

IN THE SUPREME COURT
STATE OF NORTH DAKOTASupreme Court Case No.'s 20140354 & 20140357
Cass County District Court No.'s 09-2013-CV-00502 & 09-2013-CV-00505

Prairie Supply, Inc.,

Plaintiff/Appellant,

v.

Apple Electric, Inc. and
Justin Neidviecky,

Defendants/Appellees.

REPLY BRIEF OF PLAINTIFF/APPELLANT

**Appeal from the District Court's Memorandum, Findings of Fact, Conclusions
of Law and Order for Judgment dated July 14, 2014, and Judgment dated
September 22, 2014**

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INTRODUCTION

[¶1] Tellingly, Appellees' main argument in response to this appeal is procedural. Rather than address the merits, Appellees confusingly attempt to limit the scope of this appeal by arguing that Prairie Supply's appeal is somehow limited to issues raised in post-trial motions. This procedural argument should be summarily rejected. The central issue before this Court is whether the District Court erred in determining the rights and liabilities of the parties with respect to the transactions at issue. More specifically, whether the District Court erred in determining the transactions at issue were sales and not leases; whether the District Court erred in determining Prairie Supply had no right to repossess the property at issue; and whether the District Court erred in awarding damages based upon a "conversion" theory, when it was undisputed that title to the property had not passed to the Appellees. Axiomatically, the law applicable to these issues includes the Uniform Commercial Code provisions applicable to such transactions, and this Court's precedents regarding the law of conversion. These issues were fully preserved below--prior to, during and following the trial--and are therefore fully reviewable by this Court.

A. Appellees' Citations Are Inapposite

[¶2] In Meier v. Meier, cited by Apple Electric in support of its contention that Prairie Supply is limited to the issues raised in its post-trial motions on appeal, this Court held that when an order on a motion for a new trial is not challenged on appeal, that order cannot then be raised later during the appeal process. 2014 ND 127, ¶ 5, 848 N.W.2d 253; see also State ex rel. North Dakota Dep't of Labor v. Riemers, 2008 ND 191, ¶ 14, 757 N.W.2d 50, overruled on other grounds by Burgard v. Burgard, 2013 ND 27, 827 N.W.2d 1, Dvorak v. Dvorak, 2007 ND 79, ¶¶ 9-10, 732 N.W.2d 698. David Meier, the

appellant, had moved for a new trial based on newly discovered evidence following the trial court's issuance of an amended divorce judgment. Id. at ¶ 4. Meier's motion was denied and his appeal followed, with his notice of appeal stating Meier appealed from the amended judgment. Id. at ¶ 5. This Court concluded that "[c]onsequently, David Meier cannot challenge in this appeal the district court's denial of his motion for a new trial." Id.

[¶3] Here, Prairie Supply has appealed from the District Court's Memorandum, Findings of Fact, Conclusions of Law and Order for Judgment dated July 14, 2014, and Judgment dated September 22, 2014. App. at 114. To be sure, Prairie Supply made post-trial Motions to Amend Findings, Make Additional Findings, or in the Alternative, for a New Trial. Appellee Br. ¶ 10; App. at 100. But unlike Meier, these motions did not allege newly discovered evidence; rather they raised issues Prairie Supply had raised prior to, during trial and in its closing brief/argument. The denial of these motions was not specifically referenced in Prairie Supply's Notice of Appeal because it did not need to be. Effectively, these were motions for reconsideration. Issues raised therein had already been raised and preserved for appeal.

[¶4] The other cases relied upon by Apple Electric are equally inapposite. In both Minto Grain, LLC v. Tibert, 2009 ND 213, ¶ 14, 776 N.W.2d 549 and State v. Zajac, 2009 ND 119, ¶ 7, 767 N.W.2d 825, the appellants appealed from the order denying their motion for a new trial. In addition, the issues both appellants sought to have heard on appeal that were not included in their motion for new trial were procedural and did not go to the merits of the case. In Minto, the appellants sought to include issues on appeal regarding evidentiary rulings as well as the juror misconduct allegation in its motion for a new trial. In Zajac the appellant sought to include issues regarding jury instructions on claims not

originally discussed in its motion for new trial, which referred only to the jury instruction on duress. Unlike both Minto and Zajac, the issues Prairie Supply has raised in its appeal are based on the merits of the case and are not procedural.

[¶5] “One of the guidelines for raising an issue on appeal is that the issue was adequately raised in the lower court.” In Interest of A.G., 506 N.W.2d 402, 403 (N.D. 1993). The reasoning behind this guideline is simple: This Court has stated, “[i]ssues or contentions not adequately developed and presented at trial are not properly before this Court. The purpose of an appeal is to review the actions of the trial court, not to grant the appellant the opportunity to develop new theories of the case.” Hansen v. Winkowitsch, 463 N.W.2d 645, 646 (N.D. 1990) (citations omitted). All of the issues raised by Prairie Supply in its appeal were raised below and are properly now before this Court. Note that this Court has held that raising an issue in a post-trial brief, which the trial court considered before issuing its order, preserves the issue for appellate review. Matter of Estate of Luken, 551 N.W.2d 794, 799 (N.D. 1996). Such was the case here.

[¶6] Prairie Supply argued in its pretrial brief, at trial, in its post-trial brief and post-trial motion that the agreements were leases, and that Prairie Supply could not have converted its own property when it repossessed the heaters. The applicable UCC provisions and law of conversion are obviously inextricably intertwined with, and controlling of, these issues. Prairie Supply adequately presented all of the issues on appeal to the district court.

CONCLUSION

[¶7] The district court’s Memorandum, Findings of Fact, Conclusions of Law and Order for Judgment should be reversed, and the case remanded.

Dated this 6th day of March, 2015.

/s/ Ann E. Miller

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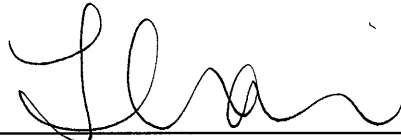
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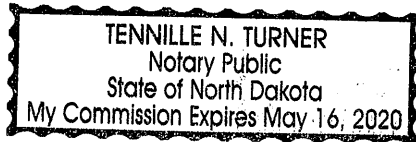


Liza A. Gion

Subscribed and sworn to before me this 6th day of March, 2015.



Notary Public



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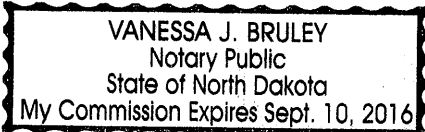
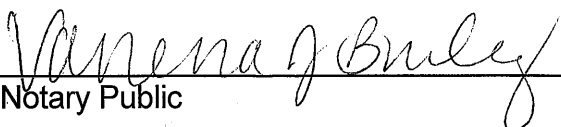
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Liza A. Gion

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