MINNESOTA STATE LAW LIBRARY

STATE OF MINNESOTA

IN COURT OF APPEALS

District Court File Nos. 17-CV-05-213 & 17-CV-06-247

Court of Appeals No. A09-607

United Prairie Bank - Mountain Lake,

Respondent,

vs.

Haugen Nutrition & Equipment LLC., Leland Haugen, Ilene Haugen et al,

Appellants.

APPELLANTS' REPLY BRIEF

MACK & DABY P.A.
John E. Mack
P.O. Box 302
New London MN 56273
(320) 354-2045
ATTORNEYS FOR APPELLANTS

BRIGGS & MORGAN
Jason Aasmus
220 IDS CENTER, 89 S. 8th St.
Minneapolis MN 55402
(612) 977-8446
ATTORNEYS FOR RESPONDENT

I.

THE DISTRICT COURT IMPROPERLY CALCULATED ATTORNEYS' FEES AND DID NOT FOLLOW ITS OWN CONCLUSIONS OF LAW EXCLUDING CONTRACT-FOR-DEED/EQUITABLE MORTGAGE ATTORNEY TIME FROM ITS ATTORNEY FEE AWARD.

There is an old joke about a criminal who was being sentenced for an elaborate theft, and who said in mitigation, "But your honor, you should take into consideration all the time and effort I had to go through to pull it off." No one would accuse United Prairie Bank of criminal behavior, but otherwise the same principal applies. UPB argues:

> Appellants appealed the February 10, 2006 Order. 1 On May 22, 2007, the Court reversed the February 10, 2006 Order and remanded the case for further proceedings. .... The legal fees and expenses incurred by UPB in connection with the appeal totaled $64,620.93.

(Respondent's Brief, p. 22)

At the District Court level, and again to the Court of Appeals, UPB advanced a legal theory which proved erroneous. UPB is asking the Haugens to pay it $64,620.93 for being its own error. Even the District Court stated:

> (15) That there, accordingly, exists no contractual obligation for HNE to be responsible for fees and costs incurred in litigating the Contract for Deed - Equitable Mortgage issue.

(A-20)

The issue in the initial appeal was whether or not the Equitable Mortgage issue should have been decided against the Haugens on summary judgment, and the Court of Appeals determined that it should not have been. Hence, the whole appeal was

related to the "Contract for Deed - Equitable Mortgage issue," and under the District Court's own analysis, UPB should not have been awarded attorneys' fees for unsuccessfully litigating it.

The same logic applies with slightly less pith to many of the other legal services performed for UPB. For example, UPB argues:

> UPB incurred significant legal fees litigating the issue of whether the Contract for Deed constituted an equitable mortgage. Through February 10, 2006, UPB's efforts regarding the contract for deed/equitable mortgage issue were successful, as all of the relief UPB sought had been granted. (Id). The total amount of attorneys' fees incurred by UPB relating to the contract for deed/equitable mortgage issue were $62,971.07.
>
> (Respondent's Brief, p. 21)

But the District Court said:

> (6) That UPB shall not recover any attorneys' fees or costs, which have been incurred in litigating the Contract for Deed - Equitable Mortgage issue.
>
> (A-20)

To extend the logic of the hard-working thief joke a bit, it is as if the thief acknowledged that he deserved to be incarcerated for his ultimate conviction, but should be granted leniency for all the times he got away with it. Surely the fact that UPB was temporary successful in its interlocutory contract-for-deed/equitable mortgage claims, but was ultimately unsuccessful in both should not permit it to recover for the times when courts erroneously ruled in its favor on these issues.

After all, the District Court said "That UPB shall not recovery ***any*** attorneys' fees...."

More seriously, Respondent's brief raises the very real possibility that many of the attorneys' fees for which the Court ultimately reimbursed UPB were actually incurred for work on the contract for deed/equitable mortgage issue - an issue for which the District Court explicitly stated that UPB was not to be paid. In their initial brief, appellants argued that it was very suspicious that UPB was awarded about 12/15 of the total amount of attorney hours it had incurred when well over 50% of the litigation in this case related to the contract-for-deed/equitable mortgage issue. Respondent's own reply brief bears out this suspicion. In addition to the above-quoted paragraphs 8 and 9 of Respondent's statement of facts, consider:

> 9. Discovery Efforts.
>
> UPB also participated in significant discovery, which was aimed at narrowing the issues for trial. ... The parties took depositions of eight witnesses - Jan Johnson, Darren Haugen, Mark Sahli, Leland Haugen, Mark Greenway, Ted Devine, J. Brian O'Leary and Jay Franz. .... The total legal fees incurred by UPB in discovery was $159,091.83.

(Respondent's Brief, p. 22)

But virtually all of the depositions of Sahli and Devine were devoted to the contract-for-deed/equitable mortgage issue, and about 50% of the other depositions were devoted to these issues as well.

10. Summary Judgment Motions.

> [A]s discussed above, UPB's initial summary judgment motion was successful. following the appeal, UPB sought summary judgment on Appellants' equitable mortgage claim on the grounds that no genuine issue of material fact existed regarding the absence of the parties. intent to enter into an equitable mortgage transaction.... On October 31, 2007, the district court denied UPB's summary judgment motion and identified several facts that, if proven, could establish that an equitable mortgage transaction was intended by the parties.
>
> (Respondent's Brief, p. 23)

If this motion did not relate to "any attorneys' fees or costs, which have been incurred in litigating the Contract for Deed - Equitable Mortgage issue," what would?

UPB claims:

> UPB retained Larson Allen and Debra Thompson to calculate the outstanding balances of the three Notes and the Contract for Deed, including the attorneys' fees and costs incurred by UPB.
>
> (Respondent's Brief, p. 26)

Indeed they did. What Larson Allen and Debra Thompson did not do, however, is segregate out the hours expended on the contract-for-deed/equitable mortgage issue from issues such as rent and replevin. Neither did anyone else, including the District Court. On the face of its own arguments, the District Court erred in determining that attorneys' fees should not be allowed for any litigation involving the contract-for-deed/equitable mortgage issue and then allowing fees for such litigation.

II.

ATTORNEYS' FEES ARE TRIABLE BY JURY UPON DEMAND OF EITHER PARTY.

It is useful, in a reply brief, to quote extensively from the other party's argument to determine whether it can withstand scrutiny. UPB argues:

> Numerous Minnesota appellate decisions confirm that the attorneys' fees determination is solely within the province of the trial court. See, e.g., *O'Donnell*, 199 N.W.2d at 434-35 (following entry of default judgment, trial court awarded attorneys' fees pursuant to provisions in subject promissory notes); *Northfield Care Ctr., Inc. v. Anderson*, 707 N.W.2d 731, 736 (Minn. Ct. App. 2006) (following entry of summary judgment, trial court awarded attorneys' fees under the subject nursing home admissions contract); *State Bank of Cokato*, 510 N.W.2d at 270 (following conclusion of trial, trial court awarded attorneys' fees pursuant to loan documents); *Oleisky v. Midwest Fed. Sav. and Loan Ass'n*, 398 N.W.2d 627, 629-30 (Minn. Ct. App. 1986)(on bank's motion, trial court awarded attorneys' fees under subject promissory note); *Potter v. Am. Bean & Gran Corp.*, 388 N.W.2d 22, 23 (Minn. Ct. App. 1986)(following jury verdict, trial court awarded attorneys' fees under subject promissory not); *Interstate One Realty v. Crippa*, No. C4-95-1253, 1996 WL 222319 (Minn. Ct. App. Jan. 23, 1996)(RA59-62)(remanding to district court to determine the reasonableness of attorneys' fees awarded under loan documents); *C.J. Duffey Paper Co. v. Reger*, 588 N.W.2d 519, 528 (Minn. Ct. App. 1999)(affirming jury's award of damages and remanding to trial court to determine reasonableness of attorneys' fees). Indeed, the "[d]etermination of the amount of fees will involve a factual inquiry more appropriately conducted by the trial court."
>
> (Respondent's Brief, p. 41)

What Respondent really needs, and what it does not produce, is a case where a party requested that the attorneys' fees issue

be submitted to a jury, the request was denied by the trial court, and the appellate court upheld the denial of a jury trial. Consider the cases it does produce in order. *O'Donnell* and *Northfield* may be quickly dismissed from consideration, because they did not involve jury trials in the first place - of course the trial court was going to determine the attorneys' fees issue - there was no one else to do so. *State Bank of Cokato* was tried to a court, so the issue of a jury determination of attorneys' fees could not arise. The same is true of *Oleisky* and *Interstate One*. *Potter* did involve a jury trial, but the parties submitted the attorneys' fees issue to the trial court, the trial court was reversed, and there is no indication that on remand the jury could not address the attorneys' fees issue.

That leaves *Duffey*. First, although Duffey did involve a jury trial, neither party requested that the jury determine the issue of attorneys' fees:

> Reger moved for post-judgment interest at the contractual rate of eight percent, rather than the statutory rate of five percent, and for indemnification for attorney fees and disbursements under Minn.Stat. § 302A.521 (1996).
>
> (*Id.* at 522)

Second, the challenge to the attorneys' fee award was denied because the aggrieved party had not preserved the issue below:

> On appeal, Reger moves for an award of attorney fees under Minn.Stat. § 302A.521 (1996). Following trial, Reger made a similar motion and the trial court awarded $191,799.44 in attorney fees and $151,797.51 in

> disbursements. That award was not challenged below, identified as an issue in appellants' statement of the case, or argued in appellants' briefs. See *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982).
>
> (*Id.* at 527)

Third, when the Court of Appeals said "[d]etermination of the amount of fees will involve a factual inquiry more appropriately conducted by the trial court," it was referring to the greater appropriateness of the District Court vis-a-vis the court of appeals, not the judge of District Court vis-a-vis the jury in a District Court action:

> Reger requests that this court award fees on appeal, which he estimates may total $50,000. His request is essentially based on the trial court's determination that the requirements of Minn.Stat. § 302A.521 have been met and on appellant's failure to challenge this determination on appeal. Because we agree that appellants failed to properly challenge the trial court's award of fees and because we are otherwise affirming the jury's verdict, we conclude that Reger is also entitled to fees on appeal under Minn.Stat. § 302A.521. Determination of the amount of fees will involve a factual inquiry more appropriately conducted by the trial court. See *In re Marriage of Richards,* 472 N.W.2d 162, 166 (Minn.App.1991); *Katz v. Katz*, 380 N.W.2d 527, 531 (Minn.App.1986), aff'd, 408 N.W.2d 835, 840 (Minn.1987). We therefore remand the matter to the trial court to determine the proper amount of reasonable fees and disbursements incurred in defense of this appeal.
>
> (*Id.* at 528)

Note, too, that all the cases cited in *Duffey* are judge-alone cases, such as divorces. In sum, respondent fails to cite a single case that stands for the proposition that, where a party demands a jury trial in a contract case arising from a

"Reasonable attorneys' fees" clause in a note and mortgage, that party's request is to be denied.

Respondent states that other state and federal courts have denied the right to a jury trial in contract cases involving attorneys' fee clauses. But there are two problems with its far-too-cursory analysis. First, there is the Minnesota Constitution, which has been interpreted several times to grant a right to a jury trial upon demand in contract cases. Appellant cited *Landgraf v. Ellsworth,* 126 N.W.2d 766 (Minn. 1964), *Tyrol v. Private Label Chemicals, Inc.,* 505 N.W. 2d 54 (Minn. 1993), and *Olson v. Aretz,* 346 N.W.2d 178 (Minn. 1984). Respondent did not even deal with these cases, or the principle they announce. Second, the federal cases cited by respondent did not directly address the jury determination issue, while *J.R. Simplot v. Chevron Pipeline, Inc.,* 563 f.3rd 1102 (10th. Cir. 2009) did, and explicitly distinguished those "no right to jury trial" federal cases which did not arise from the contract itself. Respondent's quarrel is with *Simplot.*

Quarrel it does, stating:

> Unlike *Simplot*, UPB's claims against Appellants are not in the nature of an insured against an insurer for breach of a duty to defend or indemnify. rather' UPB's breach of contract claim against Appellants seeks damages consisting of unpaid principle and interest due under the Loan Documents and cancellation/foreclosure of the Contract for Deed. In *Simplot*, there was no contractual provision for an award of attorneys' fees; that case involved an indemnity provision. In contrast, UPB's claim for attorneys' fees arises out of

the Loan Documents and si separate and distinct from its damages claim. *See supra* § II.B.2. The *Simplot* court confirmed that under these circumstances no jury trial right exists:

> The Fifth and Seventh Circuits have agreed that the court-not the jury-should generally determine the amount of attorneys' fees in cases where a contract provides for fees to the prevailing party. The Fifth Circuit held the Seventh Amendment does not guarantee a jury trial to determine the amount of reasonable attorneys' fees, as no common law right exists to recover attorneys' fees awarded pursuant to a contract. *Resolution Trust Corp. v. Marshall*, 939 F.2d 274, 279 (5th Cir. 1991)
>
> (Respondent's Brief, p. 36)

But Article 1 § 4 of the Minnesota Constitution has been interpreted to grant a jury trial in contract cases. See *Landgraf, supra*. Furthermore, the Minnesota Supreme Court has interpreted the Seventh Amendment of the United States Constitution to be consistent with a jury trial right even in cases at equity. See, *Onvoy, Inc. v. ALLETE, Inc.*, 736 N.W.2d 611 (Minn. 2007). Minnesota clearly comes down on the *Simplot* side of the argument.

Finally, with respect to the jury trial argument, respondent states:

> The Loan Documents and Contract for Deed plainly provide for an award of attorneys' fees to UPB, a point that Appellants did not challenge at trial.
>
> (Respondent's Brief, p. 36)

It is important to distinguish this true statement from the

possible implication that the Haugens did not raise the jury trial issue prior to trial. The did so several times and the District Court denied their claimed right several times. Neither side doubts that UPB has the right to reimbursement for reasonable attorneys' fees and that this right arises from its contracts with the Haugens. Where appellants challenge UPB, however, is on its right to avoid the jury trial right on the attorneys' fees part of the contract claim, while having a right to such a trial on every other disputed trial issue.

There is one further matter which should be addressed with respect to the attorneys' fee issue. Respondent devotes approximately ten pages to various challenges to a specific award of attorneys' fees above and beyond the central challenge based upon the award for matters involving the contract-for-deed/equitable mortgage issue. Appellants will not devote much time to this matter, because (1) most of the arguments relating to them was adequately addressed in appellant's initial brief and (2) since appellant believes the case must be reversed for failure to segregate out contract-for-deed/equitable mortgage attorneys' fee claims from other attorney fee claims, the case should be remanded anyway and all these other fee claims can be addressed more adequately once this segregation is made. However, respondent makes a few rather egregious mistakes that need the Court's attention.

First, respondent argues that it is entitled to recover attorneys' fees even with respect to issues which it unsuccessfully raised. This is problematical. Obviously, the major such issue involved contract-for-deed/equitable mortgage, which the court determined was not compensable, and which the respondent did not challenge under Minn.R.Civ.App.P. 106. Second, there is in fact very powerful authority that reasonable attorneys' fees are not awardable for unsuccessful litigation - the United States Supreme Court said in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933 (1983):

> The District Court did not properly consider the relationship between the extent of success and the amount of the attorney's fee award. The extent of a plaintiff's success is a crucial factor in determining the proper amount of an attorney's fee award under § 1988. Where the plaintiff failed to prevail on a claim unrelated to the successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the court should award only that amount of fees that is reasonable in relation to the results obtained.

While Minnesota has nothing quite as strong as the U.S. Supreme Court's holding in *Hensley,* it has repeatedly indicated that an important factor in determining the allowability and size of an attorney fee award is the result obtained. It said, in *Obraske v. Woody*, 199 N.W.2d 429 (Minn. 1972):

> A large fee is not necessarily an unreasonable fee. On

> the other hand, in cases involving the awarding of reasonable attorneys' fees, we do not deem it to be unduly burdensome on attorneys to require them to present probative evidence to the trial court to assist it in setting the amount of the fees. In that connection it would be helpful to the trial court, and to this court on appeal, to have, if possible, in addition to a recitation of the services performed and to be performed in the future, testimony regarding the time consumed by the attorney in performing his services or such other probative evidence as may assist the trial court in arriving at a fair and reasonable fee. The trial court may also take into consideration such factors as the ability and experience of the attorneys involved, the amount involved, the responsibilities assumed by the attorneys in the case, and the results obtained. In re Living Trust Created by Atwood, 227 Minn. 495, 35 N.W.2d 736 (1949); *Hempel v. Hempel*, 225 Minn. 287, 30 N.W.2d 594 (1948).
>
> (*Id.* at 432)

UPB presented documents indicating the hours worked on the file and the lawyers and other personnel working on the file. On the other hand, the evidence presented by UPB does not break down the work performed by issue, so that it is impossible for this Court to determine whether the work was performed on a successful or an unsuccessful issue.

UPB also attempts to use the *Lodestar* method in determining attorneys' fees. It is doubtful that the *Lodestar* method is even appropriate in a contract-based reasonable attorney fees case, as opposed to, say, a civil rights case; and in any event, a *Lodestar* award in Minnesota is strictly scrutinized. As our Supreme Court said in *Milner v. Farmers Ins. Exchange*, 748 N.W.2d 608 (Minn. 2008).

> In this case, the district court found that the plaintiffs' attorneys obtained "a successful result for their clients" because they established that Farmers violated the MFLSA and Farmers was assessed a large civil penalty and is now paying its claims representatives in Minnesota overtime pay. Although these achievements did not result in any monetary relief for the plaintiffs, they are properly considered in assessing the plaintiffs' success in this litigation. For example, several federal circuits measure success not only by looking at the difference between the judgment recovered and the recovery sought, but also by looking at the significance of the legal issues on which the plaintiff prevailed and the public purpose served by the litigation. See, e.g., *Brandau v. Kansas*, 168 F.3d 1179, 1181 (10th Cir.1999) (citing *Farrar v. Hobby*, 506 U.S. 103, 121-22, 113 S.Ct. 566, 121 L.Ed.2d 494 (O'Connor, J., concurring)); Scott v. Sunrise Healthcare Corp., No. 95 C 1277, 1999 WL 787624, at 2 (N.D.Ill. Sept. 23, 1999) (recognizing that FLSA cases "are affected with the public interest, and the value of such a suit to the public may exceed its limited monetary value" to the plaintiffs).
>
> The achievement of some success, however, does not necessarily support a significant attorney fees award. The attorney fees award must reflect "the degree of success obtained." *Henley*, 461 U.S. at 436, 103 S.Ct. 1933 (emphasis added). "A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." Id. at 440, 103 S.Ct. 1933. The court should focus on whether the hours expended are reasonable in relation to the overall relief obtained. See id. at 435-36, 103 S.Ct. 1933; see also Farrar, 506 U.S. at 114, 113 S.Ct. 566 (stating that when recovery of private damages is the purpose of the litigation, "a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought" (internal quotation marks omitted)).
>
> (*Id.* at 432)

UPB having failed to prevail on the equitable mortgage issue, virtually all the attorney hours accumulated since the

replevin action have been a waste of time. Defendants have at all times been willing to settle with UPB for the amounts owed UPB less attorney fees, and the only substantial issues outstanding between UPB and the Haugens since the reversal of this Court's summary judgment determination have been (a) equitable mortgage and (b) attorney fees. Most of the litigation has been over UPB's unsuccessful efforts to defeat the Haugen's equitable mortgage claim, and had the time expended on that issue been factored out, the Haugens could have paid off UPB.

Finally, with respect to the attorney fee issue, respondent raises an important issue on page 44 of its brief which the Court of Appeals should address. It argues:

> [U]PB's participation in mediations and other attempts to settle this lawsuit are part of its efforts to collect amounts due and owing under the Notes and to protect and preserve UPB's collateral and the Real Property. Under the unambiguous, and admittedly binding, provisions of the Loan Documents and Mortgage, UPB's attorneys' fees [for time spent in mediation] are recoverable.
>
> (Respondent's Brief, p. 44)

This is very unhealthy. The Minnesota Supreme Court promulgated Minn.Gen.R.Prac. 114.02 et seq. in order to create an impartial process where parties are encouraged to resolve their differences short of trial. To that end, Rule 114.08 states:

> a. Evidence. Without the consent of all the parties and an order of the court, or except as provided in Rule 114.09(e)(4), no evidence that there has been an ADR proceeding or any fact concerning the proceeding may be admitted in a trial de novo or in any subsequent

proceeding involving any of the issues or parties to the proceeding.

Evidence of the mediation process, the results thereof, and the time attorneys for the respondent spent in mediation are facts "concerning the proceeding," and in the absence of an order from the trial court permitting their consideration, would be inadmissible.

The larger point is that permitting attorneys' fees for participation in mediation - recovery of which necessarily invokes facts about the mediation, such as its length of time - undermines the entire process. The District Court may order mediation or other forms of alternative dispute resolution (See Minn.Gen.R.Prac. 114.04.01 et seq.). So if attorneys' fees may be awarded for mediation, the District Court is requiring the party vulnerable to "reasonable attorneys' fees" to feed his opponent's coffers and deplete his own. Under such circumstances, he has a vested interest in cutting the process as short as possible, and this in turn undermines the whole purpose of mediation. Even more broadly, the purpose of mediation is to try to resolve disputes in a friendly and relaxed atmosphere. If one part is funding the other party's mediation efforts, the atmosphere is neither relaxed nor friendly. Awarding attorneys' fees for mediation simply distorts the process beyond recognition.

One general point also merits attention. What UPB claims

with respect to attorneys' fees does not pass the "smell test." Consider just respondent's deposition claim:

> The parties took depositions of eight witnesses - Jan Johnson, Darren Haugen, Mark Sahli, Leland Haugen, Mark Greenway, Ted Devine, J. Brian O'Leary and Jay Franz. .... The total legal fees incurred by UPB in discovery was $159,091.83.

$159,091.83 for eight depositions??!! That is $20,000 per deposition. No deposition lasted over eight hours. That is $2,500 per hour. To be sure, some preparation and review is indicated in the deposition process - but this much? Respondent makes much of appellants' failure to challenge respondent's timekeeping. But how could they? Respondent's attorneys sit in their office and put down virtually any figure they want to for preparation, review, analysis, etc., and there is no way appellant has any way of determining its existence or necessity. Meditating on upcoming deposition? 8.9 hours. Noodling about character of deponent? 7.9 hours. Sleeping on possible line of argument based upon deposition? 6.9 hours. This is precisely the sort of infinite flexibility in timekeeping that caused the Court in *Agri Credit Corporation v. Liedman,* 337 N.W.2d 384 (Minn. 1983) to say:

> Inasmuch as we have determined that such estimated future attorney fees should not have been considered by the trial court in making its award of attorney fees in the judgment below, we next examine the attorney fees in light of the work done by the respondent's attorneys up to the time of entry of judgment. Applying our estimate of 15 hours of service, such examination shows that the attorney fees awarded amounted to more than

> $1,500 an hour for services rendered by respondent's attorneys up to the time of the denial of the new trial motion. It seems clear to us that the trial court's award is patently unreasonable.
>
> (*Id.* at 387)

The instant fee charges are 1 ½ times the amount found unreasonable in Liedman, and are patently unreasonable here too.

III.

APPELLANTS MADE TIMELY AND PROPER OBJECTION TO THE WITHDRAWAL FROM THEIR ACCOUNT OF MONEYS UNLAWFULLY PAID TO A THIRD PARTY.

Respondent argues, first, that Leland Haugen's objection to UPB's unauthorized withdrawals from his account to pay Devine and Sahli were not timely made. The problem with this argument is (a) the bank did not inform Mr. Haugen of the withdrawals; (2) Mr. Haugen made timely objection to Mr. Devine as soon as he found out about them; and (3) the bank denied that the withdrawals had been made, and did not tell Mr. Haugen until the trial that it had applied the money improperly withdrawn to anything.

Even worse is what UPB did with the money:

> Each of the withdrawals was applied to Appellant's outstanding obligations. The $8,800 payment to Sahli on May 27th, 2003 represented the profit Sahli received on the purchase and sale of the Haugen Feeds assets, which was acknowledge and agreed to by the Haugens. See Devine Depo. at 50-51. The $1,400 payment to Sahli on August 1, 2003 was applied to the real estate taxes due on the Real Property. See Devine Depo. at 60. Each of the remaining withdrawals was applied to the outstanding balance owed on the Contract for deed.

(Respondent's Brief, p. 47)

This is a little like a thief claiming that he has done no wrong because he applied the proceeds of the theft to a bill that the victim previously owed him. No wonder Mr. Haugen was so outraged by what Devine (and hence UPB) did to him! Because UPB had not notified him of the withdrawals, his checks bounced, he was charged overdraft fees, his creditors were outraged, and his credit and credibility in the community were undermined. And UPB has the gall to say it credited these amounts to other obligations, even though these obligations were not due, much less in default, at the time Devine withdrew the money. When money is improperly withdrawn from an account, a bank does not make the depositor whole by giving him credit and telling him about it. It makes him whole by refunding the money and making good the overdraft fees and collateral damage the depositor has suffered. *People's State Bank of Jordan v. Ruppert,* 249 N.W. 325 (Minn. 1933) is directly in point, and appellants had a cause of action which was not erased by a belated and self-serving "application of proceeds."

IV.

THE MONEY DEPOSITED BY DARREN HAUGEN IN LIEU OF BOND SHOULD NOT HAVE BEEN SUBJECT TO THE CLAIMS OF UNITED PRAIRIE BANK.

If appellants are correct in the arguments advanced above, this issue is moot, because the amount owed to UPB will have to

be recalculated by either a judge or a jury. But it is worth noting that the amount deposited by Darren Haugen, while calculated based upon the fair rental value of the property, was deposited as a supersedeas. There is a difference between the way it was calculated - which was indeed the fair rental value of the land - and its purpose, which was to preserve the status quo in the event UPB prevailed on appeal. UPB did not prevail on appeal, and the amount should not have been subject to UPB's liens.

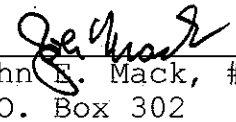
To be sure, Darren Haugen testified that he thought it was rent. But that is irrelevant. It is the legal status of that amount which controls, and the legal status was clearly a bond to protect UPB in case it prevailed on appeal. Because it did not, the status of the money deposited by Darren Haugen is exactly the same as an amount deposited by a bonding company pursuant to a supersedeas bond and should have been available to UPB only in the event it prevailed on appeal.

CONCLUSION

For these reasons, the decision of the District Court should be reversed and the matter remanded to the District Court for trial by jury on all issues.

Dated: October 4th, 2009

MACK & DABY, P.A.



John E. Mack, #65973
P.O. Box 302
New London MN 56273
(320) 354-2045
ATTORNEYS FOR APPELLANTS