
STATE OF MINNESOTA
IN COURT OF APPEALS

CASE NO. A09-607

UNITED PRAIRIE BANK – MOUNTAIN LAKE,

RESPONDENT,

vs.

HAUGEN NUTRITION & EQUIPMENT, LLC,
LELAND HAUGEN AND ILENE HAUGEN,

APPELLANTS.

RESPONDENT'S BRIEF

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STATEMENT OF ISSUES WITH RESULTS BELOW

1. **WHETHER THE DISTRICT COURT CORRECTLY DETERMINED THAT APPELLANTS WERE NOT ENTITLED TO A JURY TRIAL ON UPB'S REQUEST FOR ATTORNEYS' FEES?**

RESULT BELOW:

The district court correctly determined that Appellants were not entitled to a jury trial on UPB's request for attorneys' fees under the subject promissory notes, security agreements, personal guarantees, mortgage and contract for deed/equitable mortgage.

RELEVANT AUTHORITY:

- *O'Donnell v. McGee Trucks, Inc.*, 199 N.W.2d 432 (Minn. 1972)
- *C.J. Duffey Paper Co. v. Reger*, 588 N.W.2d 519 (Minn. Ct. App. 1999)
- *State Bank of Cokato v. Ziehwein*, 510 N.W.2d 268 (Minn. Ct. App. 1994), review denied (Minn. Mar. 15, 1994)
- *Oleisky v. Midwest Fed. Sav. and Loan Ass'n*, 398 N.W.2d 627 (Minn. Ct. App. 1986)

2. **WHETHER THE DISTRICT COURT CORRECTLY DETERMINED THE AMOUNT OF ATTORNEYS' FEES AWARDED TO UPB?**

RESULT BELOW:

The district court correctly determined the amount of attorneys' fees that UPB was awarded under the subject promissory notes, security agreements, personal guarantees, mortgage and contract for deed/equitable mortgage.

RELEVANT AUTHORITY:

- *Specialized Tours, Inc. v. Hagen*, 392 N.W.2d 520 (Minn. 1986)
- *Toth v. Arason*, 722 N.W.2d 437 (Minn. 2006)
- *Thiele v. Stich*, 425 N.W.2d 580 (Minn. 1988)
- *C.J. Duffey Paper Co. v. Reger*, 588 N.W.2d 519 (Minn. Ct. App. 1999)

3. WHETHER THE DISTRICT COURT CORRECTLY DETERMINED THAT UPB CREDITED APPELLANTS FOR WITHDRAWALS MADE FROM THEIR ACCOUNT?

RESULT BELOW:

The district court correctly determined that Appellants were credited for the amounts withdrawn from their account.

RELEVANT AUTHORITY:

- *Stowell v. Cloquet Co-op Credit Union*, 557 N.W.2d 567 (Minn. 1997)
- *Brunswick Corp. v. Northwestern Nat'l Bank & Trust Co.*, 8 N.W.2d 333 (Minn. 1943)

4. WHETHER THE DISTRICT COURT CORRECTLY DETERMINED THAT UPB WAS ENTITLED TO RECOVER MONEY PAID INTO THE COURT AS RENT BY DARREN HAUGEN?

RESULT BELOW:

The district court correctly determined that the money paid into the court by Darren Haugen constituted rent by Darren Haugen's own uncontroverted testimony, which belonged to UPB under the subject promissory notes and security agreements.

RELEVANT AUTHORITY:

- N/A.

STATEMENT OF THE CASE

Respondent United Prairie Bank – Mountain Lake ("UPB") made several loans to Appellants in 2003-2004 as part of a comprehensive refinancing of their significant existing debt. Appellants almost immediately defaulted. UPB subsequently commenced the underlying lawsuit to (1) recover amounts owed under the promissory notes; (2) recover property in which UPB had a security interest; (3) declare that UPB was the owner of the subject real property via cancellation of a contract for deed or, alternatively, via foreclosure of an equitable mortgage; and (4) to recover its attorneys' fees and costs, as provided by the subject promissory notes, security agreements, personal guarantees and contract for deed.

After more than three years of protracted litigation regarding dozens of claims and defenses raised by Appellants, prior to trial the district court entered summary judgment dismissing all of Appellants' counterclaims and determining that Appellants were in breach of the promissory notes, security agreements, personal guarantees and contract for deed. The parties then proceeded with a court trial on four narrow issues, after which the district court made the following determinations: (1) the contract for deed constituted an equitable mortgage, which UPB could foreclose in this lawsuit; (2) UPB was entitled to recover the outstanding principal and interest due under the promissory notes; (3) UPB was entitled to receive \$175,000 in rent for the real property that was deposited with the district court during the pendency of the lawsuit; and (4) UPB was entitled to recover approximately 45% of the attorneys' fees and costs it had incurred to collect the notes and to protect and preserve its interests in the personal and real property.

Appellants do not contest the district court's first two determinations. In this appeal, Appellants argue that they were entitled to have a jury decide UPB's attorneys' fees award and, in any event, the district court's attorneys' fees award was too high. Appellants also argue that, despite the uncontroverted trial testimony to the contrary, the \$175,000 awarded to UPB by the district court was not rent but rather was merely an appeal bond that should be returned.

The issues raised by Appellants on appeal were largely unchallenged at trial. Indeed, Appellants' brief fails to identify any trial testimony or other record evidence to show that these issues were raised before the trial court and thereby preserved for appeal. Tellingly, in violation of Minn. R. Civ. App. P. 128.02, subd. 1(c), Appellants' statement of the case and facts is almost completely devoid of any citations to the trial record. Contrary to Appellants' unsupported arguments, the record demonstrates that the district court presided over several years of contentious litigation, properly considered all of the evidence, and then issued a decision that is factually and legally supported. Appellants provide no legitimate basis to reverse that decision.

STATEMENT OF FACTS

A. THE HAUGENS AND HNE

On January 14, 1987, Leland and Ilene Haugen (the "Haugens") acquired via personal representative's deed a 160-acre parcel of land in Cottonwood County, Minnesota. (Ex. 1.¹) On May 3, 2000, Ilene Haugen acquired via warranty deed a nearby 80-acre parcel of land, also in Cottonwood County. (Ex. 2.) These two parcels were the subject of the underlying lawsuit and are referred to as the "Real Property."

In addition to farming the Real Property, the Haugens operated a feed mill business through Haugen Feeds, Inc. ("Haugen Feeds"). On July 15, 2002, the Haugens, with the assistance of their counsel, J. Brian O'Leary ("O'Leary"), formed Haugen Nutrition & Equipment, LLC ("HNE") to "sell livestock feed and equipment." (Ex. 31; Tr. at 62, 465, 477-78.²) O'Leary and Haugen confirmed that HNE was a "separate legal entity" and not an alter ego of Haugen Feeds or the Haugens. (Tr. at 203, 465, 492.) HNE had employees, owned equipment, had accounts receivable, prepared financial statements, received income and paid bills, had a tax identification number and filed tax returns. (Tr. at 201-02.) O'Leary testified that HNE was formed so the feed operation could be operated without creditors "nipping at their heels." (Tr. at 477.)

When the Haugens and Haugen Feeds experienced financial difficulties in 2002-2003, as described more fully below, they executed a series of transactions that: (i)

¹ Citations to "Ex. ___" refer to the exhibits admitted at trial.

² Citations to "Tr. at ___" refer to the transcript of the testimony at trial.

refinanced their outstanding debts through UPB, substantially reducing the principal and interest owed; and (ii) transferred assets and property to HNE for the purpose of continuing the farming and feed mill operations through HNE, free from the claims of creditors of the Haugens and Haugen Feeds.

Without this refinancing by UPB and the transfer of assets, the Haugens and Haugen Feeds would have lost all of their assets and the Real Property in 2003 through replevin and foreclosure. (Tr. at 403, 466-68, 494.) UPB was the only lender who offered to provide refinancing assistance. (Tr. at 459.) Because of the assistance provided by UPB, the Haugens were given an opportunity to avoid foreclosure and liquidation of all of their personal and real estate assets, and HNE retained control of the Real Property for five years without making any substantial debt payments. (Tr. at 420.)

B. UPB'S LOANS TO HNE AND ILENE HAUGEN

UPB made three loans to the Haugens and HNE in 2003 and 2004 that are the subject of this lawsuit.

1. Note 601480

On August 19, 2003, UPB provided financing to HNE in the amount of \$220,025.00 to refinance existing bank debt at UPB and First Security Bank Canby ("Canby Bank"), as memorialized in promissory note #601480 ("Note 601480"). (Ex. 3.)

Note 601480 was secured by, among other things, a real estate mortgage and a commercial security agreement. The real estate mortgage ("Mortgage") granted UPB a mortgage interest in the Real Property. (Ex. 4.) The commercial security agreement ("Security Agreement") executed by HNE in connection with Note 601480 grants UPB a

security interest in all property owned by HNE at the time of execution or later acquired by HNE in the future, including without limitation, accounts receivable, inventory, equipment, instruments and chattel paper, farm products and supplies, government payments and programs, investment property and deposit accounts. (Ex. 5.)

2. Note 60160

On November 5, 2003, Ilene Haugen borrowed another \$26,125.00 from UPB under promissory note #60160 ("Note 60160") to purchase grain. (Ex. 6.) Note 60160 was secured by a commercial security agreement, which contained the same terms as the Security Agreement executed in connection with Note 60148. (Ex. 8)

3. Note 60240

On July 2, 2004, HNE borrowed an additional \$77,334.82 from UPB under promissory note #60240 ("Note 60240") to refinance the purchase of machinery and other debt. (Ex. 9.) Note 60240 was secured by a commercial security agreement containing the same terms as the commercial security agreements executed with Notes 60148 and 60160. (Ex. 10.)

4. Personal Guarantees

Ilene Haugen and Leland Haugen each executed personal guarantees (the "Guarantees") in which they each personally, jointly, severally, absolutely and unconditionally guaranteed HNE's and Ilene Haugen's obligations under the Notes. (Exs. 82 and 161.)

5. Appellants Admit They Are Bound by the Terms of the Loan Documents

Ilene Haugen was duly authorized to, and did, execute the Notes, Mortgage and Security Agreements (collectively, "Loan Documents") on behalf of herself and HNE. (Exs. 149-50; Tr. at 201, 204, 208, 213-14, 216, 218.) Leland Haugen confirmed that the Haugens and HNE are bound by the terms of the Loan Documents and that the Loan Documents incorporate their contracting intent. (*Id.*) Leland Haugen understood that when he signed a contract, including the Notes, he was agreeing to abide by the terms of the contract. (Tr. at 201.) The Haugens and HNE's attorney, O'Leary, confirmed that the parties' respective rights and obligations are outlined in the written agreements. (Tr. at 481-82, 485-87, 489.)

The Notes obligate the Haugens and HNE to reimburse UPB for all costs, expenses and attorneys' fees incurred in collecting the Notes as follows:

COLLECTION COSTS AND ATTORNEYS FEES: I [HNE/Haugens] will pay all costs of collection, replevin [an action for the recover of property wrongfully taken or detained], or any other or similar type of cost if I am in default.

In addition, if you [UPB] hire any attorney to collect this note, I will pay attorney's fees plus court costs (except where prohibited by law).

(Exs. 3, 6 & 9.)

Upon an event of default, the Mortgage provides that UPB is entitled to take action to protect and preserve the Real Property:

If there is a default, Lender may, in addition to any other permitted remedy, advertise and sell the Property as a whole or in separate parcels at public auction to the highest bidder. . . Upon sale of the Property and to the extent not prohibited by law, Lender shall make and deliver a deed to the Property

sold which conveys absolute title to the purchaser. Lender shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable attorneys' fees; (b) to all sums secured by this Mortgage; and (c) any excess to the person or persons legally entitled to it.

(Ex. 4 § 16.) The Mortgage also obligates HNE to reimburse UPB for its costs, expenses and attorneys' fees incurred in preserving or protecting the Real Property as follows:

EXPENSES; ADVANCES ON COVENANTS; ATTORNEYS' FEES; COLLECTION COSTS. Except when prohibited by law, Mortgagor [HNE] agrees to pay all of Lender's [UPB] expenses if Mortgagor breaches any covenant in this Mortgage. Mortgagor will also pay on demand all of Lender's expenses incurred in collecting, insuring, preserving or protecting the Property. Mortgagor agrees to pay all costs and expenses incurred by Lender in enforcing or protecting Lender's rights and remedies under this Mortgage, including, but not limited to, attorneys' fees, court costs, and other legal expenses.

(*Id.* § 17.)

The Security Agreements give UPB the right to protect and preserve its collateral in the event of default:

After Debtor [Haugens/HNE] defaults, and after Secured Party [UPB] gives any legally required notice and opportunity to cure the default, Secured Party may at Secured Party's option do any one or more of the following: (1) make all or any part of the Secured Debts immediately due and accrue interest at the highest post-maturity interest rate; (2) require Debtor to gather the Property and make it available to Secured Party in a reasonable fashion; (3) enter upon Debtor's premises and take possession of all or any portion of Debtor's property for purposes of preserving the Property or its value and use and operate Debtor's property to protect Secured Party's interest, all without payment or compensation to Debtor; (4) use any remedy allowed by state or federal law, or provided in any agreement evidencing or pertaining to the Secured Debt.

(Exs. 5, 8 & 10.) The Security Agreements also obligate HNE to pay UPB's costs, expenses and attorneys' fees incurred in collecting, protecting or preserving the collateral:

If Secured Party [UPB] repossesses the Property or enforces the obligations of an account debtor, Secured Party may keep or dispose of the Property as provided by law. Secured Party will apply the proceeds of any collection or disposition first to Secured Party's expenses of enforcement, which includes reasonable attorneys' fees and legal expenses to the extent not prohibited by law, and then to the Secured Debts. Debtor (or Borrower, if not the same) will be liable for the deficiency, if any.

(Id.)

Finally, the Guarantees obligate Leland and Ilene Haugen to pay UPB's costs, expenses and attorneys' fees incurred in collecting, protecting or preserving the secured assets:

The liability of the Undersigned hereunder shall be limited to a principal amount of "Unlimited" (if unlimited or if no amount is stated, the Undersigned shall be liable for all indebtedness, without limitation as to amount), plus accrued interest thereon and all attorneys' fees, collection costs and enforcement expenses referable thereto.

* * *

The Undersigned will pay or reimburse Lender for all costs and expenses (including reasonable attorneys' fees and legal expenses) incurred by Lender in connection with the protection, defense or enforcement of this guaranty in any litigation or bankruptcy or insolvency proceedings.

(Exs. 82 and 161 ¶¶ 4-5.)

An event of default under any of the Loan Documents constitutes an event of default under all of the Loan Documents. (Exs. 3, 6 & 9.) The terms of Notes, corresponding Security Agreements and the Mortgage are standard in the banking industry and are commercially reasonable. (Tr. at 130-36, 434.)

C. THE FINANCIAL STATUS OF HAUGEN FEEDS AND THE HAUGENS BEFORE UPB

Prior to UPB's involvement with the Haugens, the Haugens and Haugen Feeds were having significant financial problems, and were facing imminent foreclosure and liquidation of their real estate and other assets. (Tr. at 403, 466-68, 494.)

In May 2000, Mark Halverson docketed a \$10,655.06 judgment against Haugen Feeds. (Ex. 12.) By January 2002, Meadowland Farmers Cooperative ("Meadowland") obtained judgments against Leland Haugen and Haugen Feeds totaling over \$140,000. (Ex. 27.) In October 2002, New Vision Coop sued the Haugens and Haugen Feeds for nearly \$100,000. (Ex. 11.) John Morrell sued Leland Haugen in May 2003 for more than \$299,000 due and owing under various ledger contracts, and had obtained a judgment against Leland Haugen. (Ex. 15.) Prudential Insurance Company of America ("Prudential") held a mortgage in excess of \$138,000 on the 80-acre parcel of the Real Property, which mortgage was in foreclosure. (Ex. 19.)

The Haugens' and Haugen Feeds' most significant creditor was First Security Bank Canby ("Canby Bank"). Between 1997 and 2002, the Haugens and Haugen Feeds obtained a number of loans from Canby Bank and had executed various promissory notes, personal guarantees and security agreements in favor of Canby Bank to secure the debt. (Ex. 20.) Canby Bank also held three mortgages on the Real Property. (Ex. 125.) (Greenway Depo. at 34.)

By January 2003, the Haugens and Haugen Feeds had defaulted on their repayment obligations to Canby Bank. (Greenway Depo. at 11-12.³) The Haugens and Haugen Feeds also were significantly overdrawn on their checking accounts. (*Id.*) The total amount owed by the Haugens and Haugen Feeds in January 2003 was nearly \$950,000. (Ex. 20.)

Because of these defaults, Canby Bank decided that it would no longer provide financing to the Haugens or Haugen Feeds. (Ex. 21; Greenway Depo. at 11-16; Tr. at 468, 520.) On January 20, 2003, Canby Bank notified the Haugens and Haugen Feeds that "the bank is not interested in continuing the lending relationship on any sort of restructured terms" and that "[u]pon conclusion of the mediation period, we plan to proceed promptly with commencement of collection." (Ex. 21.) Canby Bank sued the Haugens and Haugen Feeds on February 10, 2003 to collect \$948,264.19 for all outstanding loan obligations and overdrawn checking accounts. (Ex. 20.)

The Haugens and Haugen Feeds stipulated to the entry of a replevin order, pursuant to which Canby Bank was authorized to seize and liquidate all of the Haugens' and Haugen Feeds' assets in which Canby Bank had a security interest. (Ex. 22.) A stipulated replevin order was entered on March 6, 2002. (Ex. 23.) The Haugens faced imminent foreclosure of their farm land. Enforcement and execution of the replevin order was stayed by the parties' agreement until March 17, 2002. (*Id.*) The purpose of

³ Citations to "Greenway Depo." refer to the deposition of Canby Bank's Mark Greenway, which was admitted into evidence at trial.

the stay was to allow Canby Bank and the Haugens and Haugen Feeds to negotiate a buy-out transaction to liquidate the debt owed to Canby Bank. (Greenway Depo. at 16-19.)

D. THE TWO-STEP CANBY BANK BUY OUT

In 2003, the Haugens and Haugen Feeds entered into two separate four-step transactions to liquidate their debt to Canby Bank and resolve the Canby Bank's lawsuit.

1. Step One

In the first step, the Haugens sold all of their property in the following four separate sales: (1) the Haugens sold their inventory of hogs to Darren Haugen for \$58,500 (Ex. 37); (2) the Haugens sold their personally-owned machinery and equipment to Mark Sahli ("Sahli") for \$60,000 (Exs. 45 and 51); (3) Haugen Feeds sold its assets to Sahli for \$130,000 (Exs. 51 and 55); and (4) the Haugens sold the Real Property via warranty deed to Sahli for \$460,500 (Exs. 59, 67 and 73).

Each of the four transactions in this first step were financed by UPB. (Tr. at 61-70.) UPB financed Darren Haugen's purchase of the hogs through a promissory note, which has been repaid and is not at issue in this lawsuit. (Ex. 38.) UPB financed Sahli's purchase of the Haugens' machinery and equipment and HNE's corporate assets with a \$190,000 promissory note and corresponding commercial security agreement. (Exs. 53-53.) UPB financed Sahli's purchase of the Real Property via a promissory note, which was secured by a corresponding mortgage and commercial security agreement. (Exs. 69-72.) The sale proceeds received by the Haugens and Haugen Feeds were used to pay off the promissory notes and satisfy the real estate mortgages held by Canby Bank and Prudential. (Exs. 56, 75-79.)

The first step of the Canby Bank buy-out transaction provided a substantial benefit to the Haugens and Haugen Feeds. (Tr. at 73, 420, 478.) With financing provided by UPB, the Haugens and Haugen Feeds were able to settle their nearly \$950,000 Canby Bank debt at the substantially-reduced price of \$611,000 — a savings of nearly \$350,000. (Tr. at 420, 487.) Without the financial restructuring assistance provided by UPB, the Haugens and Haugen Feeds would not have been able to maintain their personal property and real estate holdings. (Tr. at 403.) All personal property would have been replevied and sold, and the real estate would have been foreclosed. (Tr. at 403, 494.)

2. Step Two

The second step of the Canby Bank buy-out transaction also involved four transactions: (1) HNE acquired the hog inventory from Darren Haugen for \$49,500 (Ex. 41); (2) HNE acquired the machinery and equipment from Sahli for \$64,000 (Ex. 57); (3) HNE purchased the Haugen Feeds assets from Sahli for \$138,000 (Ex. 87); and (4) HNE bought the Real Property from Sahli via contract for deed for \$486,500 (Ex. 89).

UPB financed HNE's purchase of the machinery and equipment from Sahli with promissory note #60126, which has been repaid in full and is not at issue in this lawsuit. (Ex. 80.) UPB also partially financed HNE's purchase of the machinery and equipment and Haugen Feeds assets via Note 601480, which was secured by the Mortgage and Security Agreement. (Exs. 3-5.)

Sahli sold the Real Property to HNE under a contract for deed ("Contract for Deed"), which was drafted by O'Leary as counsel for the Haugens and HNE. (Ex. 89.)

Haugen confirmed that Ilene Haugen signed the Contract for Deed on behalf of HNE and agreed to be bound by its terms. (Tr. at 218-19.) Sahli testified in his deposition that he intended that the Contract for Deed be valid and enforceable according to its terms. (Sahli Depo. at 29, 36 and 43.⁴)

This second set of four transactions allowed the Haugens to continue their farming and feed mill operations through HNE without being burdened by creditors' claims against them and Haugen Feeds. (Tr. at 477-78.) All of this greatly benefited the Haugens.

E. HNE DEFAULTS ON THE CONTRACT FOR DEED AND SAHLI DEFAULTS ON HIS MORTGAGE TO UPB

HNE made the required initial \$8,600 down payment on the Contract for Deed on the date of closing. (Ex. 90.) HNE did not make the required balloon payment on September 12, 2004. (Tr. at 178.)

HNE's default under the Contract for Deed caused Sahli to default on his promissory note and mortgage to UPB. (Sahli Depo. at 41-43; Exs. 69-72.) Rather than face immediate collection and foreclosure proceedings, on October 20, 2004, Sahli conveyed the Real Property to UPB by warranty deed in lieu of foreclosure. (Ex. 93.) By virtue of this deed in lieu, UPB acquired Sahli's vendor rights under the Contract for Deed. (*Id.*) HNE made no subsequent payments under the Contract for Deed. (Tr. at 178.)

⁴ Citations to "Sahli Depo." refer to the deposition of Mark Sahli, which was admitted into evidence at trial.

F. THE MEADOWLAND LAWSUIT AND UPB'S ATTORNEYS' FEES

On December 31, 2003, Meadowland commenced a lawsuit against the Haugens, Haugen Feeds, HNE, UPB and Sahli (the "Meadowland Lawsuit"). (Ex. 94.) Meadowland was a judgment creditor of Leland Haugen and Haugen Feeds, and claimed that the Canby Bank buy-out transactions constituted fraudulent transfers. (*Id.*)

UPB incurred \$117,110.24 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. (Tr. at 315; Exs. 145 & 167.) 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. (Tr. 315-21; Exs. 145 & 167.)

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 Sahli and HNE, including the Real Property. (Tr. at 315-24.) UPB's counsel, Joseph Roach, reviewed all of the legal invoices relating to the Meadowland Lawsuit and determined that the matter was appropriately staffed by UPB's attorneys and that UPB was not assessed with duplicative charges of legal fees. (Tr. at 321-22.) The rates charged by UPB's attorneys were commensurate with other Twin Cities law firms. (Tr. at 322-24.) UPB's banking expert, Frank Brosseau, confirmed that, in his review of UPB's legal invoices, he did not see any duplicative charges and that the legal fees were commensurate with market rates. (Tr. at 435-36.)

The Meadowland Lawsuit settled on April 15, 2005. (Ex. 156.) The settlement included a \$25,000 payment from UPB to Meadowland. (Ex. 95.) UPB also consented to the Haugens selling cattle, in which UPB had a security interest, to pay their portion of the settlement. (*Id.*)

G. THIS LAWSUIT AND UPB'S ATTORNEYS' FEES

1. Appellants Are Notified of Their Defaults

On November 17, 2004, UPB notified HNE of its default under Note 60148, and demanded full and immediate payment. (Ex. 96.) UPB also specifically notified HNE that it was required to reimburse UPB for all costs, expenses and attorneys' fees incurred in any action to collect the outstanding Notes. (*Id.*) Neither HNE nor the Haugens responded to UPB's default notice.

2. UPB Initiates This Lawsuit

On May 2, 2005, UPB commenced this lawsuit to collect amounts owed under the Notes and recover personal property in which UPB held a security interest under the Security Agreements. (Ex. 153.) UPB also sought a determination that it was the sole owner of the Real Property or, alternatively, that the Contract for Deed be judicially canceled. (*Id.*) UPB incurred legal fees totaling \$18,417.47 to conduct its initial review of the lawsuit and draft the complaint. (Exs. 145 & 167; Tr. at 327-28.)

3. The Preliminary Injunction

UPB next filed motions for a temporary restraining order and preliminary injunction for the purpose of protecting and preserving its interest in personal property and real estate collateral. (Tr. at 328-29.) On May 18, 2005, the district court entered a

preliminary injunction enjoining the Haugens and HNE from encumbering, leasing or transferring the Real Property and the personal property in which UPB held a security interest. (Order, dated May 18, 2005.) The legal fees and expenses incurred by UPB to obtain the temporary restraining order and preliminary injunction totaled \$10,070.20. (Exs. 145 & 167; Tr. at 328.)

4. The Replevin Order

UPB was also forced to file a motion for replevin. (Tr. at 329-30.) On June 30, 2005, the district court entered a replevin order pursuant to which UPB was authorized to seize and sell all collateral in which it held a security interest under the Notes and Security Agreements. (Order, dated June 30, 2005.)

UPB, through the Cottonwood County Sheriff's Office, seized all collateral subject to the replevin order – certain machinery and equipment and hogs – on July 1 and 11, 2005. (Exs. 97 and 98.) All collateral seized during these two days was inventoried. (*Id.*)

UPB retained Gehling Auctions to sell the machinery and equipment. (Tr. at 87.) In late August 2005, the machinery and equipment was sold at a public auction for \$280,216.00. (Ex. 99.) After reimbursing Gehling Auctions for expenses and fees, the net was \$193,811.30. (*Id.*) UPB retained Pro Pig to oversee the sale of the livestock. (Tr. at 87.) The cattle and hogs were sold at public auctions at market prices. (Tr. at 87-88.) UPB provided an accounting of the sale proceeds for all collateral to Leland Haugen. (Ex. 99.)

All replevin proceeds were applied to the outstanding Note balances pursuant to the terms of the Notes and Security Agreements. (Exs. 146 and 147; Tr. at 91.) In addition, the non-legal fees and expenses incurred by UPB relating to the replevin were applied to the outstanding Note balances. (Exs. 146-47, 152; Tr. at 91.)

In addition to the fees paid to Gehling Auctions and Pro Pig, UPB was forced to incur legal fees relating to replevin issues, including a number of motions – UPB's motion for contempt, Appellants' motion for sanctions, UPB's motion for an order to show cause and UPB's motion regarding crop harvesting – all of which were resolved in UPB's favor. (Tr. at 330-34.) UPB's legal fees and expenses incurred in connection with the replevin totaled \$63,364.09. (Exs. 145 & 167.)

Appellants did not raise a single issue of fact at trial regarding the seizure or sale of the machinery and equipment and livestock. Nor did Appellants contest at trial any of the expenses incurred by UPB relating to the replevin issues.

5. Appellants' Answer and Ten Counterclaims

On May 23, 2005, Faegre & Benson and O'Leary filed an Answer and Counterclaims on behalf of the Haugens and HNE. (Ex. 103.) Appellants asserted 10 counterclaims against UPB. (*Id.*) Additionally, Appellants moved to amend their counterclaims to assert a punitive damages claim not once, but twice. (Def. Mem. in Supp. of Mot. to Amend, dated March 2, 2006 and May 12, 2008.)

UPB was forced to incur significant legal fees defending against Appellants' 10 counterclaims and punitive damages motions. (Tr. at 337-39.) Without exception, UPB's defense of the counterclaims and punitive damages motions were successful. On August

15, 2006, the district court granted summary judgment for UPB and dismissed Appellants' counterclaims. (Order, dated August 15, 2006.) Prior to trial, Appellants attempted to assert their counterclaims again. (Tr. at 339.) UPB incurred additional legal fees to obtain a stipulation from Appellants regarding which counterclaims they intended to pursue. On April 14, 2008, pursuant to the parties' joint stipulation, the district court dismissed with prejudice Counts VI, VII, VIII, IX and X of Appellants' counterclaims. (Order, dated April 14, 2008.)

UPB then sought summary judgment dismissing Appellants' remaining counterclaims. On August 28, 2008, the district court dismissed all of Appellants' counterclaims as a matter of law: (i) Count I – Conversion; (ii) Count II – Unjust Enrichment; (iii) Count III – Fraud; (iv) Count IV – Conspiracy; and (v) Count V – Tortious Interference With Contract and Prospective Advantage. (Order, dated August 28, 2008.)

The legal fees and expenses incurred by UPB in connection with Appellants' counterclaims totaled \$62,400.63. (Exs. 145 & 167.)

6. Mr. Mack's Substitution as Counsel for Appellants

John Mack was substituted as counsel for Appellants on August 2, 2005, after the district court had issued the preliminary injunction and replevin orders. (Tr. at 336.) Within days of appearing in this lawsuit, Mr. Mack sought to overturn nearly all of the district court's prior decisions, including the preliminary injunction and the replevin order. (Tr. at 336-37.) Mr. Mack also filed a motion to temporarily enjoin the replevin sale. (*Id.*) The district court denied each of these motions. (Tr. at 337.) Nonetheless,

UPB was forced to incur legal fees and expenses totaling \$17,416.99 to oppose the motions. (Exs. 145 & 167; Tr. at 337.)

7. **UPB's Summary Judgment Motion on its Judicial Cancellation Claim**

In July 2005, UPB moved for summary judgment on its claim to judicially cancel the Contract for Deed. (Pl. Not. of Mot. and Mot. for Partial Sum. Jud., dated July 22, 2005, at 1-2.) In their response, Appellants stated that the Contract for Deed from Sahli to HNE may constitute an equitable mortgage rather than a true contract for deed, a claim that never appeared in any prior pleading. (Def. Mem. in Reply to Pl. Mot. for Sum. Jud., dated August 10, 2005.)

On February 10, 2006, the district court issued an Order that the Contract for Deed was not an equitable mortgage. (Order, dated February 10, 2006, at 4.) The court then determined that HNE defaulted under the Contract for Deed, and ordered judicial cancellation. (*Id.* at 3.) Judgment was entered pursuant to this Order on February 10, 2006. (*Id.*)

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. (Exs. 145 & 167; Tr. 344.)

8. The Appeal

Appellants appealed the February 10, 2006 Order. On May 22, 2007, this Court reversed the February 10, 2006 Order and remanded the case for further proceedings. "Although we have no criticism of the district court, we do not find the requisite clarity to support the conclusion that the parties conferred authority on the court to decide the equitable-mortgage issue on the record before it." *See United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equip., LLC*, Nos. A06-722, A06-868, 2007 WL 1470219, at *3 (Minn. Ct. App. May 22, 2007) (RA53-56). The legal fees and expenses incurred by UPB in connection with the appeal totaled \$64,620.93. (Exs. 145 & 167; Tr. 348-49.)

9. Discovery Efforts

UPB also participated in significant discovery, which was aimed at narrowing the issues for trial. UPB drafted three sets of interrogatories and requests for production of documents and responded to two sets of interrogatories and requests for production of documents from Appellants. (Tr. at 340-41.) UPB was also forced to serve subpoenas on Mr. O'Leary, the Haugens' accountant, Bruce Kaardal, and the Cottonwood County Auditor/Treasurer, Jan Johnson. (*Id.*) 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. (*Id.*; Ex. 167.) All of these discovery efforts were necessary for UPB to take appropriate action to protect and preserve its interest in collateral and Real Property, as well as narrow the issues for trial. (Tr. at 340.) The total legal fees incurred by UPB in discovery was \$159,091.83, which represents just over \$4,400 per month over 36 months of litigation. (Exs. 145 & 167; Tr. at 341.)

10. Summary Judgment Motions

As a result of the facts uncovered through discovery, UPB filed a number of summary judgment motions to obtain judgment on certain claims and counterclaims. (Tr. at 345-46.) UPB also responded to summary judgment motions filed by Appellants. (*Id.*)

As 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. (Pl. Mot. for Sum. Jud., dated July 19, 2007.) 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. (Order, dated October 31, 2007.)

Following the October 31, 2007 Order, the parties engaged in substantial discovery aimed to address the potential fact issues identified by the district court. The deposition testimony and exhibits did, in fact, significantly narrow the issues for trial. UPB subsequently filed its final summary judgment motion, seeking: (i) entry of judgment in UPB's favor on Appellants' breaches of the Loan Documents; (ii) entry of judgment in UPB's favor on Appellants' equitable mortgage claim; and (iii) dismissal of Appellants' counterclaims. (Pl. Mot. for Sum. Jud., dated May 12, 2008.)

In its August 28, 2008 Order, the district court granted nearly all of UPB's requested relief. (Order, dated August 28, 2008.) Judgment was entered for UPB regarding Appellants' breach of contract and all of Appellants' counterclaims were

dismissed with prejudice. (*Id.*) The only issues that remained for trial was Appellants' equitable mortgage defense and UPB's request for attorneys' fees incurred in the Meadowland Lawsuit and this lawsuit. (*Id.*)

UPB incurred significant legal fees in the summary judgment motion practice, totaling \$97,969.36. (Exs. 145 & 167; Tr. at 345-47.) It was necessary for UPB to engage in this motion practice for the purpose of protecting and preserving its interest in the collateral and Real Property, as well as to narrow the issues for trial. (Tr. at 345-47.)

11. Motions Regarding Rent Payments Deposited With the Court

HNE and Darren Haugen farmed the land and used the buildings and equipment located on the Real Property in 2006, 2007 and 2008 without paying UPB any rent. (Tr. at 351.) On April 27, 2006, the district court issued a Writ of Recovery granting UPB possession of the Real Property unless HNE posted a \$75,000 bond to cover rents, costs and other damages due to UPB by reason of Appellants' refusal to relinquish possession of the Real Property for the 2006 crop season. (Order, dated April 27, 2006.) Darren Haugen, who was renting the Real Property, posted the bond for the 2006 rent and remained in possession of the Real Property. (Tr. at 296-97.)

UPB subsequently moved to increase the security for rents associated with the 2007 crop year, and on March 28, 2007, the district court increased the required deposit by \$40,000 "in order to protect [UPB] . . . if Defendants chose not to release the Property to [UPB] or to again farm the premises or rent same for crops usage." (Order, dated March 28, 2007.) Darren Haugen again posted the \$40,000 bond for the 2007 crop year rent. (Tr. at 296-97.)

On October 31, 2007, the district court issued an Order that "Defendant[s] are currently indebted to [UPB] in an amount greater than the \$115,000 deposit" and "[t]hat said debt is the subject of this litigation." (Order, dated October 31, 2007.) The court retained the \$115,000 deposited by Appellants for the 2006 and 2007 rent pending resolution of this lawsuit. (*Id.*)

On August 28, 2008, the district court issued an Order that HNE "shall deposit in certified funds the sum of \$60,000.00 with the Court Administrator of Cottonwood County regarding land value usage or crop value as additional security for the 2008 crop year." (Order, dated August 28, 2008.) HNE was ordered to make the required rent deposit by September 9, 2008. (*Id.*) Darren Haugen deposited the 2008 rent. (Tr. at 296-97.)

At trial, Darren Haugen confirmed that he paid the rent into the district court for 2006, 2007 for 2008, and that all the money he deposited constituted rent he paid for use of the Real Property. (Tr. at 296-97.) UPB is entitled to these rent payments plus interest because it has title to the Real Property by virtue of Sahli's warranty deed in lieu of foreclosure or, alternatively, because it has a valid, perfected security interest in "[a]ll rights to payment, whether or not earned by performance, including, but not limited to, payment for property or services sold, leased, rented, licensed, or assigned" and "[a]ll deposit accounts including, but not limited to, demand, time, savings, passbook, and similar accounts" under the Security Agreements. (Exs. 5, 8 and 10.)

UPB incurred legal fees of \$37,312.63 relating to its motions regarding the deposit of rent into the district court. (Exs. 145 & 167; Tr. at 351.)

12. Miscellaneous Issues and Trial Preparation

UPB also incurred legal fees totaling \$34,274.57 in connection with a number of other issues in this lawsuit, including responding to Appellants' motion to sell the Real Property, motions to amend and amended pleadings, settlement efforts and trial preparation through July 2008. (Exs. 145 & 167; Tr. at 352-54.) Significantly, UPB did not seek any of its trial preparation, trial or post-trial legal fees and expenses incurred after July 2008.

13. UPB's Total Attorneys' Fees

All told, UPB incurred \$627,909.77 in legal fees in this lawsuit through July 2008. (Exs. 145 & 167; Tr. at 355.) All of these legal fees were incurred to collect the amounts due and owing under the Notes, as well as to protect and preserve UPB's interest in the collateral and Real Property. (Tr. at 355-56.) These legal fees were charged to the outstanding balances due under each of the Notes, on a pro rata basis. (Tr. at 143-44, 355.) In addition, after the equitable mortgage issue was raised in October 2005, UPB began charging its legal fees to the outstanding balance due under the Contract for Deed. (Tr. at 143-44, 356-57.) UPB charged only 100% of its legal fees to the Notes and Contract for Deed; there was no "double dipping." (Tr. at 143-44, 357.) 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. (Tr. at 91-92, 122; Ex. 116.)

H. THE DISTRICT COURT'S JANUARY 26, 2009 ORDER AND JUDGMENT

Following a two-day trial on September 10 and 11, 2008, the district court issued its Findings of Fact, Conclusions of Law and Order for Judgment on January 26, 2009. A-1-21. The district court determined that: (1) Appellants had breached the Loan Documents and UPB was entitled to recover unpaid principal and interest due; (2) the Contract for Deed constituted an equitable mortgage; (3) HNE had breached the Contract for Deed and the amount due was the initial loan advance of \$486,200, minus any payments made by HNE, plus interest at the rate set forth in the Contract for Deed; (4) UPB could foreclose the Contract for Deed as part of this lawsuit; and (5) UPB was entitled to receive the \$175,000 in rent deposited with the district court.

With respect to UPB's request for an award of attorneys' fees of \$745,020.01, the district court determined that UPB was not entitled to recover legal fees incurred to litigate the contract for deed/equitable mortgage issue. A-20 ¶ 6. The district court also determined that all other legal fees incurred by UPB in this lawsuit and the Meadowland Lawsuit were reasonably incurred to collect amounts due under the Loan Documents and to protect and preserve the collateral and Real Property and were therefore recoverable. A-12 ¶¶ 52-53 and A-15 ¶¶ 71-75. As set forth above, UPB had allocated its attorneys' fees on a pro rata basis to the outstanding amounts due under the Notes and contract for deed/equitable mortgage. As a result, following the district court's decision UPB submitted the revised expert report of Debra Thompson to the district court on February 13, 2009, which confirmed that UPB removed the \$341,198.19 in attorneys' fees that had been allocated to the contract for deed/equitable mortgage balance. RA17-25. Thus, the

total attorneys' fees awarded by the district court was \$117,110.24 for the Meadowland Lawsuit and \$286,711.58 for this lawsuit, which is just 45.8% of the total attorneys' fees incurred by UPB.

I. THE DISTRICT COURT DENIES APPELLANTS' MOTION FOR NEW TRIAL

On February 11, 2009, Appellants filed a motion for new trial, alleging three errors: (1) the district court erroneously denied Appellants' a jury trial on the reasonableness of UPB's attorneys' fees; (2) the district court's attorneys' fees award was excessive; and (3) the district court erroneously awarded UPB the \$175,000 in rent on deposit with the Court. On April 2, 2009, the district court denied Appellants' motion for new trial in its entirety. A-72-74.

This appeal followed.⁵

⁵ While UPB initially filed a Notice of Review with respect to the district court's determination that the Contract for Deed constituted an equitable mortgage, UPB has withdrawn that Notice of Review because it proceeded with a judicial foreclosure of the contract for deed/equitable mortgage in the interests of efficiency and expediency. (RA26-52.) Reversal or remand of the equitable mortgage determination could lead to further delays and additional uncollectible costs. Appellants did not appeal any of the district court's orders and judgments relating to UPB's foreclosure of the contract for deed/equitable mortgage. Those issues are not part of this appeal and, indeed, cannot be appealed because the 60-day appeal period has expired. Minn. R. Civ. App. P. 104.01, subd. 1 and 126.02.

ARGUMENT

I. STANDARD OF REVIEW

The standard of review on appeal from judgment is whether the evidence is sufficient to support the trial court's findings, and whether the findings support the trial court's conclusions of law. *See Comstock & Davis, Inc. v. G.D.S. & Assocs.*, 481 N.W.2d 82, 84 (Minn. Ct. App. 1992) (citation omitted). A trial court's findings of fact are not disturbed unless they are clearly erroneous. *See* Minn. R. Civ. P. 52.01; *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999). Indeed, in actions tried to the court without a jury, the trial court's factual findings must be sustained unless they are "palpably and manifestly contrary to the evidence." *Samuelson v. Farm Bureau Mut. Ins. Co.*, 446 N.W.2d 428, 430 (Minn. Ct. App. 1989), *pet. for rev. denied*, (Minn. Nov. 22, 1989). In making that determination, this Court gives due regard to the trial court's judgment as to witness credibility. *See* Minn. R. Civ. P. 52.01; *General v. General*, 409 N.W.2d 511, 513 (Minn. Ct. App. 1987). The reviewing court should not reverse the trial court's findings unless it is left with the definite and firm conviction the trial court made a mistake. *See Cherne Indus., Inc. v. Grounds & Assocs., Inc.*, 278 N.W.2d 81, 88 (Minn. 1979). The evidence and its reasonable inferences must be viewed in the light most favorable to the prevailing party. *See State, Dep't of Pub. Welfare v. Thibert*, 279 N.W.2d 53, 56 (Minn. 1979).

II. APPELLANTS HAVE NO RIGHT TO A JURY TRIAL ON UPB'S REQUEST FOR ATTORNEYS' FEES

As their first point of alleged error, Appellants claim that they were entitled to a jury trial on UPB's request for an award of attorneys' fees under the Loan Documents and Contract for Deed. *See* App. Br. at 6-19. Appellants' argument is meritless.

A. An Award of Attorneys' Fees is Made by the Trial Court, Not a Jury

Minnesota law is clear that lenders may recover attorneys' fees and costs incurred in seeking to collect outstanding debts. "Where loan documents authorize a lender to recover legal expenses associated with collection . . . Minnesota courts will enforce the provision as long as the fees are reasonable." *State Bank of Cokato v. Ziehwein*, 510 N.W.2d 268, 270 (Minn. Ct. App. 1994), *review denied* (Minn. Mar. 15, 1994) (citing *O'Donnell v. McGee Trucks, Inc.*, 199 N.W.2d 432, 434-35 (Minn. 1972)). Lenders are entitled to recover attorneys' fees incurred even in defense of claims asserted by their borrowers. *See Boone v. Wells Fargo Bank, N.A.*, Civil No. 07-3922 (DWF/AJB), 2009 WL 2461736, at *1 (D. Minn. Aug. 10, 2009) (RA57-58) (citations omitted).

Minnesota law is also unequivocal that the trial court, not a jury, decides the amount of attorneys' fees to be recovered. 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 subject

nursing home admissions contract); *State Bank of Cokato*, 510 N.W.2d at 270 (following the 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 & Grain Corp.*, 388 N.W.2d 22, 25 (Minn. Ct. App. 1986) (following jury verdict, trial court awarded attorneys' fees under subject promissory note); *Interstate One Realty v Crippa*, No. C4-95-1253, 1996 WL 22319 (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." *C.J. Duffey Paper Co.*, 588 N.W.2d at 528 (emphasis added).

Minnesota courts are not alone on this issue. Numerous federal and state courts have held that the award of reasonable attorneys' fees is to be made by the trial court, not a jury. See, e.g., *Ideal Elec. Sec. Co. v. Int'l Fidelity Ins. Co.*, 129 F.3d 143, 150 (D.C. Cir. 1997) ("[O]nce a contractual entitlement to attorney's fees has been ascertained, the determination of a reasonable fee award is for the trial court in light of the relevant circumstances"); *The Scotts Co. v. Central Garden & Pet Co.*, 256 F. Supp. 2d 734, 748 (S.D. Ohio 2003) ("Attorneys fees and costs are matters traditionally reserved for court determination"); *Redshaw Credit Corp v. Diamond*, 686 F. Supp. 674, 676 (E.D. Tenn.

1988) ("Attorney fees and costs have been traditionally viewed as a determination to be made by the courts"); *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 683 N.W.2d 58, 65 (Wis. 2004) (holding that the reasonableness of requested attorneys' fees is for the trial court to decide); *Glamann v. St. Paul Fire & Marine Ins. Co.*, 424 N.W.2d 924 (Wis. 1988) (holding that well-settled Wisconsin law directs trial courts, not the jury, to ascertain the amount of an attorney fee award).

B. None of Appellants' Three Arguments Supports a Reversal of This Jurisprudence

1. UPB's Attorneys' Fees Claim is Not an Attorneys' Lien Claim

Appellants first try to morph UPB's request for its reasonable attorneys' fees incurred into a direct claim by UPB's attorneys against Appellants under Minnesota's Attorney's Lien Statute. *See* App. Br. at 8-10. This argument is disingenuous. Appellants know full well that UPB's request for its reasonable attorneys' fees under the Loan Documents and Contract for Deed is not a "common law breach-of-contract claim by an attorney," as they misleadingly suggest. *Id.* at 10. Indeed, Appellants concede that "[n]aturally, the attorney's lien statute does not apply directly to this case, because [Appellants] were not the clients of [UPB's] attorneys." *Id.* at 8.

2. UPB's Attorneys' Fees Claim is Separate and Distinct From its Damages Claim

Appellants' second argument is that UPB's claim for attorneys' fees is subsumed within its damages claim and, therefore, a constitutional jury trial right arises. *See* App. Br. at 10-19. This argument is erroneous.

The Minnesota Supreme Court has recognized that attorneys' fees are separate and distinct from recoverable damages of the underlying action. *See, e.g., Fownes v. Hubbard Broadcasting, Inc.*, 246 N.W.2d 700, 703 (Minn. 1976) (the Minnesota legislature will "explicitly provid[e] for the recovery of 'reasonable attorneys' fees' in addition to 'damages' when it so desires") (emphasis added); *AMF Pinspotters, Inc v. Harkins Bowling, Inc.*, 110 N.W.2d 348, 353 (Minn. 1961) (damages from wrongful issuance of an injunction are recoverable and that "[r]easonable attorneys' fees may also be recovered") (citations omitted) (emphasis added); *Prior Lake State Bank v. Groth*, 108 N.W.2d 619, 620 (Minn. 1961) (attorneys' fees and expenses incurred in action for damages may be recovered by the injured party in subsequent action against person whose tortious conduct gave rise to such damages). Notably, even where a jury awards damages for the underlying action, it is the trial court that determines the reasonableness of attorneys' fees. *See, e.g., C.J. Duffey Paper Co.*, 588 N.W.2d at 528.⁶

Other courts have likewise determined that a claim for attorneys' fees under a contract or statute does not implicate the constitutional right to a jury trial. *See, e.g., Kudon v. f.m.e. Corp.*, 547 A.2d 976 (D.C. 1998) (where claim for attorneys' fees arises under private contract provision, award of fees is more in nature of equitable rather than

⁶ In *C.J. Duffey Paper Co.*, after the jury verdict, the trial court awarded the defendant more than \$190,000 in attorneys' fees. *Id.* at 521. On appeal, the Minnesota Court of Appeals upheld the attorneys' fee award and also determined that the defendant was entitled to recover his attorneys' fees on appeal. *Id.* at 528. With respect to the attorneys' fees on appeal, the appellate court concluded that "[d]etermination of the amount of fees will involve a factual inquiry more appropriately conducted by the trial court," and remanded that issue for a determination by the trial court, not the jury. *Id.*

legal remedy and, thus, such a claim does not embody a right to trial by jury under the Seventh Amendment); *Ideal Elec. Sec. Co.*, 129 F.3d at 150 ("Where a claim for attorney's fees arises from a private contract provision, such a claim does not embody a right to trial by jury"); *Resolution Trust Corp. v. Marshall*, 939 F.2d 274, 279 (5th Cir. 1991) ("Since there is no common law right to recover attorneys fees, the Seventh Amendment does not guarantee a trial by jury to determine the amount of reasonable attorneys fees"); *A.G. Becker-Kipnis & Co. v. Letterman Commodities, Inc.*, 553 F. Supp. 118, 119 (N.D. Ill. 1982) ("[W]e agree [] that a jury trial is not available for the determination of costs and attorneys' fees"); *State ex rel. Chase Resorts, Inc. v. Campbell*, 913 S.W.2d 832 (Mo. App. 1995) (holding that there is no common-law right to jury trial to determine reasonable attorney fees once liability therefore has been established).

UPB's request for its attorneys' fees is not part of its underlying damages claim to recover principal and interest due under the Loan Documents, but rather is separate and distinct from its damages claim. Accordingly, the district court correctly determined that Appellants had no right to a jury trial.

3. Appellants' Reliance on *Simplot* is Misplaced

For their third argument, Appellants provide five pages of quotations from *J.R. Simplot v. Chevron Pipeline, Inc.*, 563 F.3d 1102 (10th Cir. 2009), without any substantive analysis. *See* App. Br. at 12-16. But *Simplot* is wholly inapposite and does not support Appellants' jury trial claim.

In *Simplot*, Chevron owned and operated a 97-mile pipeline between its phosphate mine and fertilizer processing facility. *Id.* at 1105. Ashley owned undeveloped

phosphate leases adjacent to Chevron's mine, and sought access to Chevron's pipeline. *Id.* Chevron subsequently published a tariff for its pipeline. *Id.* Ashley sued Chevron, alleging that the pipeline tariff violated antitrust laws. *Id.* During the litigation, Chevron entered into discussions with Simplot to purchase Chevron's entire phosphate operation, including the pipeline. *Id.* at 1106. After extensive negotiations, Simplot and Chevron entered into various purchase agreements which provided, among other things, that Chevron would indemnify and defend Simplot for liabilities arising from the operation of the pipeline before the closing date, while Simplot would indemnify and defend Chevron for liabilities arising from the operation of the pipeline after the closing date. *Id.*

After acquiring the pipeline, Simplot adopted Chevron's pipeline tariff. *Id.* Ashley subsequently sued Simplot for antitrust violations. *Id.* at 1106-07. Simplot then notified Chevron of its contractual duty to defend and indemnify Simplot from and against Ashley's claims on the grounds that they arose before the closing date, and Chevron refused. *Id.* at 1107. After the Ashley litigation was resolved in Simplot's favor, Simplot sued Chevron for breach of contract and sought damages in the amount of the attorneys' fees and costs it incurred in the Ashley litigation. *Id.* at 1107-08. The trial court denied Chevron's request for a jury trial on the amount of Simplot's attorneys' fees and costs and granted summary judgment in favor of Simplot. *Id.* at 1108. Chevron appealed. *Id.*

On appeal, the Tenth Circuit determined that the trial court erroneously denied Chevron's request for a jury trial. The appellate court held that "[u]nlike 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." *Id.* at 1115. The court reasoned that "[t]his 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 change . . . the nature of Simplot's claim." *Id.* at 1116. Thus, the court held that because "[t]his case is like an insurance case where the insurer has breached its duty to defend a lawsuit against the insured party and the insured sues the insurer for payment of the costs of its defense, particularly attorneys' fees," Chevron was entitled to a jury trial. *Id.* at 1117.

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 principal 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 is 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).

Id. at 1117 (emphasis added).

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. The only issue for the trial court was the reasonableness of UPB's attorneys' fees. Minnesota law is clear that a contractual award of attorneys' fees does not implicate any jury trial right. Accordingly, the district court properly determined that Appellants were not entitled to a jury trial on UPB's request for attorneys' fees. This Court should affirm.

III. THE DISTRICT COURT'S ATTORNEYS' FEE AWARD WAS REASONABLE AND NOT EXCESSIVE

For its second alleged error, Appellants challenge the district court's attorneys' fee award as being excessive. *See* App. Br. at 19-34. As set forth below, none of Appellants' five arguments has any merit.

A. FAILED ARGUMENT NO. 1: The District Court Properly Accepted UPB's Evidence of Its Attorneys' Fees

In Minnesota, courts use the "lodestar method" to determine the reasonableness of attorneys' fees. *See Specialized Tours, Inc. v. Hagen*, 392 N.W.2d 520, 542 (Minn. 1986) (citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983)). While Appellants argue that "it is questionable whether the Lodestar or the enhanced attorneys' fees method of determining a right to such fees applies in 'reasonable attorneys' fees' contract cases" (App. Br. at 22), later in their brief Appellants state that "[t]he District Court correctly laid out the factors to be considered in determining reasonable attorneys' fees." *Id.* at 32 (emphasis added). Regardless, this Court has confirmed that the lodestar analysis applies to a contractual attorneys' fees claim. *See River Ridge Dairy, L.L.P. v. Hammers Constr. Co.*, No. C1-02-2, 2002 WL 31057405, at *3 (Minn. Ct. App. Sept. 11, 2002) (RA63-65).

In applying the lodestar method to determine UPB's attorneys' fees, the district court made the following findings:

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.

74) That the Court has reviewed UPB's claimed attorneys' fees and expenses incurred in collecting amounts due under the various notes in default and to protect and preserve the collateral securing Defendants' repayment obligations to UPB.

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 difficulty and complicated issues raised in the instant case, (4) the customary fees charged for similar legal services, (5) the large amount of monies due on the defaulted notes, (6) and the experience, reputation, and ability of the 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 ¶¶ 73-75. In order to sustain their burden on appeal, Appellants must establish that the district court's findings regarding UPB's attorneys' fees were "palpably and manifestly contrary to the evidence." *Samuelson*, 446 N.W.2d at 430. Appellants cannot do so.

The trial record contains exhaustive, un rebutted evidence to support the district court's findings concerning UPB's attorneys' fees in this lawsuit and the Meadowland Lawsuit. First, Exhibit 145 consists of copies of all invoices from UPB's attorneys, which provide specific detail of the tasks performed by UPB's attorneys, the identity of the attorneys who performed services for UPB, the amount of time spent by the attorneys on each task and the attorneys' billing rates and corresponding fees charged by UPB's attorneys. Exhibit 167 provides, in summary form, a break-down of discrete subject matter issues and/or tasks that UPB's attorneys performed in this lawsuit and the Meadowland Lawsuit.

Second, Joe Roach and Frank Brosseau gave detailed testimony at trial that (1) all of UPB's legal fees were incurred to collect the amounts due and owing under the Notes and to protect and preserve UPB's interest in the collateral and Real Property (Tr. at 355-56); (2) the legal fees were charged to the outstanding balances due under each of the Notes, on a pro rata basis (Tr. at 143-44, 355); (3) the matters were appropriately staffed by UPB's attorneys and that UPB was not assessed with duplicative charges of legal fees (Tr. at 358 and 435-36); and (4) the rates charged by UPB's attorneys were commensurate with other law firms in the Twin Cities⁷ (Tr. at 322-24).

⁷ In fact, Judge James Rosenbaum recently determined that in the Twin Cities market, the reasonable hourly rate for a partner is \$500, which is well below the rates charged by UPB's attorneys here. See *In re UnitedHealth Group Incorporated PSLRA Litig.*, --- F.3d ---, 2009 WL 2482029, at *11 (D. Minn. Aug. 11, 2009) (RA66-74).

None of these exhibits or testimony were rebutted at trial. Appellants contest the district court's findings by arguing that "[t]hey vigorously disputed the claim that the fees were incurred to collect amounts due." App. Br. at 27. Yet Appellants' brief is conspicuously devoid of citations to any exhibits or testimony to support their alleged "vigorous" defense. Nor do Appellants provide any evidentiary support for their speculative assessment that it should have taken "[p]erhaps 30 hours" to resolve this lawsuit. *Id.* at 28. The reason is simple. There is no such evidence; Appellants did not contest any of UPB's testimony or exhibits at trial.

It is well-settled law that a reviewing court "generally may consider only those issues that the record shows were presented to and considered by the trial court." *Toth v. Arason*, 722 N.W.2d 437, 443 (Minn. 2006) (quoting *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 673 (Minn. 2001) and citing *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988)). "Nor may a party obtain review by raising the same general issue litigated below but under a different theory." *Thiele*, 425 N.W.2d at 582; *accord*, *Johnson v. Jensen*, 446 N.W.2d 664, 665 (Minn. 1989) ("[a]s a general rule, litigants are bound on appeal by the theory or theories, however erroneous or improvident upon which the case was actually tried"). Appellants' failure to contest this issue below waives any contrary argument on appeal.

B. FAILED ARGUMENT NO. 2: The District Court Correctly Determined That UPB Was Entitled to Recover Its Attorneys' Fees Incurred in the Meadowland Lawsuit

Appellants challenge the district court's award of attorneys' fees incurred by UPB in the Meadowland Lawsuit. *See* App. Br. at 24-25. Appellants argue that the district

court's attorneys' fee award was improper under the Notes because Appellants were not in default at the time Meadowland sued. *Id.* Appellants' argument is erroneous for at least two reasons.

First, Appellants never challenged at trial the attorneys' fees incurred by UPB in the Meadowland Lawsuit. Indeed, Appellants' brief does not contain citations to any testimony, exhibits or briefs to show that it raised the issue before the district court. Appellants' failure to raise this argument below is fatal. *See Toth*, 722 N.W.2d at 444; *Thiele*, 425 N.W.2d at 582.

Second, Appellants' reliance on the Notes is misplaced. Whether Appellants were in default under the Notes at the time of the Meadowland Lawsuit is immaterial because the operative agreements are three Security Agreements and Mortgage executed by Appellants. *See Exs. 4, 5, 8 and 10.* These agreements authorize UPB's recovery of attorneys' fees incurred to protect and preserve the collateral and Real Property. *Id.* Meadowland sought to unwind the Canby Bank buy-out transactions, which included the hogs, machinery and equipment and Real Property in which UPB had a security interest. UPB was forced to defend against the claims to protect and preserve its security interests. Thus, the district court correctly concluded that UPB was entitled to recover its attorneys' fees incurred in defending the Meadowland Lawsuit.

C. **FAILED ARGUMENT NO. 3: The District Court Correctly Determined That UPB's Success in This Lawsuit Warranted Recovery of Attorneys' Fees**

Appellants' third failed argument is that UPB was unsuccessful in many aspects of its litigation against Appellants and, therefore, the district court erred in awarding attorneys' fees under the Loan Documents.⁸ *See* App. Br. at 27-31.

Contrary to Appellants' argument, there is absolutely no case law in Minnesota that a party may recover attorneys' fees only for specific issues, matters or motions which are ultimately successful. Courts do not conduct an issue-by-issue or motion-by-motion analysis; rather "[t]he results obtained in the litigation are relevant to a determination of the ultimate fee award." *Musicland Group, Inc. v. Ceridian Corp.*, 508 N.W.2d 524, 535 (Minn. Ct. App. 1993) (emphasis added) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 430 (1983); *Specialized Tours, Inc. v. Hagen*, 392 N.W.2d 520, 541 (Minn. 1986)). Attorneys' fees expended on specific issues or matters that are unsuccessful are nonetheless recoverable if the litigation as a whole was successful and if the unsuccessful matters were interrelated and based on the same set of facts. *See Musicland*, 508 N.W.2d at 535; *Specialized Tours, Inc.*, 392 N.W.2d at 541; *Reome v Gottlieb*, 361 N.W.2d 75, 78-79 (Minn. Ct. App. 1985), *review denied* (Minn. July 11, 1985); *see also Ryther v. KARE 11*, 864 F. Supp. 1525, 1532-33 (D. Minn. 1994) (holding plaintiff could recover for unsuccessful reprisal claim, in part because of common core of facts).

⁸ Appellants' argument that UPB lost in nearly all aspects of this case is particularly curious given that it was Appellants, not UPB, that chose to appeal the district court's decision.

Here, Appellants did not dispute that all of the legal fees awarded to UPB were the result of UPB's litigation efforts to collect the outstanding amounts owed under the Loan Documents and Contract for Deed, and to protect and preserve UPB's interest in the personal property and real estate collateral. And UPB was ultimately successful on all of its primary claims.⁹ The district court determined that UPB was entitled to: (1) a damage award for Appellants' breaches and (2) recovery of the Real Property via foreclosure of the Contract for Deed. The district court also dismissed all of Appellants' counterclaims.¹⁰

Moreover, if this Court chooses to re-examine specific issues relating to discovery and motion practice in this lawsuit, UPB was successful on virtually all accounts. UPB twice obtained the dismissal of all of Appellants' counterclaims on summary judgment and twice defeated Appellants' efforts to assert a punitive damages claim. UPB successfully obtained a temporary restraining order and preliminary injunction. UPB also successfully obtained a replevin order, successfully enforced the replevin order and successfully resisted Appellants' efforts to have the replevin order overturned. UPB's three motions regarding the deposit of rent deposited into the Court for the 2006, 2007 and 2008 crop years were also successful. Finally, Appellants' statement that UPB's

⁹ As set forth above, the district court did determine that the Contract for Deed constituted an equitable mortgage, and precluded UPB from recovering any attorneys' fees incurred in litigating that issue. UPB removed those legal fees from the contract for deed/equitable mortgage balance. *See* RA17-25.

¹⁰ All of UPB's legal fees incurred to defend against Appellants' counterclaims are recoverable. *See Boone*, 2009 WL 2461736, at *1.

efforts have been unsuccessful because Appellants was willing to settle with UPB by "proffer[ing] a check for \$525,000 in payment of their obligations to UPB" (App. Br. at 26-27), is not only factually unsupported, but it was expressly rejected by the district court at trial. *See* Tr. at 364-65.

Because UPB was ultimately successful in obtaining the relief it sought – *i.e.*, an award of the outstanding balances due and owing under the Loan Documents and recovery of the Real Property by foreclosure of the Contract for Deed – the district court properly determined that UPB was entitled to recover all of its legal fees.

D. FAILED ARGUMENT NO. 4: The District Court Properly Determined That UPB Was Entitled to Recover Attorneys' Fees Incurred in Mediation With Appellants

Appellants' fourth argument is that the district court should not have awarded UPB its attorneys' fees incurred in numerous mediation efforts. *See* App. Br. at 31-32. This argument should be rejected out of hand because Appellants did not raise it below. *See Toth*, 722 N.W.2d at 444; *Thiele*, 425 N.W.2d at 582. Regardless, UPB'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 are recoverable.

E. FAILED ARGUMENT NO. 5: The District Court Properly Determined That the Hourly Rates For UPB's Attorneys Were Reasonable

Appellants provide no legal support for their final argument that UPB is not entitled to recover attorneys' fees that exceed the hourly rates charged by attorneys in

Cottonwood County. Nor does any support exist. The reasonableness of attorneys' fees is not a function of geography. It is determined by an examination of "all relevant circumstances." *Milner v. Farmers Ins. Exchange*, 748 N.W.2d 608, 621 (Minn. 2008). The district court correctly determined that the relevant circumstances here support UPB's attorneys' fees request.

This case involved complicated factual and legal issues concerning the refinancing of the Haugens' and Haugen Feeds' debts to Canby Bank and Prudential, the Sahli transactions, the Notes, Security Agreements, Mortgage and Guarantees executed by the Haugens and HNE, and the Contract for Deed and related issues. More than \$1 million and ownership of 240 acres of farmland was at stake. UPB was free to retain counsel of its choice, and Appellants did not and cannot dispute, the skill, experience, reputation and ability of UPB's counsel in handling this case. Mr. O'Leary's testimony regarding his \$150 hourly rate does not evidence that UPB's attorneys' hourly rates are uncustomary or unreasonable. In fact, the rates charged by UPB's attorneys were below the \$500 hourly rates affirmed by Judge James Rosenbaum in Minnesota federal district court. *See In re UnitedHealth Group Incorporated PSLRA Litig.*, 2009 WL 2482029, at *11. And Appellants' initial retention of Faegre & Benson constitutes an acknowledgement that Twin Cities law firm rates are reasonable. Therefore, the district court's attorneys' fee award should be affirmed.

IV. APPELLANTS WERE GIVEN CREDIT FOR THE PAYMENTS WITHDRAWN FROM THEIR ACCOUNT

Appellants' third alleged error on appeal is that the district court did not provide Appellants with credit for certain withdrawals made by Devine. App. Br. at 35-39. This argument is legally and factually erroneous.

First, Appellants' brief does not identify or provide any explanation of what specific cause of action exists with respect to the withdrawal of funds from HNE's bank account. Instead, Appellants merely provide a page-long quotation from a 75-year-old case, *People's State Bank of Jordan v. Ruppert*, 249 N.W. 325 (Minn. 1933), to argue that "the underlying facts alleged in the complaint and by Mr. Haugen in his previous affidavits does give rise to several causes of action." App. Br. at 36.

But *Ruppert* does not support any legal claim. That case merely addressed a bank's attempt to foreclose a mortgage given by a partnership. There, the partnership tendered funds to a bank employee (who was also a partner in the partnership) to be applied to the outstanding mortgage balance. *See Ruppert*, 249 N.W. at 326. Instead of doing so, the bank employee misappropriated funds and used them to pay overdraft charges on his own bank account. *Id.* In defending against the foreclosure action, the partnership claimed that the funds were misappropriated and should have been applied to the mortgage balance. *Id.* The court did not find that the bank had committed any tort or other wrongful action by virtue of its employee's misappropriation of funds. Instead, the court merely held that the bank was deemed to have knowledge of its employee's actions

and, therefore, the money given to the bank employee should be applied to the outstanding mortgage balance. *Id.* at 326-27.

Here, it is undisputed that HNE did not object within the 60-day period mandated by the checking account terms and conditions (Ex. 32), thus waiving its right to challenge the withdrawals. *See Stowell v. Cloquet Co-op Credit Union*, 557 N.W.2d 567, 573-74 (Minn. 1997); *Brunswick Corp. v. Northwestern Nat'l Bank & Trust Co.*, 8 N.W.2d 333, 334-36 (Minn. 1943). Indeed, in a January 4, 2005 letter to UPB's counsel, O'Leary stated that "Mr. Haugen did not complain about [the payments to Sahli] because it was part of the 'agreement' between Mr. Sahli and the bank which was made apparently for the benefit of Mr. Haugen to get him refinanced." Ex. 92.

Second, Appellants' allegation that "the bank did not credit the amount seized against the Haugen loans or the contract for deed/equitable mortgage payments" (App. Br. at 37) is absolutely wrong. Each of the withdrawals was applied to Appellants' outstanding obligations. The \$8,800 payment to Sahli on May 27, 2003 represented the profit Sahli received on the purchase and sale of the Haugen Feeds assets, which was acknowledged 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. Ex. 147.

Because HNE failed to timely object to the withdrawals and, regardless, the withdrawals were properly applied to Appellants' obligations, neither the Haugens have

any legally cognizable claim against UPB.¹¹ The district court's decision should be affirmed.

V. THE DISTRICT COURT CORRECTLY DETERMINED THAT UPB WAS ENTITLED TO THE \$175,000 IN "RENT" DEPOSITED WITH THE COURT BY DARREN HAUGEN

Appellants' fourth and final alleged error is that UPB should not be entitled to recover the \$175,000 in rent on deposit with the district court. *See* App. Br. at 39-42. Appellants misleadingly suggest that the deposit was a mere supersedeas bond. *Id.* at 39-40. This is directly contrary to the uncontroverted record evidence.

On April 27, 2006, this Court issued a Writ of Recovery granting UPB possession of the Real Property unless HNE posted a \$75,000 bond to cover rents, costs and other damages due to UPB by reason of Appellants' refusal to relinquish possession of the Real Property for the 2006 crop season. (Order, dated April 27, 2006.) At UPB's request, on March 28, 2007, this Court increased the required deposit by \$40,000 "in order to protect [UPB] . . . if Defendants chose not to release the Property to [UPB] or to again farm the premises or rent same for crops usage." (Order, dated March 28, 2007.) On August 28,

¹¹ Appellants' citation of *Williamson v. Prasciunas*, 661 N.W.2d 645 (Minn. Ct. App. 2003), which involves a punitive damages claim in a conversion case, is inapposite. First, because Appellants cannot assert a conversion claim against UPB as a matter of law, they cannot seek punitive damages against UPB based on non-existent conversion claim. *See Jacobs v. Farmland Mut. Ins. Co.*, 377 N.W.2d 441, 446 (Minn. 1985); *Covey v. Detroit Lakes Printing Co.*, 490 N.W.2d 138, 144 (Minn. Ct. App. 1992). Second, because Appellants did not appeal the district court's denial of their motion for leave to amend to assert a claim for punitive damages within 60 days of entry of final judgment, this Court lacks jurisdiction to consider the argument. *See Township of Honner v. Redwood County*, 518 N.W.2d 639, 641 (Minn. Ct. App. 1994); Minn. R. Civ. App. P. 104.01, subd. 1 and 126.02.

2008, the Court issued an Order that HNE "shall deposit in certified funds the sum of \$60,000.00 with the Court Administrator of Cottonwood County regarding land value usage or crop value as additional security for the 2008 crop year." (Order, dated August 28, 2008.)

Darren Haugen, who was renting the Real Property from HNE in 2006, 2007 and 2008, paid the amounts as ordered by the district court and remained in possession of the Real Property for those years. (Tr. at 296-97.) He unequivocally confirmed at trial that he paid the \$175,000 into the Court for 2006, 2007 for 2008 and that all the money he deposited constituted rent for use of the Real Property:

Q. Now, there have been three different orders in this case respecting the rent for 2006, 2007 and 2008, 75,000, 40,000 and 60,000; does that sound about right?

A. I think so.

Q. And you have paid all of that money into the court?

A. Yes.

Q. Okay. Did you pay that money as the renter of the land?

A. Yes.

Q. And so that money constitutes rent, correct?

A. Correct.

(Tr. at 296-97 (emphasis added).) Appellants did not challenge Darren Haugen's testimony at trial, nor did they submit any other evidence to contradict this testimony. Appellants are bound by this testimony and cannot contest it for the first time on appeal. *See Toth*, 722 N.W.2d at 444; *Thiele*, 425 N.W.2d at 582.

The Security Agreements grant to UPB a "priority security interest in all of the Property described in th[e] Agreement that [Appellants] owns or has sufficient rights in which to transfer an interest. . . ." Exs. 5, 8 and 10. The Security Agreements further grant UPB a security interest in "[a]ll rights to payment, whether or not earned by performance, including, but not limited to, payment for property or services sold, leased, rented, licensed, or assigned" and "[a]ll deposit accounts including, but not limited to, demand, time, savings, passbook, and similar accounts." *Id.* Thus, UPB has a valid, perfected security interest in all rents for the Real Property.

Because UPB holds fee title to the Real Property by virtue of the Sahli warranty deed in lieu of foreclosure, UPB is entitled to all payments of rent made by Darren Haugen to farm the Real Property during the 2006, 2007 and 2008 crop years. Additionally, by virtue of the valid, perfected security interest held by UPB in all rents for the Real Property, UPB is legally entitled to the \$175,000 held by the district court as rent payments for the 2006, 2007 and 2008 crop years. The district court's decision was correct and should be affirmed.

CONCLUSION

Appellants have failed to raise any factual or legal issue requiring reversal of the district court's judgment. Accordingly, Appellants' appeal should be denied and the judgment should be affirmed.

DATED: September 21, 2009

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Respondent certifies that this Opening Brief and Addendum complies with the requirements of Minn. R. App. P. 132.01 in that it is printed in a 13-point, proportionately spaced typeface utilizing Microsoft Word 2003 and contains 13,271 words, excluding the Table of Contents, Table of Authorities, and Appendix.

DATED: September 21, 2009



Charles B. Rogers (#130588)

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