

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' BRIEF ON APPEAL

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STATEMENT OF THE LEGAL ISSUE INVOLVED

I. DID THE DISTRICT COURT ERR IN DENYING APPELLANTS A JURY TRIAL ON THE ISSUE OF ATTORNEYS' FEES AND RELATED COSTS OF COLLECTION?

The District Court Held: In the NEGATIVE.

MOST APPOSITE STATUTES:

Minnesota Constitution, Article I § 4

Minn. Stat. § 481.13

Minn. Stat. § 500.24

MOST APPOSITE CASES:

Abraham v. County of Hennepin, 639 N.W.2d 342 (Minn. 2002)

Simplot v. Chevron Pipeline, Inc., 563 F.3rd 1102 (10th. Cir. 2009)

Landgraf v. Ellsworth, 126 N.W.2d 766 (Minn. 1964)

Westerlund v. Peterson, 197 N.W. 110 (Minn. 1923)

II. DID THE DISTRICT COURT ERR IN THE AMOUNT OF ATTORNEYS' FEES IT AWARDED?

The District Court Held: In the NEGATIVE.

MOST APPOSITE STATUTES:

Minn. Stat. § 481.13

Minn. Stat. § 500.24

MOST APPOSITE CASES:

Agri Credit Corporation v. Liedman, 337 N.W.2d 384 (Minn. 1983)

Jorstad v. IDS Realty Trust, 643 F.2d 1305 (8th Cir. 1981)

Bierlein v. Gagnon, 96 N.W.2d 573 (Minn. 1959)

III. DID THE DISTRICT COURT ERR IN NOT GIVING THE HAUGENS CREDIT FOR THE MONEY WRONGFULLY WITHDRAWN FROM THE HAUGEN ACCOUNT BY THEODORE DEVINE?

The District Court held: In the NEGATIVE.

MOST APPOSITE STATUTE:

Minn. Stat. § 549.20

MOST APPOSITE CASES:

Reome v. Gottlieb, 361 N.W.2d 75 (Minn. App. 1985)

People's State Bank of Jordan v. Rupert, 249 N.W. 325 (Minn. 1933)

IV. DID THE DISTRICT COURT ERRONEOUSLY AWARD THE AMOUNT DEPOSITED BY DARREN HAUGEN IN LIEU OF SUPERSEDEAS BOND TO BE CREDITED TOWARD APPELLANTS' OBLIGATIONS TO UPB?

The District Court held: In the NEGATIVE.

MOST APPOSITE STATUTE:

Minn. Stat. § 570.02

MOST APPOSITE CASE:

Williamson v. Prasciunas, 661 N.W.2d 645 (Minn. App. 2003)

STATEMENT OF THE CASE AND FACTS

The facts in this case are difficult to disentangle from the procedure, and thus the two elements ordinarily separated in the Statement of the Case and Facts will be discussed together.

Leland and Ilene Haugen owned a farm in Cottonwood County described as follows:

The Southwest Quarter (SW $\frac{1}{4}$), Section 4, Township One Hundred Seven (107), Range Thirty-Five (35) West, Cottonwood County, Minnesota; and

The East Half of the Northeast Quarter (E $\frac{1}{2}$ NE $\frac{1}{4}$) of Section Two (2) in Township One Hundred Seven (107) North, Range Thirty-Five (35) West of the Fifth Principal Meridian in Cottonwood County, Minnesota.

When the events which gave rise to this litigation began, the Haugens had mortgaged their farm to the Bank of Canby ("Canby Bank") and Prudential. The Haugens began to experience financial difficulties, and sought refinancing (A-2)¹. They sought a possible loan from United Prairie Bank ("UPB"), and conducted most of their discussions with Theodore "Ted" Devine, then a vice president and loan officer of the bank (A-2). Devine indicated that the bank might have difficulty financing the Haugens directly for the full amount they requested, but that it could perhaps finance the transaction if some additional lender were more bankable, such as his friend, Mark Sahli of North Dakota.

¹To save time and space, Appellants will usually cite to the District Court's opinion when a "fact" appears not to be in dispute. Actually, very few facts (except ultimate ones) are in dispute between the parties for purposes of this appeal.

Devine proposed that instead of making a loan directly to the Haugens, which would be secured by the real estate, equipment, crops, etc. Moreover, he suggested that as to the balance which the Haugens required, the Haugens should incorporate, transfer their property to a corporation, Haugen Nutrition and Equipment Inc. ("Haugen N & E" hereafter, unless an individual is specified, the appellants will often be referred to as "the Haugens"), that Haugen N & E should sell the property on warranty deed to Mr. Sahli, that Mr. Sahli should give the Haugens a contract for deed back, and that Mr. Sahli should take out a loan with United Prairie Bank, giving a mortgage in turn directly to the bank (A-2, 3).

The Haugens obtained an operating loan from UPB. The Haugens also sold their interest in their farm to Haugen N & E (A-3). Mr. Sahli obtained a loan from the bank, which was used to pay off the existing indebtedness of the Haugens to the Canby Bank, and gave a mortgage to United Prairie in return.² Haugen N & E sold the farm to Mr. Sahli on contract for deed (A-3). Sahli gave a warranty deed to the farm to the bank (A-3). Appellants did not pay off the contract for deed³ in accordance with its

²Somewhat oddly, Sahli seems to have given this mortgage before Haugen N & E gave its deed to Sahli.

³Reference to the document as "contract for deed" is made for purpose of identification only. Ultimately, the document was determined by the Court to create an equitable mortgage, a conclusion appellants support and respondent has appealed.

terms. Neither the bank nor Mr. Sahli brought an action to cancel the contract for deed⁴, and the bank has never brought a formal action to foreclose the mortgage on Sahli⁵ or the (possible) mortgage with Appellants.

The bank sued Appellants to collect on its notes and to repossess various personal property upon which it had a security interest (A-4). The suit also requested that the Court determine that the bank owned all right, title and interest in the Haugen farm. The bank claimed absolute ownership of the farm, basing its claim on several legal theories. Its first claim was that because the contract for deed was never recorded, the bank had obtained a deed absolute from Sahli and appellants were mere trespassers. Its alternative position was that even if the bank's acquisition of title from Sahli was subject to the contract for deed, appellants had defaulted on that contract and the bank was entitled to cancel the contract for deed.

The appellants answered and counterclaimed, asserting that they owned fee title to the farm subject to an equitable mortgage, or, at the least, owned the vendees' interest in a

⁴Prior to the Court's determination on the summary judgment motion, of course.

⁵The bank may have informally indicated to Sahli that it would foreclose its mortgage if he did not voluntarily transfer his interest to United Prairie. It would have been the sensible thing to do.

contract for deed.⁶ Appellants claimed that the Sahli transaction was in effect an equitable mortgagee, based upon the argument that since the transfer of the property to Sahli was made solely to secure a debt to Mr. Sahli (and effectively, to the bank), the contract for deed was in reality a mortgage. The Appellant's "fallback" position was that at the least, the Sahli transaction created a contract for deed relationship between Haugen N & E and Sahli, and, upon Sahli's sale of his interest to the bank, between Haugen N & E and the bank. Since the bank had not foreclosed the equitable mortgage or cancelled the contract for deed, the Haugens owned the property subject to some interest in the bank.

Prior to the events which constitute the essence of this appeal, the bank brought a replevin action and obtained crops, machinery, hogs and other property on the farm land. Appellants brought a motion demanding an accounting, and UPB produced a partial accounting, the gist of which is that its expenses and attorneys fees exceeded the value of the property sold at the replevin sale (A-4, 8).

The bank also brought a motion for summary judgment to

⁶The transaction was more complicated than this, but for purposes of the introduction, any recitation of the facts has been stripped to its logical skeleton. Much of the material in this introduction will be discussed in more detail below, but because this case is procedurally complicated, it may be helpful to give a thumbnail sketch before stating the facts and argument more precisely.

determine that the Sahli deed to the bank vested absolute ownership in the bank, and that Appellants had no interest in the farm. The Appellants opposed this motion, based upon the claim that the bank's interest was in effect an equitable mortgage, and that if it was not, it was at least a contract for deed and the bank had not brought a cancellation action. The Court agreed with the Appellants and held (1) there were sufficient facts upon which a trier of fact could determine that the Sahli transaction was a valid contract for deed and (2) there were sufficient facts upon which a trier of facts could determine that an equitable mortgage relationship had been created.

The bank brought a second motion, to determine in the alternative (a) that Haugen N & E had no interest in the property; (b) that if Haugen N & E did have an interest in the property, there was merely a contract for deed between Haugen N & E and the bank; (c) that there was no equitable mortgage between Haugen N & E and the bank; and (d) if there was any sort of security interest in the bank, to set the terms upon which the security interest could be foreclosed. The District Court ruled in favor of UPB, holding that there was not an equitable mortgage. The bank then brought a motion to evict Appellants, which motion was held in the separate file, CV-06-247. The Court ordered that Appellants be evicted, but they could remain on the property provided they posted a bond in the amount of \$75,000.

Appellants posted that bond and appealed the eviction order as well. The cases were consolidated for purposes of this appeal.

Appellants prevailed on this first appeal and the Court of Appeals reversed as to all issues, directing the District Court to determine as a matter of fact whether there was an equitable mortgage, whether respondent was entitled to attorneys' fees, and if so, how much. Trial was held on September 10th and 11th, 2008 (A-1). At trial, UPB claimed it had incurred and paid more than \$750,000 in attorneys' fees (T-359). The District Court held that respondent was entitled to attorneys' fees in the amount of \$601,567.65 including costs together with interest, but that the Haugens were entitled to live on the land subject to an equitable mortgage (A-20). After an unsuccessful motion for new trial, the Haugens appealed (A-75). The respondents cross-appealed the Court's finding that an equitable mortgage relationship had been created .

ARGUMENT

I.

THE DISTRICT COURT ERRED IN DENYING APPELLANTS A JURY TRIAL ON THE ISSUE OF ATTORNEYS' FEES AND RELATED COSTS OF COLLECTION.

The tragedy which has befallen the Haugens and their family in this case is largely a function of out-of-control attorneys' fees. Because the notes, mortgages and guarantees signed by Leland Haugen, Ilene Haugen, Haugen Nutrition and Equipment,

Inc., and other entities belong to or controlled by Leland and Ilene Haugen contained clauses permitting United Prairie Bank to charge costs of collection and reasonable attorneys' fees, UPB took advantage. While the Haugens could have paid off their obligations absent the huge amount awarded UPB in attorneys fees, the size of this award has made it impossible for them to do so.

As the District Court's analysis of its attorney fee award indicates, the ultimate amount of that award is subjective, and a reviewing court could uphold many different awards if it were minded to. A rural jury, while it would certainly have upheld the clear and legitimate costs a bank might have incurred in enforcing a debt on a farm, is unlikely to have been as generous in an area as subjective and nebulous as a determination of attorneys' fees. Indeed, the failure of the District Court to permit a jury determination of this issue is the single most important factor in the size of the award to UPB and the likelihood that the Haugens will be unable to redeem from the bank's foreclosure of their mortgage.

Minn. Const. Art. 1 § 4 states, among other things:

The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy.

A suit on a contract for the recovery of money is a legal action triable by jury. *Landgraf v. Ellsworth*, 126 N.W.2d 766 (Minn. 1964). The state constitution guarantees a jury trial for

causes of action recognized as common law actions when the State Constitution was adopted. *Tyroll v. Private Label Chemicals, Inc.*, 505 N.W. 2d 54 (Minn. 1993). A claim for recovery of money is such a common law action. *Olson v. Aretz*, 346 N.W.2d 178 (Minn. 1984).

Plaintiff's complaint and cause of action is based upon several notes to UPB, which notes contain a "reasonable attorneys' fee" clause. Without that clause, plaintiff would not be entitled to attorneys' fees at all. Hence, plaintiff's claim for reasonable attorneys' fees is a contract case. As a contract case, there is nothing special about attorneys' fees. If a case gives a defendant a right a jury trial in a suit to award fees to a doctor, a grocer, or any other creditor - and it does - then it permits a defendant to obtain a jury trial in a case involving attorneys as well.

To be sure, there is a special statute permitting an award of attorneys' fees without a jury - Minn. Stat. § 481.13ff. This is sometimes referred to as the "Attorneys' Lien Statute." Naturally, the attorney's lien statute does not apply directly to this case, because defendants were not the clients of plaintiff's attorneys. But the cases which have interpreted the attorneys' lien statute have had to confront the issue of the right to a jury trial in attorneys' fees cases, and hence have had much to say about the generalized right to a jury trial when an attorney

is claiming contract-based attorneys' fees. Frequently, in a case where an attorneys' lien is appropriate, an attorney has an action against a client who fails to pay him in both contract and statute. Where there are claims which involve both issues triable by jury and issues triable by the court alone, the right to jury trial prevails. *Onvoy, Inc. v. Allette, Inc.*, 736 N.W.2d 611 (Minn. 2007). The Court said:

We agree with the weight of authority on this issue and hold that factual findings that are common to both claims at law and claims for equitable relief are binding upon the district court. In making this determination, we recognize the parallels between the state and federal rights to a civil jury trial and note that these parallels support extending the reasoning of *Beacon Theaters* to our state courts. The Seventh Amendment of the United States Constitution preserves the right to a jury trial in civil actions at common law. The right to a jury trial under the Minnesota Constitution protects essentially the same jury trial rights as those provided under the federal constitution. Compare *Parsons v. Bedford*, 28 U.S. 433, 446-47, 3 Pet. 433, 7 L.Ed. 732 (1830) (determining that in the Seventh Amendment "[b]y common law, they meant what the constitution denominated in the third article 'law;' not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized"), with *Whallon v. Bancroft*, 4 Minn. 109 (Gil. 70, 74) (1860) (stating that Article I, section 4 of the Minnesota Constitution was intended to continue, unimpaired and inviolate, the right to trial by jury as it existed in the Territory of Minnesota when our constitution was adopted), and *Morton Brick & Tile Co.*, 130 Minn. at 254, 153 N.W. at 528 (recognizing that Article 1, section 4 was meant to protect the right to a civil jury trial as it existed when the Minnesota Constitution was adopted and noting that the right to the jury trial extended only to actions at law). Making a jury's factual findings that are common to claims of law and claims for equitable

relief binding on the district court not only helps protect the right to a jury trial by ensuring that proper weight is given to jury findings by the district court, but it also prevents inconsistent decisions between claims at law and claims for equitable relief, thus maintaining the integrity of the judiciary.

There is nothing special about an attorney's breach-of-contract claim (as opposed to attorneys' lien claim) with respect to the jury trial right. An attorney provides services, just like any other service provider. If the attorney wants to recover in contract for the agreed amount or value of his services, he has a right to sue, but is subject to the same rules as any other contractor. That includes jury trial. As the Court said in *Westerlund v. Peterson*, 157 Minn. 379:

By extending equitable jurisdiction to new subjects, the Legislature cannot impair the right to trial by jury. It cannot 'confer equity jurisdiction * * * in matters in respect to which such jurisdiction did not exist before the adoption of the Constitution, and draw to it a legal cause of action cognizable exclusively in a law court and triable by jury, and have both tried by the court without a jury.' *Wiggins & Johnson v. Williams*, 36 Fla. 637, 18 South. 859, 30 L. R. A. 754, citing *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358.

(*Id.* at 385)

While there is a special proceeding permitting an attorney to in effect recover for his legal services in a summary action before the bench, this right does not extend to the common law breach-of-contract claim by an attorney. As noted, a fee shifting provision in a note invokes the common law cause of action rather than the attorneys' lien, and as long as the

plaintiff is pursuing this theory of recovery, the defendant has a right to a jury trial and the amount owed, which is central to its cause of action, must be determined by a jury.

The District Court denied appellants a jury trial based upon two grounds. First, the District Court stated that a determination of attorneys' fees is traditionally a matter for the court, citing *Northfield Care Center, Inc. v. Anderson*, 707 N.W.2d 73 (Minn. App. 2006), *Becker v. Alloy Hardfacing & Engineering Co.*, 401 N.W. 2d 633 (Minn. 1987), and *Amerman v. Lakeland Development Corporation*, 203 N.W.2d 400 (Minn. 1973). None of these cases is remotely in point. First, the party against whom attorneys' fees were to be charged did not demand a jury trial in these cases, so that the issue of the right to a jury trial on the attorneys' fees issue never arose. Second, in two of the three cases, an attorneys' fees award was either denied outright (*Becker*) or criticized and remanded (*Northfield*). Third, only one of these cases was a "reasonable attorneys' fees" clause case, and that case, *Northfield*, was decided on summary judgment so the jury issue never arose. *Northfield* was also a case involving the question of whether a son was personally liable for his mother's nursing home debt, including attorneys' fees, and that issue was reversed and remanded. *Becker* was a defamation case, and the District Court denied an award of attorneys' fees. The Supreme Court stated that the District

Court should state its reasons for denying attorneys' fees, but did not consider the amount of fees or the right of a party to a jury trial on that issue at all. And *Amerman* was a case of a client contesting his own attorney's billings. There is also no indication that a jury trial was ever requested.

The second reason for denying appellants' request for a jury trial is based upon several federal cases where it was determined that there was no right to a jury trial on the attorneys' fee issue. The Court cites *McGuire v. Russell Miller, Inc.*, 1 F.3d 1306 (2nd Cir. 1993) and *Resolution Trust Corporation v. Marshall*, 939 F.2d 274 (5th Cir. 1991). First, it should be noted that there is a substantial split of authority among the federal circuits on this issue, and the more recent ones, such as *J.R. Simplot v. Chevron Pipeline, Inc.*, 563 F.3rd 1102 (10th Cir. 2009) come out the other way:

The right to a jury trial as declared by the Seventh Amendment is preserved inviolate. See Fed.R.Civ.P. 38(a). The Seventh Amendment protects this right "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars." U.S. Const. amend. XII. The Supreme Court has held that "the phrase 'Suits at common law' refers to 'suits in which legal rights [are] to be ascertained and determined, in contradistinction to those where equitable rights alone [are] recognized, and equitable remedies [are] administered.'" *Teamsters, Local No. 391 v. Terry*, 494 U.S. 558, 564, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990) (emphasis and alterations in original). The nature of the issues presented and the remedies sought determines whether an action qualifies as "legal." *Id.* at 565, 110 S.Ct. 1339. The general rule is that monetary relief is legal. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710, 119 S.Ct. 1624, 143 L.Ed.2d

882 (1999). An ordinary breach of contract claim is no different. See *Terry*, 494 U.S. at 569-70, 110 S.Ct. 1339 (Marshall, J., concurring) (noting that a breach of contract claim is a legal issue); *Ross v. Bernhard*, 396 U.S. 531, 542, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970) (concluding stockholders in derivative action were entitled to a jury trial where the complaint included allegations of ordinary breach of contract and gross negligence and sought damages); *Simler*, 372 U.S. at 223, 83 S.Ct. 609 (holding declaratory judgment action by client wherein client challenged the enforceability of a contingent fee retainer agreement "was in its basic character a suit to determine and adjudicate the amount of fees owing to a lawyer by a client under a contingent fee retainer contract, a traditionally 'legal' action"); FN10 *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 477, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962) ("As an action on a debt allegedly due under a contract, it would be difficult to conceive of an action of a more traditionally legal character.").

FN10. As later intimated by the Court, *Simler* stands for the principle that "[t]he Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action." *Ross*, 396 U.S. at 538, 90 S.Ct. 733 (citing *Simler*). The actual language in *Simler* supports this interpretation. *Simler* concluded, "The fact that the action is in form a declaratory judgment case should not obscure the essentially legal nature of the action. The questions involved [i.e., contractual enforceability] are traditional common-law issues which can be and should have been submitted to a jury...." 372 U.S. at 223, 83 S.Ct. 609.

The Supreme Court has not specifically addressed a case where previously incurred attorneys' fees are sought as the measure of compensatory damages in a breach of contract suit. Unlike cases in which attorneys' fees are allowable to the prevailing party, here Simplot's attorneys' fees and costs are themselves part of the merits of their contract claim. See *N. Am. Specialty Ins. Co. v. Correctional Med. Servs. Inc.*, 527 F.3d 1033, 1038-39 (10th Cir.2008) (in jurisdictional decision, holding that attorneys' fees and costs

awarded as compensatory damages to insured are inseparable from merits of insured's breach of contract claim; distinguishing statutory prevailing party attorneys' fees, which are collateral to the merits). Simplot does not seek the fees "as an element of 'costs' awarded to the prevailing party," *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200, 108 S.Ct. 1717, 100 L.Ed.2d 178 (1988), which "raises legal issues collateral to and separate from the decision on the merits." *Id.* (quotation marks and citations omitted). Rather, Simplot seeks the fees as the measure of damages resulting from Chevron's breach, "as an element of damages under a contract." 10 J. Moore, *Moore's Federal Practice* § 54.171[1][a] (3d ed.2008) (noting such fees may present "jury triable issues").

Rule 54 of the Federal Rules of Civil Procedure recognizes this distinction. See Fed.R.Civ.P. 54(d)(2)(A) ("A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages." (emphasis added)). The advisory committee's note to the 1993 Amendments of Rule 54(d)(2) explains further:

This new paragraph establishes a procedure for presenting claims for attorneys' fees, whether or not denominated as "costs." It applies also to requests for reimbursement of expenses, not taxable as costs, when recoverable under governing law incident to the award of fees. Cf. *West Virginia Univ. Hosp. v. Casey*, 499 U.S. 83, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991), holding, prior to the Civil Rights Act of 1991, that expert witness fees were not recoverable under 42 U.S.C. § 1988. As noted in subparagraph (A), it does not, however, apply to fees recoverable as an element of damages, as when sought under the terms of a contract; such damages typically are to be claimed in a pleading and may involve issues to be resolved by a jury.

This action is, at bottom, a legal action for compensatory damages resulting from a breach of contract. That the measure of damages happens to be attorneys' fees does not in and of itself change the nature of Simplot's claim.

(*Id.* at 1115, 1116)

The same principle applies to this case. *Simplot* carefully distinguished cases like *McGuire* and *Marshall*, noting that these cases involved after-the-fact attorney fee awards, not "free standing" attorney fee cases where the right to and amount of attorney fees is part of the contract itself:

While *Simplot* argues to the contrary, other Circuits' decisions addressing contractual attorneys' fees are distinguishable and do not support its contention. In *McGuire v. Russell Miller, Inc.*, 1 F.3d 1306, 1308 (2d Cir.1993), the owner of a merged company sued to rescind the merger. The defendants counterclaimed, alleging, inter alia, that plaintiff had misrepresented the value of its stock and was also liable for breach of contract. *Id.* The jury awarded damages to defendants for fraud and for breach of contract, and determined, in response to a special verdict form, that the plaintiff owed the defendants' attorneys' fees under a contractual provision providing indemnification for "[a]ll costs ... (including costs of defense ... and reasonable attorney's fees) arising out of any claim ... made with respect to" the merger agreement. *Id.* at 1309. The jury did not compute the amount of fees, however, and the defendants presented no evidence of attorneys' fees at trial. *Id.* The district court refused to award the fees. *Id.* The parties appealed, disputing whether the district court or the jury should have decided the amount and reasonableness of any fee award. *Id.* at 1312.

The Second Circuit concluded that the district court should have ascertained the amount of fees due the prevailing party. *Id.* at 1316. "[W]hen a contract provides for an award of attorneys' fees, the jury is to decide at trial whether a party may recover such fees." *Id.* at 1313. Once the jury determines liability, "the judge is to determine a reasonable amount of fees." *Id.* The court reasoned that a contrary rule would be impractical and inefficient. See *id.* at 1316. "[T]he jury would have to keep a running total of fees as they accrued through summations and then predict future fees from post-trial proceedings and motions." *Id.*

The McGuire concurrence carefully limited the court's holding by noting the nature of the parties' action. The case did not involve "the availability of a jury trial for fees where ... a claimant seeks contractual indemnification for fees incurred in a separate litigation against a third party." *Id.* at 1317 (Jacobs, J., concurring) (emphasis added). In that instance, the concurrence pointed out, Supreme Court precedent might require a jury trial for such a "free-standing" attorneys' fees claim. *Id.*

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). Applying a different rationale, the Seventh Circuit concluded "[t]he issue of attorneys' fees (including amount) [i]s [] an issue to be resolved after the trial on the basis of the judgment entered at the trial, just as in cases in which statutory rather than contractual entitlements to attorneys' fees are involved." *Eastern Trading Co. v. Refco, Inc.*, 229 F.3d 617, 627 (7th Cir.2000) (citations omitted). Yet each of these cases, like McGuire, share one significant distinguishing factor: none involves a "free-standing" breach of contract claim-as here-for attorneys' fees already incurred in a separate, underlying action against a third party.

(*Id.* at 117)

The distinction made in *Simplot* is an important one. Where statutory attorneys' fees are awardable as costs and disbursements for the prevailing party, many courts have held that attorneys' fees are for the Court. Where attorneys' fees arise from a contract granting attorneys' fees, regardless of whether the party prevails or not - as here - the awardability

and amount of attorneys' fees is for the jury.⁷

Second, even if the United States Constitution were not to permit a jury trial on the attorneys' fees issue, the Minnesota Constitution does. The 5th Circuit noted in *Marshall*, there is no right in the United States Constitution to a jury trial in a contract case. Therefore, there is no federal right to a jury trial on a contract case. Now this conclusion is vigorously disputed in *Simplot* and the cases it cites, but at least there is an argument at the federal level over whether there is a jury trial right in contract cases.

Not so in Minnesota. In the seminal case of *Abraham v. County of Hennepin*, 639 N.W.2d 342 (Minn. 2002) the court discussed the right of jury trial under the Minnesota Constitution at length and held that there was a right to a jury trial in a whistleblower case. It noted that the key distinction was between an equitable action and an action at law and held that a whistleblower case was an action at law. It discussed the cases, including contract cases, noting that contract and tort cases were actions at law:

In *Bond v. Welcome*, 61 Minn. 43, 63 N.W. 3 (1895), we identified those cases at law that are guaranteed the right to jury trial under our constitution as actions

⁷It is an extremely interesting question whether a party may, by contract, indicate that issues such as attorneys' fees are to be determined by the court or jury. See, e.g., *Eriksson v. Boym*, 184 N.W. 961 (Minn. 1921). Fortunately, the notes involved in this case do not involve this touchy issue.

at law for the recovery of money only, and we concluded that actions that are equitable in nature are not entitled to jury trials:

If [the action] is an action at law for the recovery of money only, the plaintiff is entitled absolutely to a trial by jury, although it involves the examination of a long account on either side, for the constitution guaranties to him this right. But if the action is equitable in its nature * * * the plaintiff is not entitled to a jury trial * * * for in such cases, at the time of the adoption of the constitution, there was no absolute right of trial by jury.

Id. at 43-44, 63 N.W. at 3-4 (citations omitted). A thread runs through our line of decisions following *Bond* and culminating with *Olson* that has consistently acknowledged the distinction between actions at law, for which the constitution guarantees a right to jury trial, and actions in equity, for which there is no constitutional right to jury trial. See *Rognrud v. Zubert*, 282 Minn. 430, 434, 165 N.W.2d 244, 247 (1969) (concluding that causes of action that are legal, as opposed to equitable, are entitled to jury trial); ***Landgraf v. Ellsworth*, 267 Minn. 323, 327, 126 N.W.2d 766, 768 (1964) (concluding that suit on contract to recover money is legal action, and as such, triable to jury)**; *Westerlund v. Peterson*, 157 Minn. 379, 384, 197 N.W. 110, 112 (1923); *Hawley v. Wallace*, 137 Minn. 183, 187, 163 N.W. 127, 129 (1917) ("The term 'cases at law' as used in the Constitution has been construed as referring to ordinary common-law actions as distinguished from equity or admiralty causes and special proceedings such as quo warranto, mandamus and the like"); *Morton Brick & Tile Co. v. Sodergren*, 130 Minn. 252, 254-55, 153 N.W. 527, 528 (1915) (holding that in actions originally actions at law either party may demand jury trial, but in equitable actions there is no right to jury trial); see also *Tyroll v. Private Label Chems., Inc.*, 505 N.W.2d 54, 57 (Minn.1993).

In *Tyroll*, we held that the third-party defendant tortfeasor was entitled to a jury trial in a subrogation claim brought against the third-party defendant by an employer after settlement of the employee's negligence suit left only the employer's subrogation claim for trial. 505 N.W.2d at 56. We concluded that the controversy was a routine negligence

personal injury action, in which one party sought damages resulting from another party's failure to exercise reasonable care. *Id.* at 57. We concluded that the claims were common law issues triable to a jury because of the essential nature and character of the controversy, even though the Workers' Compensation Act statutorily created the right of the employer-insurer to intervene and maintain the action as a subrogee long after our constitution was adopted. See *id.*

This court has not held that only those causes of action that were identified in 1857 as causes of action at law carry today an attendant right to jury trial. Rather, the constitutional right exists for the same type of action for which a jury trial existed when the constitution was adopted, any cause of action at law. See *Olson*, 628 N.W.2d at 149; *Tyroll*, 505 N.W.2d at 57; *Bond*, 61 Minn. at 43-44, 63 N.W. at 3-4. The constitution is not frozen in time in 1857, incapable of application to the law as it evolves. The nature and character of the controversy, as determined from all the pleadings and by the relief sought, determines whether the cause of action is one at law today, and thus carries an attendant constitutional right to jury trial. *Olson*, 628 N.W.2d at 152; *Tyroll*, 505 N.W.2d at 57; *Morton*, 130 Minn. at 255, 153 N.W. at 528; see also *Westerlund*, 157 Minn. at 383, 197 N.W. at 111.

(*Id.* at 349; Italics added)

This is not a close case. The right to recover attorneys' fees was part and parcel of the note (itself a contract), and would not exist without contract. The right to recover attorneys' fees is therefore a contract action, and all elements of a contract action are triable to a jury.

II.

THE DISTRICT COURT ERRED IN THE AMOUNT OF ATTORNEYS' FEES IT AWARDED.

The District Court awarded \$601,567.65 as attorneys' fees

and costs against the Haugens (A-20).⁸ The total amount due on the Haugens' equitable mortgage was \$486,200.00 (A-20). The District Court disallowed any attorneys' fees for actions related to appellants' claim of equitable mortgage, noting that appellants had prevailed on this issue and a party cannot charge attorneys' fees to another with respect to litigation upon which the party seeking attorneys' fees had lost (A-20). Adding the attorneys' fees sought by UPB for issues upon which prevailed to attorneys' fees sought for issues upon which it did not prevail, the requested award was far in excess of the value of all the property ever mortgaged or secured to UPB. This has to be economic folly.

As some of the cases cited in *Simplot, supra*, cautioned, cases where attorneys fees are to be awarded under contract need to be carefully scrutinized, because attorneys working against an adverse party who is liable for such fees have an incentive to "run up the bill." As the Court said in *Agri Credit Corporation v. Liedman*, 337 N.W.2d 384 (Minn. 1983):

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

⁸There was also a judgment against Ilene Haugen in the sum of \$5,008.27 but this amount is so small compared to the judgment against Leland Haugen and Haugen N & E that little will be said about it.

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. Accordingly, we reverse and remand to the district court for a determination of reasonable collection costs, including attorney fees, "incurred or paid" by respondent to its attorneys up to the time of the determination on the motion for new trial. In so doing, the court should consider the factors set forth in *Obraske* and should not rely upon the Eighth Judicial District's policy for setting attorney fees.

(*Id.* at 386)

In *Obraske v. Woody*, 199 N.W.2d 429 (Minn. 1972) the Supreme Court set forth the principles guiding attorney fee determinations:

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 *110 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 107)

It should be noted that a review of the cases involving

attorneys' fee awards make a distinction between attorneys' fees awardable in statutory attorneys' fee cases and contract attorneys' fee cases, although this distinction is not always explicit. In statutory attorneys' fee cases, courts stress that an attorney seeking to uphold the civil rights of a client is performing a public service by vindicating the constitution. See, e.g., *Nadarajah v. Holder*, 569 F.3d 906 (C.A.9 2009). By contrast, attorneys' fees which arise solely by reason of a contract involve matters where, absent contractual provision, attorneys' fees are disallowed as a matter of law. See, e.g., *Barr/Nelson, Inc. v. Tonto's, Inc.*, 336 N.W.2d 46 (Minn. 1983). Far from providing a public service, a large award of attorneys' fees may frustrate important state policies, such as keeping family farmers on their land under Minn. Stat. § 500.24. Thus, it is questionable whether the *Lodestar* or the enhanced attorneys' fees method of determining a right to such fees applies in "reasonable attorneys' fee" contract cases, and in any event, there are important qualifications to that right which do not apply in cases where an award of attorneys' fees is in the public interest.

It is the duty of appellate courts to guard against overgenerosity in the award of attorneys' fees and expenses, even in a statutory attorneys' fee case. The 8th Circuit Court of Appeals, in *Jorstad v. IDS Realty Turst*, 643 F.2d 1305 (8th Cir.

1981), noted:

The standard to be applied by this court in reviewing awards of attorneys' fees is straightforward: we must determine "whether the district court's findings were clearly erroneous as to the factual basis for the award, or whether it committed abuse as to the discretionary margin involved in its allowance." *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1274 (8th Cir. 1980). Accord, *Omaha Paper Stock Co. v. Harbor Insurance Co.*, 596 F.2d 283, 292 (8th Cir. 1979); *Grunin v. International House of Pancakes*, 513 F.2d 114, 126 (8th Cir.), cert. denied, 423 U.S. 864, 96 S.Ct. 124, 46 L.Ed.2d 93 (1975). Although these cases did not involve class actions based on alleged securities violations, the rationale for determining the general rule in the appellate review of an award of attorneys' fees is basically the same. Our review of the arguments, the briefs and the record in this appeal has convinced us that Judge Lord's award of fees was excessive and must be reduced. And although we have carefully considered those of the appellants' arguments which are directed towards the district court's factual findings, we must conclude that the error lies in the abuse of the trial court's discretion in awarding "reasonable" attorneys' fees and expenses.

Our task is not simplified by the fact that we sustain most of the district court's findings of fact on appeal. We have examined the record carefully and are basically in accord with Judge Lord's views as to the quality of the work performed by class counsel, the benefits which flowed from their efforts and the risk involved in the undertaking of this litigation. Nevertheless, this court has previously recognized that it is the duty of appellate courts to guard against over-generosity in the award of attorneys' fees and expenses. *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, *supra*, 623 F.2d at 1274. See also *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 469 (2d Cir. 1974) (Grinnell I). And in this particular case, several factors have combined to make the district court's award of fees excessive, unacceptable and an abuse of that court's discretionary margin.

(*Id.* at 1312)

With these principles in mind, let us consider the Courts' order of attorneys' fees.

First, the Court awarded \$117,110.24 in attorneys' fees for the defense of another lawsuit, *Meadowland v. Haugen et al.* This lawsuit was commenced in 2003. The District Court held:

52) That UPB incurred \$117,119.24 in legal fees defending against the claims asserted in the Meadowland Lawsuit to preserve and protect its security interests in the hogs, machinery and equipment, and Real Property. These fees were incurred in: (1) reviewing and responding to Meadowland's complaint; (2) discovery, including interrogatories, document production and depositions; (3) summary judgment motion practice; (4) settlement efforts; and (5) reviewing and responding to the Haugens' litigation threat.

53) that all fees incurred by UPB in the Meadowland lawsuit were reasonably and necessarily incurred to preserve and protect UPB's interest in the collateral securing its loans to HNE and the Haugens, including the Real Property.

(A-12)

There are several problems with this analysis. First, the Meadowlands action did not demonstrably arise from the Haugen's default. The notes signed by the Haugens states:

I [HNE/Haugens] will pay all costs of collection, replevin, or any other or similar type of cost ***if I am in default.***

(A-4; Italics added)

Most of the actions alleged in the meadowlands lawsuit took place before the relevant notes and mortgages to UPB were signed, and so could hardly have been in default. Furthermore, UPB never claimed that the Haugens were somehow in default of an obligation

to UPB at the time the events giving rise to the Meadowlands litigation occurred. Moreover, UPB never gave notice to the Haugens that it was adding its attorney fees to subsequent notes and mortgages. Also, the Meadowland lawsuit alleged direct misconduct by UPB as well as the Haugens, and a party who is in pari dilecto with another can hardly seek reimbursement for its own misconduct. Furthermore, the Meadowlands lawsuit was settled without any misconduct found on the part of either the Haugens or UPB, so Meadowlands can hardly seek reimbursement for something that was neither a default nor an action giving rise to unnecessary liability on the part of UPB. Indeed, Meadowlands, in its lawsuit, did its best to assert the innocence of the Haugens. While an attorneys' fees clause in a note may justify attorney costs incurred with respect to the note, it may not justify attorney fees with regard to an action unrelated to the note.

Second, the Court erred with respect to attorneys' fees with respect to the instant lawsuit. The Court said:

63) That Defendants did not raise any issue of fact at trial regarding the seizure or sale of the machinery and equipment and livestock. Nor did Defendants contest at trial any of the expenses included and accounted for by UPB relating to the replevin issues.

(A-14)

In one way, this is misleading, and in another way it is wrong. It is misleading because the Haugens vigorously protested

the seizure and the amount of expenses incurred, but their protests at trial were precluded because they lost on these issues upon summary judgment. It is wrong, because the Haugens have always opposed the expenses in the form of attorneys' fees.

73) That Defendants did not dispute any of the non-legal replevin expenses incurred by UPB. Nor did Defendants raise any other fact issue at trial relating to the execution of the June 30, 2005 replevin order or the resulting sale of the machinery and equipment and livestock. Likewise, Defendants did not dispute that the attorneys' fees and expenses were actually incurred and paid by UPB to collect amounts due under the Loan Documents, to protect and preserve the collateral securing Defendants' repayment obligations to UPB and/or to defeat adverse claims made against the Real Property. Finally, Defendants did not challenge UPB's testimony that the instant litigation has been appropriately staffed and that there have been no duplicative charges.

(A-15)

At best, this finding is irrelevant; at worst, it is wrong.

It is irrelevant, because whether UPB paid or incurred the expenses has virtually nothing to do with the real issue here - whether the charges were reasonable. Indeed, it is really odd that UPB permitted \$800,000 in attorneys' fees to be incurred. This is more than the total amount of the Haugen's debt, and may well turn out to be more than the value of the land, machinery, and livestock put together. At least one test of the reasonableness of attorneys' fees is whether they were wisely incurred. At one point, the Haugens proffered a check for \$525,000 in payment of their obligations to UPB, which UPB

refused on the grounds that it still had obligations on other instruments. Since that time, the records of UPB's attorneys indicate that more attorneys' fees have been incurred than the balance due and owing in excess of the Haugen's proffer.

In another way, the Court's claim that "[D]efendants did not dispute that the attorneys' fees and expenses were actually incurred by UPB to collect amounts due under the Loan Documents...." is simply wrong. They vigorously disputed the claim that the fees were incurred to collect amounts due. They stated that the fees were excessive, unnecessary, had nothing to do with collection, and had everything to do with ruining the Haugens and obtaining their property. Consider the issue of excessiveness. UPB took lengthy depositions of Leland Haugen, Darren Haugen, Brian O'Leary, Mark Sahli, Theodore Devine, and others, in each of which depositions approximately 100 exhibits, virtually the same exhibits in each case, were introduced. UPB's attorneys claim approximately 10 hours or more for preparation, travel, and conduct of most of these depositions. Yet the Sahli deposition and the Devine deposition largely resulted in appellant's victory on the equitable mortgage issue, an issue for which the trial court indicated that UPB could not charge (A-20, no. 6). Important parts of the depositions of Leland and Darren Haugen and Mr. O'Leary were also devoted to the equitable mortgage issue, and the depositions and related documents were

never broken down between time spent on a winning issue and time spent on a losing issue.⁹

Indeed, the issue upon which UPB prevailed were fairly simple: Were there notes and mortgages signed by the Haugens? Yes. It takes about 30 minutes to establish this. Did the Haugens pay these notes and mortgages in accordance with their terms? No. It takes about 30 minutes to establish this. Did they make some payments on their notes and mortgages. Yes. It takes about 10 minutes to establish this. How much did the Haugens owe, exclusive of attorneys' fees and costs? With modern computers and records of payment, it should have taken about 5 hours of accountant time to establish this. Motion practice to obtain orders and judgments for replevin and summary judgment on issues not related to costs and attorneys' fees? Perhaps 30 hours. That is about all the non-equitable-mortgage litigation which was contested.

Contrast this with the equitable mortgage issue. Every deposition taken by UPB was directly related to the equitable mortgage issue, even though many of them were devoted to other issues as well. Nothing in the record reflects an amortization between equitable mortgage and non-equitable mortgage questions, but a review of the file should indicate that well over 50% of

⁹Note that UPB incurred \$750,000 in attorneys fees and was awarded \$600,000. It is hard to believe 4/5 of respondent's attorney time was not devoted to the equitable mortgage issue.

the questions related to the equitable mortgage issue. UPB made four motions for summary or partial summary judgment on the equitable mortgage issue, three of them unsuccessful, one of them successful but reversed on appeal.

Moreover, a considerable amount of litigation was indirectly related to the equitable mortgage issue and UPB's attorneys appear to have been awarded fees for them. UPB's attorneys initially denied that the contract for deed which the Court held to be an equitable mortgage even existed, despite strong evidence that it did. UPB fought the District Court's interim finding that the document was (at least) a contract for deed, and UPB's attorneys charged for the time spent on this losing cause.

As even the District Court acknowledged, attorneys' fees incurred in an unsuccessful attempt to assert a position are not incurred in the enforcement of a note. The notes signed by various defendants permit an award of attorneys' fees for reasonable costs of collection. Unsuccessful attempts to claim that there was no contract for deed, for example, is not a fee incurred in the enforcement of a note. Neither is an unsuccessful attempt to have a document declared not to be an equitable mortgage as a matter of law. Attorneys' fees are not allowable in the absence of statutory or contractual authority. *Bierlein v. Gagnon*, 96 N.W.2d 573 (Minn. 1959). Here, although the notes signed by the defendants permit the collection of

attorneys' fees, they only do so with respect to the enforcement of the notes. As *Bierlein* makes clear, attorney's fees may be permitted in the enforcement of a right, but must be based on the reasonable value of the services in the enforcement of the action, not the collateral actions where the plaintiff was charged attorneys' fees. Thus, in *Bierlein*, the plaintiff's attorneys fees were limited to twice the value of the services involved in a mechanic's line foreclosure action rather than the total services performed by an attorney with respect to the entire action. As the *Bierlein* Court said:

In any event, allowance of an attorneys' fee must rest upon the reasonable value of the services rendered, where the amount is not specified in the statute. There is no evidence to establish reasonable value. Plaintiffs, and apparently the trial court, relied on the minimum fee schedule adopted by the Minnesota State Bar Association in 1952, which provides (Advisory Schedule of Minimum Fees, p. 14) that the minimum fee for foreclosure of an uncontested mechanics lien of the amount involved here shall be \$150 plus 10 percent on the excess of the amount involved over \$1,000. Plaintiffs contend that, in addition to the minimum recommended for foreclosure of an uncontested lien, they are entitled to a per diem fee for 7 days of trial. The combination of these fees, they argue, is less than the amount which the court allowed.

We do not think that plaintiffs' contentions are tenable. In the first place, the minimum fee schedule is intended to govern minimum charges between attorney and client. No such relationship exists here between defendants and plaintiffs' attorney. While the minimum fee schedule may, in a proper case, serve as a guide in determining what is reasonable, it cannot be used to supersede a statutory provision limiting the amount of such fee, nor can it be used in a case such as this to replace a determination of reasonable value. In the second place, it is obvious that the minimum fee

recommended for foreclosure of a mechanics lien includes a collection fee based on the amount involved. A comparison of the minimum fee recommended for the foreclosure of a mechanics lien with the maximum fee allowed for the foreclosure of a mortgage under s 582.01, subd. 1, easily demonstrates that the minimum fee recommended as charges between attorney and client can hardly be used as a criterion in determining what should be allowed by the court in a case of this kind. In other words, the entire cost of foreclosure and collection recommended by the minimum fee schedule cannot be saddled upon the landowner. The amount which may be allowed may not exceed a reasonable charge for the work involved in foreclosing the lien. In an ordinary case, that may not exceed the amount indicated by § 514.10. Inasmuch as the allowance in this case is determined on an erroneous basis, there must be a new trial on that issue. In order to obviate the necessity of such new trial, the order will be affirmed if within 10 days plaintiffs shall file in the office of the clerk of this court a consent to a reduction of the attorneys' fees allowed to the sum of \$500; otherwise a new trial is granted on the issue of attorneys' fees.

(*Id.* at 579)

It also appears that UPB is charging for the work its attorneys performed with respect to mediation. Mediation fees should not be collectable, either directly (i.e. mediator expenses) or indirectly (fees of attorneys at mediation).

Minn.Gen.R.Prac. 114.11(b) states:

The parties shall pay for the neutral. It is presumed that the parties shall split the costs of the ADR process on an equal basis. The parties may, however, agree on a different allocation. Where the parties cannot agree, the court retains the authority to determine a final and equitable allocation of the costs of the ADR process.

Note that Rule 114.11(b) refers to the "costs of the ADR process" apart from the payment to the neutral. So the drafters

envisioned that all costs relating to the process be shared, not simply the costs of the neutral. Since the Haugen's attorney and UPB's attorney would spend approximately equal amounts of time in the ADR process, neither party should have the ability to bill the other for costs and attorney time associated with the process. Furthermore, permitting recovery of attorney fees for mediation undermines the procedure. If an attorney knows that his fee will have to be paid by the other party, he may unnecessarily prolong or obstruct the process. The whole idea behind mediation is to lighten the adversarial atmosphere between the parties in the interest of possible agreement. If a party can tax the other for the procedure, this idea is subverted.

The District Court correctly laid out the factors to be considered in determining reasonable attorneys' fees:

75) That after considering all relevant circumstances, including: (1) the time and labor required to suitably litigate the issues in the instant case, the (2) nature and difficulty of the responsibility assumed by UPB and its attorneys in bringing the instant litigation, in obtaining and executing a replevin order, in responding to the Defendants' answer and numerous counterclaims, in defending against various motions brought by Defendants, and in bringing various motions of its own (3) the skill necessary to perform the legal services entailed in resolving and litigating the difficult and complicated issues raised in the instant case¹⁰, (4) the customary fees charged for similar legal services, (5) the large amount of monies due to the defaulted notes, (6) and the experience, reputation, and ability of the

¹⁰The Court of Appeals may profitably ask itself, what issue, besides contract-for-deed/equitable mortgage claim was complicated in this particular case?

attorneys retained by UPB, the court concludes that the attorneys' fees and costs incurred by UPB in collecting on Notes 601480, 60160, and 60240, and as accounted for in Exhibits 145 and 147, have been reasonable.

(A-15)

One would have expected this to have been the beginning of the Court's inquiry, not its end. One of the reasons given in *Marshall, supra*, for making an attorneys' fee question one for the Court is that the complicated accounting sometimes required in an attorneys' fee case requires a professional trier of fact to sort it out. Regardless of the correctness of the *Marshall* decision, it does serve to emphasize one thing - the importance of a judge's attempt to make such an accounting. In particular, the court's findings on the 5 issues noted should be discussed, not summarily expressed. But there are no such findings. To be sure, the number of hours worked on the case by UPB's attorneys is of record, and was not challenged. But the relevance of these hours, and their relation to issues upon which UPB prevailed, was critically challenged, and the Court makes no breakdown permitting counsel or the Court of Appeals to determine what hours were "counted," and which were not. With respect to issue 2, the nature and difficulty in bringing the instant litigation, in the absence of the contract-for-deed/equitable mortgage issue, this was a fairly standard farm foreclosure - replevin case. With respect to the issue of customary charges, it is the charges in the area for legal services which counts, not the rate the

attorneys actually charge. See *Reome v. Gottlieb*, 361 N.W.2d 75 (Minn. App. 1985). Mr. O'Leary testified:

Q. You've practiced in this area for 37 years?

A. 36-and-a-half.

Q. 36-and-a-half?

A. Yep.

Q. And has that been largely in the Cottonwood County area?

A. Well, yes. I've been at Springfield the whole time.

Q. What's your hourly rate of pay now?

A. \$150.00 per hour.

Q. And how long has that been your charge as an attorney?

A. About two years, I think

Q. Are you familiar with, as we call it, the going rate among attorneys in the Cottonwood County area?

A. Yes.

Q. And how does yours compare with them?

A. It's comparable, unless you get in the bigger firms.

Q. Now in the Cottonwood County area, are there larger firms - are there any firms that you know of in the county that are larger than, say, 10 lawyers?

A. Not in this county, but in the area like Gislason is one of the biggest firms in the area.

Q. That would be then New Ulm and also Minneapolis.

A. Yes. It's the only big firm out here.

(T-518, 519)

No one would claim that UPB was required to pay no more than

\$150 per hour. But if it chose to have Twin City lawyers come to Cottonwood County to represent it in matters such as replevin, it should at least be required to approximate rates in the Cottonwood County area. Over \$300 per hour is not such an approximation. And if there were issues which only Twin City law firms could handle successfully that a local attorney or firm could not handle (other than equitable mortgage/contract for deed, which UPB lost), neither the Court nor UPB has explained what such an issue was.

UPB's attorney fees were excessive, and even if appellants are not entitled to a jury trial on the issue, the case should be remanded for a redetermination of them.

III.

THE DISTRICT COURT ERRED IN NOT GIVING THE HAUGENS CREDIT FOR THE MONEY WRONGFULLY WITHDRAWN FROM THE HAUGEN ACCOUNT BY THEODORE DEVINE.

Momentarily, this is a comparatively minor issue. But it is one which deeply troubles appellants and accounts for some of the acrimony which has attended what is otherwise a rather typical farm debt case. During the course of Leland Haugen's initial dealings with UPB, he had set up an account in the name of Haugen N & E and then entered into the contract for deed with Mr. Sahli which called for payment at the end of its term. Shortly after this contract was signed, Mr. Devine withdrew various sums of money, totally between \$20,000 and \$30,000 and split these sums

between himself and Mr. Sahli. He did not tell Mr. Haugen that he had withdrawn the funds, and some of Mr. Haugen's checks bounced, causing him considerable loss and embarrassment. Mr. Haugen brought a motion seeking punitive damages for what he considered to be theft, and UPB prevailed on the issue, based upon its claim that the funds were really not Haugens, but belonged to the bank. Needless to say, Mr. Haugen felt violated. After fighting the Haugens on this issue until just before trial, UPB claims to have credited them with the amounts so withdrawn, such credit applying against the amount owed by the appellants.

It is not clear what the status is with regard to the defendants' claim that approximately \$30,000 was taken from Mr. Haugen's account and in some cases, forwarded to Mark Sahli and in others, simply pocketed by Ted Devine. The District Court did determine that an action in conversion will not lie as a remedy for this act, but the underlying facts alleged in the complaint and by Mr. Haugen in his previous affidavits does give rise to several causes of action.

In the case of *People's State Bank of Jordan v. Rupert*, 249 N.W. 325 (Minn. 1933), the Court held that a bank is liable for unauthorized withdrawals from an account by an bank officer, saying:

It is urged, for plaintiff, that Alois M. Schaefer had authority to draw checks on the farm account, and that, in so drawing checks payable to himself on that account, he acted for the farm company in an adversary

capacity as to the bank, and that the bank was not chargeable with notice of his lack of authority to withdraw the money or notice of his misappropriation thereof. It is conceded that Schaefer had authority to draw checks on the farm company account for debts incurred by the company, but, as he well knew, he had no authority to withdraw its funds for his personal use. Was the bank chargeable with notice of Schaefer's lack of authority and misappropriation of the farm company's funds? The rule is well stated in *State Bank of Morton v. Adams*, 142 Minn. 63, 170 N. W. 925, that, where the officer (of the bank) who is interested is the sole representative of the bank in the transaction, his knowledge is chargeable to the bank. The rule has been applied in *Farmers's & Merchants' State Bank v. Kohler*, 159 Minn. 35, 198 N. W. 413; *Central Metropolitan Bank v. Chippewa County State Bank*, 160 Minn. 129, 199 N. W. 901; *Citizens' State Bank of St. Paul v. Wade*, 165 Minn. 396, 206 N. W. 728; *Union Central Life Ins. Co. v. Star Ins. Co.*, 178 Minn. 526, 227 N. W. 850; *Rodgers v. Bankers Nat. Bank*, 179 Minn. 197, 229 N. W. 90; *Solway State Bank v. School District*, 179 Minn. 423, 229 N. W. 568, and in other cases. The court's finding that Schaefer was the sole representative of the bank in its transactions with the farm company is sustained by the evidence.

That the bank profited by having Schaefer's overdrafts reduced is quite clearly shown by the evidence. The court made very complete findings of fact, which are fairly sustained by the evidence and need no further discussion, except as to the one matter now to be considered.

(*Id.* at 326)

Clearly, the vice-president's wrongful withdrawal of funds from the Haugen account is attributable to UPB. The bank was aware of this transaction and has not paid defendants back for it. Moreover, the bank did not credit the amount seized against the Haugen loans or the contract for deed/equitable mortgage payments when the bank became "owner" of the rights it had

obtained from Mr. Sahli. So the bank clearly has civil liability for wrongfully obtaining these funds, whether this be denominated "conversion" or some other form of wrongful appropriation.

Punitive damages are awardable in civil cases if the defendant has acted with willful disregard for the rights or safety of others (Minn. Stat. § 549.20). A right to punitive damages is not limited to personal injury cases. *Williamson v. Prasciunas*, 661 N.W.2d 645 (Minn. App. 2003). In *Williamson*, the court recognized that punitive damages would be awardable in a conversion case, but because in a civil damage for theft punitive damages up to 200% of the value of the property stolen were already awardable, further punitive damages would result in a double recovery. Here, the court has determined that conversion does not apply. Hence, the punitive damages for theft statute does not apply, and hence Mr. Devine's act, which was equivalent to theft even if it may not technically have been a conversion, should have permitted an award of punitive damages.

A footnote is in order here. UPB took the position, until immediately before trial, that it had no responsibility at all for these withdrawals. This position is clearly nonsense. If a bank, whether deliberately or mistakenly, takes money from a depositor's account and gives it to another, it is liable to the depositor for the amount of the money, as UPB ultimately acknowledged. Yet it incurred attorneys' fees and charged them

to the appellants for taking a position which was not only wrong, but nearly frivolous. This is one more example, if any more were needed, why the award of attorneys' fees in this case is grossly excessive.

IV.

THE DISTRICT COURT ERRONEOUSLY AWARDED THE AMOUNT DEPOSITED BY DARREN HAUGEN IN LIEU OF SUPERSEDEAS BOND TO BE CREDITED TOWARD APPELLANTS' OBLIGATIONS TO UPB.

Prior to the successful determination of Appellants' first appeal to the Minnesota Court of Appeals, Darren Haugen, Leland's son, filed \$115,000 with the Court in lieu of a supersedeas bond. After the appeal was resolved in appellants' favor, Mr. Haugen sought return of this money from the Court of Appeals, which deferred to the District Court on the matter. The District Court treated this sum as rent, and ultimately awarded it to UPB. Appellants want it back even if respondent prevails on the instant appeal. It is Darren Haugen's money, not UPB's or Leland Haugen's or Haugen N & E's.

Respondent claims that this money rightfully should belong to UPB. It reasons by analogy from Rule 108.01 subd. 8 and Rule 108.01 subd. 8 jurisprudence. The analogy is unsound.

Minn.R.Civ.P. 108.01 subd. 8 states:

Upon motion, the trial court may require the appellant to file a supersedeas bond if it determines that the provisions of Rule 108 do not provide adequate security to the respondent.

The purpose of a supersedeas bond is to guarantee that the

appellant will obey the District Court's order in the event of affirmance. So the District Court has the right to insure that its order be obeyed if affirmed. But once the District Court is reversed, there is no District Court order to obey. So the Court of Appeals' reversal deprives the District Court of the right and authority to require bond in lieu of the requirement that its order be obeyed. Note, too, that the Court of Appeals' decision reversed every order of the District Court after its Order for Summary Judgment. That includes the order requiring a supersedeas bond or deposit in lieu of bond. There is thus no valid order on the basis of which the deposit may be retained.

Respondent's attorney previously stated that:

Any request for a stay, whether supported by a bond or other terms, is made first to the trial court The trial court determines the amount of any bond, the appropriateness of the proposed surety, the appropriateness of substitute security or any other provisions relating either to the bond or the stay. Any aspect of these decisions can be reviewed by the appellate court...only after being submitted to the trial court.

But of course this says nothing at all about any request for release of bond.

Appellants' position really is not about the release of a deposit in lieu of bond. If appellants had filed an ordinary supersedeas bond and were seeking its release, there would probably be no opposition to the motion. The issue here is that respondent wants to capture a pot of money lying in the District

Court for reasons now having nothing to do with the security provided for appellants' appeal. It wants the money to recoup its alleged losses in a foreclosure and replevin action. This is essentially a request for a pre-judgment attachment. And Minn. Stat. § 570.02 does not permit a pre-judgment attachment on the grounds that the appellants have money "lying around" and respondent wants it.

Perhaps the most dubious proposition in the respondent's entire position is the claim that "Here, it is uncontested that UPB is owed at least \$690,011.10 in principal, interest, and/or late fees based on four notes...." This contention is bitterly disputed. For example, UPB already conducted a replevin action on appellants' personalty and sold the personalty at auction for over \$300,000. However, it contends that the replevin was insufficient to cover the \$350,000 respondent claims in attorneys' fees for the replevin action. So obviously if appellants prevail on either issue I or issue II in this appeal, Darren Haugen should not only get his money back - he should get back the money paid as rent too.

After all, it has now been established that the Haugens have had a right to live on this property since the commencement of the suit. Hence, they have a right to the rents and profits. To be sure, UPB has a right to garnish or attach some of these rents and profits if it can establish that its attorneys' fees are fair and

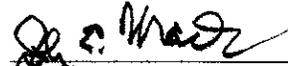
that the Haugens did not have a right to a jury trial on the attorney fee issue. But if they can establish that the fees are unfair or that they did have a right to a jury trial, the rent Darren Haugen has paid should not be attachable by UPB. The amount paid in lieu of bond should not be attachable at all.

CONCLUSION

This case is an outrage. Appellants would long since have paid off their loans to UPB if the latter's attorneys had not charged over \$750,000 in attorneys' fees, much of it unnecessary, overpriced, futile, repetitive, or all of the above. There is always a danger when one is dealing with an opponent who is liable for payment of attorneys' fees, that this liability will be used as a weapon rather than a reimbursement. That is precisely the case here. The matter should be returned to the District Court for a trial by jury, appellants should be permitted to insert punitive damage claims for money wrongfully withdrawn from their account, and the attorneys' fee award should be drastically reduced.

Dated: August 3rd, 2009

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