hospitalized and in a coma and did not know his check was dishonored. Metro mailed notice of dishonor but the drawer of the check never received it. The drawer remained in the hospital, incapacitated, and died six days after the notice was mailed.

After the drawer's death, Metro filed a Written Statement of Claim in probate court for the debt which resulted from the dishonored check. The Written Statement of Claim acknowledged that the debt was unsecured, and that the instrument creating the debt did not contain a provision for interest. The drawer's estate admitted the

debt and the personal representative served and filed an Allowance of claim. No legal action was initiated by Metro after its probate claim was allowed. The entire claim (\$232,195.50) was paid by the estate in less than three months.

After receiving the estate's final payment for the full balance of the claim, Metro demanded an additional \$20,000.00 in civil penalties, including attorney fees, from the estate. The estate denied Metro's claim for attorney fees. Metro initially petitioned the probate court but the time period for amending and filing claims against the estate had expired. Metro then brought the civil penalty matter back to the district court, seeking attorney fees as part of the original law suit. The estate defended. The sole issue was whether the drawer's estate was liable to Metro for civil penalties under Minnesota's worthless check statute.

The district court heard the parties' cross motions for summary judgment. The Court ruled Metro was not entitled to civil penalties under the statute and entered summary judgment in favor of the estate. This appeal follows.

### **STATEMENT OF THE FACTS**

There is no genuine issue of material fact. The underlying transaction was the sale of gold from Metro to Peterson for \$232,195.50. The parties had a long standing business relationship of more than thirteen years. Metro routinely, if not always,

accepted Mr. Peterson's post-dated checks as payment for gold delivered in those transactions: Metro knew that Peterson was immediately re-selling the gold and that Peterson needed to receive payment from the third party buyer(s) to pay Metro. Metro always agreed to hold Peterson's post-dated checks until he received and deposited payments from third party buyers.

Metro delivered gold to Peterson on March 28, 2006, and accepted his post-dated check (in the amount of \$232,195.50) as usual. On March 30, 2006 Peterson was admitted to the hospital; later that day he fell into a coma. Peterson remained incapacitated, hospitalized, until his death on April 18, 2006. Peterson never completed the transaction.

While in the hospital, Peterson only communicated during brief lucid periods. He did not have an agent with power of attorney. Peterson was incompetent during this time and could not grant a power of attorney.

Metro's owner telephoned Peterson's home on April 5, 2006 and April 7, 2006 and left voice mail messages that Peterson's check was returned NSF. Peterson never received those messages; he was in a coma at the hospital. Peterson's sister, Joy Stoltzmann, received the telephone messages. She called Metro's owner and told him Peterson was in a coma at the hospital. Ms. Stoltzmann shared what limited information she had with Metro's owner and, later, Metro's attorney. Metro had

*actual notice* of Peterson's legal incapacity (and terminal condition) at the time the notice of dishonor was mailed to Peterson's home. The notice was mailed April 11, 2006, seven days prior to Peterson's death.

Despite knowing of Peterson's incapacity, Metro filed suit against him. Metro's Complaint charged that Peterson was *committing intentional fraud* against Metro. Metro petitioned the court for an *ex parte* seizure order based upon sworn affidavits which represented to the court that Peterson was a flight risk and "*actively engaged in secreting and dissipating assets.*"

The court ordered pre-hearing seizure of all of Peterson's business and personal assets and accounts. At the time the court signed the pre-hearing seizure order it had no idea that Peterson was actually lying in a hospital bed or that he would be dead within twenty-four hours.

Peterson died on April 18, 2006, *prior to service of Metro's Complaint and the ex parte seizure order.* Counsel for Metro knew Peterson had died but still they forced the sheriff's seizure of all of Peterson's assets and accounts under the court order. Attorneys for Peterson's estate immediately demanded that Metro return Peterson's assets and accounts to the duly appointed personal representative of his estate. Metro refused. All of Peterson's assets and accounts remained "frozen" until the district court hearing following the seizure.

Metro opposed returning Peterson's assets to the personal representative of his estate. The district court, at the post-seizure hearing, ordered the assets and accounts to be returned to Peterson's personal representative. Metro requested the district court "reconsider" its order and thereby further delayed the return of Peterson's property to his personal representative. Peterson's assets were not returned to the personal representative until on or about May 30, 2006.

The personal representative acted diligently administering Peterson's estate. The estate did not contest Metro's written claim filed in probate court on April 24, 2006. The personal representative served and filed an Allowance of Metro's claim and aggressively repaid Metro, tendering payments as follows:

- \$ 140,195.50 paid on July 25, 2006
- \$ 60,000.00 paid on August 10, 2006
- \$ 32,000.00 paid on August 15, 2006

On September 1, 2006, after already receiving all the payments from the estate (and negotiating the first two drafts totaling \$200,195.50), counsel for Metro filed a sworn petition with the probate court alleging Metro was still a creditor of the estate with an unpaid claim balance of \$232,195.50. Counsel's sworn petition failed to inform the court that Metro had received payments from the estate and cashed all but the estate's final check for \$32,000.00 which counsel was holding in Metro's file.

When the matter came on for hearing before the probate court, Metro dismissed its frivolous petition and demanded it be allowed to assert its claim for attorney fees under the original district court action. Metro's claim for attorney's fees was considered by the district court in the parties' cross motions for summary judgment.

### **STANDARD OF REVIEW**

Whether summary judgment was properly granted is a question of law, which the appellate court reviews *de novo*. Prior Lake Am. v. Mader, 642 N.W.2d 729, 735 (Minn. 2002); Wallin v. Letourneau, 534 N.W.2d 712, 715 (Minn. 1995); State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990). Appellant states plainly, and Respondent agrees, that there are no genuine issues of material fact. Therefore, this Court need only consider whether the district court properly applied Minn. Stat. § 604.113 to the facts of this case.

### **LEGAL ARGUMENT**

The civil penalties imposed by Minn. Stat. § 604.113, subd. 2(b), against the drawer of a dishonored check who does not make the instrument good within thirty (30) days of notice of dishonor, do not apply against the personal representative of the drawer's estate when the drawer died before receiving notice, and before the thirty (30) day period to cure had expired.

This case and the applicability of § 604.113, subd. 2(b), to these unique facts is an issue of first impression in Minnesota. Appellant has raised only two points in its appeal: (1) that Minn. Stat. § 604.113 should be interpreted so as to allow it to recover its fees and interest as a "penalty" against the issuer's estate, even though the issuer died during the grace period, and (2) that its fees are reasonable.

## DISCUSSION

### **I. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S CLAIM FOR ATTORNEY FEES BECAUSE THE ISSUER OF THE WORTHLESS CHECK DIED DURING THE THIRTY (30) DAY STATUTORY PERIOD, MAKING IT IMPOSSIBLE FOR HIM TO CURE THE DEFICIENCY.**

Minn. Stat. § 604.113, subd. 2(b), the "worthless check statute," is the law on this subject. The statute is a "penalty statute" intended to punish the drawer of a worthless check who does not make the instrument good within thirty (30) days of notice of dishonor. Conversely, the statute protects a drawer who makes timely "restitution" within the thirty (30) day period. Under the statute, no civil penalties can be imposed against the drawer if he makes the instrument good within thirty (30) days of notice.

Had Peterson lived, he had until May 12, 2006 to make his dishonored check good and avoid any civil penalty. Repayment of the dishonored draft by May 12, 2006 would have acted as an affirmative defense and absolute bar to any claim for civil penalties by Metro. Peterson's untimely death on April 18, 2006 deprived him of the remaining twenty-three (23) days to cure provided by the statute. Death served as the "ultimate bar" making it impossible for Peterson to perform himself: his obligation to repay Metro was relegated to his estate.

Appellant does not dispute that Peterson's coma and death prevented him from both receiving notice that his check was dishonored (mailed April 11, 2006) and from curing the deficiency. Appellant argues all that is relevant is that it mailed Notice of Insufficient Funds to Peterson's home and that the deficiency was not cured within thirty (30) days. Appellant's argument does not consider that Appellant's ex parte order froze all of the assets of the estate until well beyond the thirty (30) day period, making it impossible for even the personal representative to cure. The law does not support Appellant's position.

There is no authority to suggest that the legislature intended to hold personal representatives of estates to the same brief thirty (30) day cure period as the drawer of a worthless check under Minn. Stat. § 604.113, subd. 2(b). The statute does not identify or include "heirs or personal representatives" of a drawer's estate. The civil

penalties imposed by the statute are specific to the issuer/drawer of a worthless check. The legislature's refusal to extend the civil penalties under the statute to the heirs and personal representatives of a drawer is entirely consistent with existing probate laws which govern claims by and against decedents and their estates.

Metro's cause of action against Peterson for the dishonored check became an unsecured claim against Peterson's estate on April 18, 2006. Metro was well aware of this; Metro filed a Written Statement of Claim in probate court on April 24, 2006, just six days after Peterson's death. Metro did not claim attorney's fees in its written claim filed with the probate court. Rather, Metro claimed fees only after full payment of the probate claim was tendered by the estate.

Attorney fees are generally not recoverable in the absence of a contract or specific statute. Northfield Care Center, Inc. v. Anderson, 707 N.W.2d 731, 735 (Minn. Ct. App. 2006). Because there is no contract in this case that would authorize attorney fees, Appellant has based its claim for attorney fees entirely on Minn. Stat. § 604.113, subd. 2. The statute only allows the recovery of reasonable attorney fees as a civil penalty against the issuer of a worthless check who does not make the instrument good within thirty days after receiving notice of dishonor.

Minn. Stat. § 604.113, subd. 5, provides that any defense which would otherwise be available to the issuer of the check also applies against any liability for

penalties. In other words, the failure to cure the deficiency within thirty days must be unjustifiable for penalties to apply. In this case, Respondents argued, and the district court agreed, that the affirmative defense of "impossibility" applied. It was impossible for Peterson to cure the deficiency because he was in a coma for the first seven days of the grace period and dead for the remaining twenty-three. Moreover, Peterson did not have a Power of Attorney and was unable to execute one while he was hospitalized.

## **II. REASONABLENESS OF THE ATTORNEY FEES CLAIMED**

Even if attorney fees are allowed under the statute, they must be reasonable. The attorney fees requested by Metro are unreasonable, unnecessary, and not related to the recovery in this matter, or the product of Metro's own intentional misconduct.

The actions of Metro, and its attorneys, give cause for the Court to deny any claim for attorney fees by Metro, whether based upon a specific statute or otherwise. Metro perpetrated a fraud upon the district court, representing that Peterson was a flight risk "actively engaged in secreting and dissipating assets" when he was really dying in a hospital bed. Metro used fraud upon the court to obtain a pre-hearing seizure. Even after plaintiff's death, when Metro knew its only status was that of an unsecured creditor, Metro attempted to control Peterson's estate. At the very least,

Metro should bear the burden and expense of its actions.

The vast majority of the initial \$14,000.00 attorney fees and expenses claimed by Metro were incurred obtaining the pre-hearing seizure order and while opposing the return of the estate's property to the personal representative. Review of counsel's billing statements shows only a small fraction of the fees were generated filing Metro's probate claim. Counsel's fees charged for the pre-hearing seizure and opposing the return of Peterson's assets to his personal representative were not reasonable, necessary or related to the recovery of Metro's unsecured probate claim.

Assets of Peterson's estate were not available to the personal representative until the end of May, 2006, because of Metro's legal "shenanigans." In essence, Metro created its own dilemma. Metro froze Peterson's assets from April 18, 2006 until May 30, 2006, resulting in the personal representative being unable to pay claims. Metro's \$14,000.00 in attorney fees and costs during this period did nothing to recover the debt to Metro.

Counsel piled on \$5,000.00 in additional attorney fees and costs incident to Metro's spurious probate petition filed September 1, 2006. Counsel's petition, which was filed *after* Metro had received full payment from the estate, can hardly be considered to have "contributed to the recovery of Metro's claim" because the claim was already paid. Said attorney fees were not reasonable, necessary, or related to

Metro's recovery.

The same "logic" extends to any purported claims that Metro should recover interest on the amount of its probate claim. First, recall Metro's Written Statement of Claim filed with the probate court stated interest was not owing on the debt. Secondly, Metro can hardly claim it should receive interest on the unpaid balance when Metro kept the estate assets frozen until May 30, 2006.

Appellant "justifies" the amount of attorney fees based on the "total amount recovered." The amount recovered is but one factor for the court to consider. When examining the record, the fees generated by Metro's counsel did not account for the actual recovery by Metro. Peterson's estate admitted the debt and paid the claim without anything more than the Written Statement of Claim Metro filed with the probate court. Of course, this is a moot point if fees are not recoverable under the Statute.

Time has shown which party was being truthful with the court. The underlying circumstance here was an uncompleted business transaction between the parties. There was no fraud, no secreting and dissipating of assets, and the only flight Peterson went on was his journey to the afterlife. In the end, Metro's unsecured probate claim was fully repaid within two and a half months, even before the statutory period for filing claims against the estate was closed.

## CONCLUSION

Appellant's claims for penalties against the estate are not proper under the worthless check statute and do not fit within the language, limits, and parameters of Minn. Stat. § 604.113, subd. 2(b). The legislature intended that penalties would only be imposed if the drawer of a worthless check failed to make the instrument good within thirty (30) days after notice. Peterson's death made it impossible for him to cure the deficiency because he died within the thirty (30) day period. There is no legal authority for imposing the penalties under the worthless check statute, Minn. Stat. § 604.113, subd. 2(b), against a drawer's estate when the drawer died before the end of the statutory cure period. Appellant fully recovered the amount of its unsecured claim, i.e., \$232,195.50, filed with the probate court. The district court properly granted summary judgment in Respondents' favor denying Appellant's claim for civil penalties.

Dated: February 28, 2008

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