**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A22-0202**

International Fluid Power, Inc.,
Respondent,

vs.

Holb-Gunther, LLC, d/b/a Sea-Legs,
Appellant.

**Filed December 27, 2022**
**Affirmed in part, reversed in part, and remanded**
**Bryan, Judge**

Hennepin County District Court
File No. 27-CV-17-17625

Sarah E. Bushnell, Jeffrey M. Markowitz, Harrison E. Berg. Arthur, Chapman, Kettering, Smetak & Pikala, P.A., Minneapolis, Minnesota (for respondent)

Ryan R. Dreyer, Jeffrey R. Underhill, Morrison Sund PLLC, Minnetonka, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Larkin, Judge; and Bryan, Judge.

**NONPRECEDENTIAL OPINION**

**BRYAN**, Judge

In this contract dispute, appellant challenges the district court's grant of summary judgment to respondent, the district court's decision to award attorney fees to respondent without a jury trial, and the district court's decision not to require respondent to tender

goods to appellant.[1] Because we conclude there are no genuine issues of material fact, we affirm the district court's decision to grant summary judgment. However, we reverse the decisions awarding attorney fees and not requiring delivery of goods and remand the case to the district court.

## FACTS

Appellant Holb-Gunther LLC d/b/a Sea-Legs (Sea-Legs) manufactures and sells hydraulic lift systems for pontoon boats. Respondent International Fluid Power Inc. (IFP) sells hydraulic products, including power unit assemblies, cylinders, and related components used in those lift systems. IFP had been selling hydraulic products to Sea-Legs for over a decade when Sea-Legs refused to pay for goods received and repudiated outstanding purchase orders. In November 2017, IFP sued Sea-Legs for breach of contract under Article II of the Uniform Commercial Code (UCC), Minn. Stat. §§ 336.2-101–336.2-725 (2022). IFP moved for summary judgment in March 2018. Given the issues on appeal, we first address the factual background and the district court's summary judgment decision before discussing the decision to award attorney fees and to not require Sea-Legs to deliver the remaining goods to IFP. The following facts are undisputed (unless otherwise noted) and taken from the summary judgment filings, including affidavits from the owner of IFP (Al Sawczuk) and the president of Sea-Legs (John Holb).

[1] Respondent filed a notice of related appeal on February 14, 2022, raising several other issues, but this court concluded in its March 1, 2022 order that "respondent's NORA does not create a cross-appeal" and observed that respondent could address these arguments in its brief. Because respondent did not do so, we need not address these arguments.

### A. The Parties' Commercial Relationship and Summary Judgment

The business relationship between Sea-Legs and IFP began in 2004 when the two parties started discussing the hydraulic components needed for Sea-Legs' lifts. In June 2004, Sea-Legs accepted IFP's proposal for the development and manufacturing of a hydraulic pump system, referred to by a specific product number: IFP #2003049 (the 2004 agreement). The agreement stated that the "IFP #2003049 pump system is considered proprietary to Sea-Legs, Inc. through the duration of our agreement, and would not be sold to anyone other than Sea-Legs, Inc. unless proper authorization is given in writing from Sea-Legs, Inc." Sea-Legs accepted IFP's proposal, and over the next several years, the parties worked together to develop a functional hydraulic pump system, redesigning the system over time.

During their ensuing business relationship from 2006 to 2016, IFP sold various hydraulic products to Sea-Legs. These products were different from the original "IFP #2003049 pump system" and had different product numbers. For example, 2008 and 2009 invoices referred to a "2007007rev1 Sea Legs standard power unit assembly." Typically, IFP would offer Sea-Legs pricing proposals for a particular product, referred to by name and product number, and Sea-Legs would accept via written purchase orders. IFP would then deliver the products and invoice Sea-Legs. Between December 2014 and October 2016, Sea-Legs placed purchase orders with IFP for cylinders, power unit assemblies, and other component parts. The purchase orders included cylinders that manufacturer Best Metal produced. None of the 2014-16 purchase orders involved the "IFP #2003049 pump

system." The claims in this lawsuit focus on the 2014-16 purchase orders and the products subject to those orders.

IFP's 2015 pricing proposal, which applies to all of the purchase orders at issue on appeal, states: "All items . . . are non-cancellable. All transactions subject to [IFP] Standard Terms, Conditions, and Warranty." Under the heading, Standard Terms, Conditions, and Warranty (the terms and conditions), the proposal states that all accounts thirty days past due will be charged 18% annual interest and that if an account must be placed with an attorney for collection, the buyer will be responsible for reasonable attorney fees. The relevant Sea-Legs' purchase orders do not contain additional terms and conditions, and they incorporate the pricing proposal by reference. None of the proposals, purchase orders, or invoices reference confidentiality, proprietary information, or exclusivity.

In 2016, Sea-Legs learned that another company, Northern Wholesale Supply Inc. (Northern) was selling a hydraulic lift product called "Ultra Legs." That August, Holb asked Sawczuk if he had heard of Northern or knew where they were getting their parts. Sawczuk replied that he had not heard of Northern and was not supplying them. In September 2016, Holb obtained Northern's brochure and, after reviewing it, believed that Ultra Legs were "almost identical to the design Sea-Legs developed." Holb again asked Sawczuk about Northern and this time Sawczuk admitted that IFP was supplying them. Sea-Legs' sales decreased after IFP began supplying Northern.

In October 2016, Sea-Legs emailed IFP a document containing "Purchase Order Terms and Conditions" for contracts with IFP. Holb's affidavit described this as an

"attempt[] to confirm in writing its confidentiality with IFP;" Sawczuk described it as an attempt "to impose a noncompetition on IFP." The emailed terms included a paragraph titled "Confidential Information, Non-compete, Severability," which would bar IFP from disclosing any specifications or designs to any third party and from "sell[ing] the parts ordered by [Sea-Legs] on this Order to any customers operating a similar Business as [Sea-Legs]." Sawczuk responded:

> Unfortunately, this is the first I have ever seen of your document. [IFP] has never agreed to these terms and conditions, nor has any officer of this company ever signed anything indicating that the company would agree to these terms. And the company never would sign or agree to them. Among other things, we would never agree to the non-compete paragraph. . . . While we value Sea Legs' business and would like to continue as one of your suppliers, we are unable to do this if your terms and conditions are a necessary stipulation for future orders.

Sawczuk emailed Sea-Legs a set of revised terms and conditions. A vice president of Sea-Legs answered: "It appears as though all of the non-compete language has been removed. Obviously not acceptable to Sea-Legs." Sawczuk reiterated that IFP would not agree to those terms. Holb responded on behalf of Sea-Legs, stating:

> At this time the main reason for this agreement is for the non-compete. Since you are not going to sign this document then let's move forward as we have in the past. Although, if Sea-Legs finds that you are manufacturing parts in the future to our direct competitor then we reserve the right to revisit the [Purchase Order] at that time.

In late 2016, Sea-Legs stopped paying for delivered goods and attempted to cancel purchase orders for undelivered goods. Based on this nonpayment and repudiation, IFP

sued Sea-Legs for breach of contract. During the litigation, the parties have disputed the uniqueness of the products that IFP sold to Sea-Legs. In his affidavit, Holb stated:

> Sea-Legs recently purchased a set of Ultra Legs and examined the products it uses. Through this review, I confirmed that the components IFP and Sea-Legs designed and developed are the same as the products IFP sells Northern for Ultra Legs, with only very slight exceptions. . . . Based on this review, it appears that almost all the parts IFP claims it 'specially manufactured for Sea-Legs could be sold to Northern, with the exception of the manifold.

Holb's statement was supported by two exhibits—a picture of Sea-Legs and Ultra Legs, and an email written to four other people (but not Holb) by the CEO of a pontoon dealer that sells Ultra Legs. The email expressed an opinion similar to Holb's—that "[f]actually there is no difference in product" between Sea-Legs and Ultra Legs, but "based on patent, the Ultra Legs . . . have improvements that Sea Legs do not." In response to Holb's affidavit, Sawczuk submitted a supplemental affidavit stating that IFP "cannot re-sell" various Sea-Legs parts to Northern and that various Sea-Legs and Northern parts were "not interchangeable."

As noted above, IFP moved for summary judgment, arguing the 2014-16 purchase orders were contracts and that Sea-Legs breached those contracts by failing to pay for goods received and by repudiating contracts for goods ordered. IFP sought damages equal to the following two items: (1) the full contract price plus interest for the goods that were delivered or for which IFP incurred production costs; and (2) lost profits plus interest for goods for which IFP did not incur costs. IFP also asserted that it was entitled to reasonable attorney fees under the terms and conditions in its pricing proposal. Sea-Legs responded

with several arguments, including two that are relevant on appeal: that (1) IFP materially breached the parties' contracts by selling identical products to Northern before Sea-Legs refused payment and repudiated outstanding purchase orders, and (2) IFP failed to mitigate its damages on the undelivered-goods contracts by not selling the undelivered goods to other buyers. Sea-Legs also argued that IFP was not entitled to attorney fees.

The district court issued an order granting IFP's summary judgment motion on July 19, 2018. First, the district court concluded that IFP did not breach the parties' contracts by selling products to Northern because there was no genuine question of fact that the 2004 agreement only applied to the IFP #2003049 pump system and there was no genuine question of fact that the 2014-16 contracts at issue did not include an exclusivity or confidentiality provision. Second, the district court concluded that IFP did not fail to mitigate its damages on the undelivered-goods contracts because there was no genuine question of fact that the products were "unique to Sea-Legs" and could not be resold. In reaching this conclusion, the district court excluded the portion of Holb's affidavit in which Hold expressed a belief that the products were interchangeable: "the email, the picture, and Holb's opinion . . . cannot be considered."

**B. Decision to Award Attorney Fees Without a Trial**

In its order granting summary judgment, the district court concluded that IFP was entitled to attorney fees, but the district court noted that "Sea-Legs is entitled to a jury trial to determine the amount of reasonable attorneys' fees if the parties do not otherwise stipulate to the amount or agree that the Court may determine the fees award in accordance with Minn. R. Civ. P. 54 and [Minn. R. Gen. Prac.] 119." At the district court's direction,

IFP filed a proposed order seeking $49,432.35 in attorney fees, costs, and disbursements. IFP also filed a subsequent motion under Minnesota Rule of General Practice 119, without first reaching an agreement with Sea-Legs. The motion was accompanied by a supporting declaration from one of IFP's attorneys which noted that IFP's counsel had emailed Sea-Legs' counsel asking if the parties could agree on a proposed order, and that Sea-Legs had not substantively responded. The motion did not identify a hearing date and a hearing was never scheduled. Sea-Legs did not submit a response to IFP's motion. On August 20, 2018—21 days after IFP's motion—the district court issued an order granting IFP's motion for attorney fees and directing entry of judgment for IFP (the August 2018 order).

The next day, Sea-Legs filed a motion under Minnesota Rule of Civil Procedure 60.02, asking the district court to "vacate the August 20, 2018 order awarding IFP Costs and Fees" because it was deprived of a jury trial on the amount of attorney fees. The district court stayed the entry of judgment pending a decision on Sea-Legs' rule 60.02 motion. In January 2019, the district court issued an order denying Sea-Legs' motion (the January 2019 order).[2] The district court reasoned that Sea-Legs had not satisfied the factors for relief under rule 60.02 established in *Finden v. Klaas*, 128 N.W.2d 748, 750 (Minn. 1964). The district court also stated that Sea-Legs waived its right to a jury trial by not timely requesting one or paying the jury fee by the deadline imposed in a prior scheduling order.[3]

[2] The district court entered judgment the next day, but the parties agreed to stay the enforcement of that judgment pending appeal.

[3] The scheduling order, issued on December 21, 2017, stated: "Any party seeking a jury trial must pay the required fee by July 17, 2018. Failure to pay the required jury fee in accordance with the terms of this Order may be deemed a waiver of any right to trial by

### C. Decision Not to Require Delivery of Remaining Goods

Later in January 2019, Sea-Legs filed a second motion for relief under rule 60.02, asking the district court to amend both the July 2018 summary judgment order and the August 2018 order directing entry of judgment. The motion was accompanied by supporting declarations from Holb and one of Sea-Legs' attorneys. Holb alleged that, during a recent mediation between the parties, IFP "took the position that it would not deliver [certain] goods at issue in this lawsuit to Sea-Legs even if Sea-Legs paid the judgment." These included goods for which the district court had awarded IFP the full contract price. In particular, Holb asserted that "during the mediation we were told that IFP could only deliver 400 cylinders of the 1,221 . . . as it had not yet ordered from its vendor or paid for the remaining 821 standard cylinders."

Sea-Legs requested that the district court amend its order "based on the surprise and newly discovered evidence that IFP would wrongfully take the position that it has no obligation to surrender the Parts to Sea-Legs upon Sea-Legs' remittance of payment." *See* Minn. R. Civ. P. 60.02(a)-(b) (allowing the district court to grant relief based on "surprise" or "[n]ewly discovered evidence"). Sea-Legs asked the district court "to specifically incorporate" Minnesota Statutes section 336.2-709(2) (2022) into the summary judgment order "and require IFP to hold all of the subject goods for Sea-Legs' benefit." Section 336.2-709(2) is a provision of the UCC that requires a seller to hold certain goods for the buyer if the seller sues for the price of the goods.

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jury in this action and will result in trial before the court." (Emphasis omitted). Sea-Legs paid the jury fee on August 23, 2018, two days after it filed its rule 60.02 motion.

IFP opposed Sea-Legs' motion. In doing so, IFP objected to Sea-Legs' disclosure of information from the parties' mediation. IFP also submitted a supporting declaration from Sawczuk noting that 821 cylinders had not yet been manufactured and explaining that the purchase order for parts from Best Metal could not be canceled:

> Best Metal has informed me (and [Holb]) that it will not cancel the IFP November 6, 2018 purchase order, because Best Metal had already purchased the unique components necessary to make the cylinders. However, in light of our long time and positive business relationship, Best Metal has agreed to hold off on collecting the $82,100 that IFP owes on the purchase order until IFP is able to collect from Sea-Legs.
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> . . . .
>
> Based on conversations with . . . Best Metal, IFP believes that if Best Metal was required to produce the remaining cylinders now, Best Metal may charge IFP more to cover increased production expenses.

The parties agree that IFP cannot cancel its order for the cylinders and that Best Metal has the unique parts necessary to make the cylinders.

Following a hearing, in May 2019, the district court issued a written order denying Sea-Legs' rule 60.02 motion but modifying its July 2018 summary judgment order. The district court reasoned that "bringing this dispute on the grounds of 'surprise' or 'newly discovered evidence' needlessly complicates the issue and does not appear to be a proper use of Minn. R. Civ. P. 60.02." Nonetheless, "[i]n determining the actual issue at hand, the Court [found] that [Minn. Stat. § 336.2-709(2)] applies to the execution of the judgment," and therefore "clarif[ied] that its previous orders require IFP to tender to Sea Legs—upon Sea Legs 'payment of the judgment amount—the goods . . . that are still under

IFP's control." The district court further determined that, because IFP did not have control over the 821 cylinders that Best Metal had yet to manufacture, section 336.2-709(2) did not apply to these cylinders. The district court did not address IFP's objection to the consideration of mediation statements to support Sea-Legs' motion.

In July 2018, after the district court's grant of summary judgment but before Sea-Legs' two rule 60.02 motions, Sea-Legs sued IFP in a separate action asserting several claims, including misappropriation of trade secrets. Based on the parties' stipulation, the cases were consolidated in November 2018.[4] The consolidated case eventually proceeded to a six-day jury trial on Sea-Legs' trade secret claim beginning in July 2021.[5] The jury found that Sea-Legs' claimed trade secrets were already generally known and that Sea-Legs did not make reasonable efforts to maintain their secrecy, and the district court entered judgment for IFP in January 2022. This appeal follows from that judgment, although none of the issues from Sea-Legs' trade-secret claim are disputed on appeal.

## DECISION

On appeal, Sea-Legs challenges the decision to grant summary judgment, arguing that the summary judgment record contained a genuine issue of fact regarding whether IFP

[4] In 2019, Sea-Legs appealed the 2018 and 2019 orders, but this court dismissed the appeal as premature. *Int'l Fluid Power, Inc. v. Holb-Gunther, LLC*, No. A19-1063 (Minn. App. Aug. 13, 2019) (order) ("Where actions are consolidated by the district court's order, a judgment which does not finally determine the entire consolidated action . . . is not appealable." (citing *Krmpotich v. City of Duluth*, 449 N.W.2d 507, 509 (Minn. App. 1990)).

[5] In its brief to this court, Sea-Legs occasionally references evidence from the 2021 trial. That evidence, however, is beyond the scope of our review of the 2018 summary judgment order. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

breached the parties' contract. Sea-Legs also challenges the district court's decision to award IFP attorney fees without a jury trial, arguing that the district court erred in determining that Sea-Legs' failure to timely demand a jury trial and failure to timely pay the jury fee amounted to a waiver of its right to a jury trial. Finally, Sea-Legs challenges the district court's decision not to require IFP to tender the cylinders not yet manufactured by Best Metal, arguing that this decision conflicts with the UCC. We affirm the summary judgment decision, reverse the award of attorney fees and the decision to not require delivery of goods, and we remand the case to the district court.

## I. Challenge to the Decision Granting Summary Judgment

Sea-Legs argues that a genuine fact dispute remains regarding whether IFP breached the parties' contract when it sold products to Northern. We do not agree that the record contains any genuine issue of material fact and affirm the summary judgment decision.

Summary judgment is appropriate "if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01. A genuine issue of material fact exists "when reasonable persons might draw different conclusions from the evidence presented." *Montemayor v. Sebright Prod., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017). "We review the grant of summary judgment de novo to determine whether there are genuine issues of material fact and whether the district court erred in its application of the law." *Id.* (quotation omitted). "In conducting this review, we view the evidence in the light most favorable to the nonmoving party . . . and resolve all doubts and factual inferences against the moving part[y]." *Fenrich v. Blake Sch.*, 920 N.W.2d 195, 201 (Minn. 2018) (quotation omitted).

"Under general contract law, a party who first breaches a contract is usually precluded from successfully claiming against the other party." *Carlson Real Est. Co. v. Soltan*, 549 N.W.2d 376, 379 (Minn. App. 1996), *rev. denied* Aug. 20, 1996. The first party's breach must be material to excuse the other party's performance. *TC/Am. Monorail, Inc. v. Custom Conveyor Corp.*, 822 N.W.2d 812, 817 (Minn. App. 2012), *rev'd on other grounds*, 840 N.W.2d 414 (Minn. 2013). "A material breach is a breach of contract that is significant enough to permit the aggrieved party to elect to treat the breach as total." *BOB Acres, LLC v. Schumacher Farms, LLC*, 797 N.W.2d 723, 728 (Minn. App. 2011) (quotation omitted).

Sea-Legs argues that the record contains a question of fact regarding whether IFP breached the parties' confidentiality and exclusivity agreement and that IFP's breach could excuse Sea-Legs' subsequent breach of the 2014-16 contracts. We are not persuaded, however, because the parties had no confidentiality and exclusivity agreement. The 2014-16 contracts lacked written language regarding confidentiality or exclusivity. Sea-Legs acknowledges this but argues that a contractual confidentiality and exclusivity term was part of the parties' course of dealing because the original 2004 agreement contained such a provision. Minn. Stat. § 336.2-202(a) (permitting a written contract under the UCC to be "explained or supplemented" by evidence of the parties' "course of performance, course of dealing, or usage of trade"). Sea-Legs' argument is unavailing because two undisputed facts leave no remaining questions of fact regarding whether IFP breached the contract before Sea-Legs did. First, Sea-Legs does not dispute that the original 2004 agreement

explicitly references a specific product, number: IFP #2003049. The 2014-16 purchase orders at issue in this lawsuit, however, concern other products, not IFP #2003049.

Second, Sea-Legs does not dispute that, after Sea-Legs sent IFP a proposed written confidentiality and exclusivity agreement in 2016, IFP expressly refused to accept the agreement. Sawczuk emailed Holb and stated that IFP "has never agreed to these terms and conditions . . . [and] we would never agree to the non-compete paragraph. . . . [W]e are unable to do this if your terms and conditions are a necessary stipulation for future orders." In response, Holb proposed that the parties continue their commercial relationship in the absence of a confidentiality or exclusivity agreement: "Since you are not going to sign this document then let's move forward as we have in the past." In light of this exchange, there is no genuine issue of material fact regarding whether IFP impliedly accepted an unwritten confidentiality or exclusivity agreement through its course of dealing. Thus, IFP did not breach the parties' agreement by selling products to Northern, and the district court did not err by rejecting this defense.[6]

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[6] Sea-Legs also argues that a genuine issue of material fact exists regarding mitigation of damages. *See* Minn. Stat. § 336.2-709 (allowing a seller to recover the contract price of goods "if the seller is unable after reasonable effort to resell them . . . or . . . such effort will be unavailing"). The only evidence Sea-Legs relies on for this argument, however, was excluded by the district court, a decision we review for an abuse of discretion, *Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 164 (Minn. 2012). The district court concluded that the evidence in question—a portion of Holb's affidavit and supporting exhibits regarding whether the IFP could resell the products—was inadmissible because it was not based on Holb's personal knowledge and constituted hearsay. Minn. R. Civ. P. 56.05 (stating that declarations supporting summary judgment pleadings "shall be made on personal knowledge" and "shall set forth such facts as would be admissible in evidence"); *Blackwell v. Eckman*, 410 N.W.2d 390, 391 (Minn. App. 1987) ("It is well settled [that] hearsay is inadmissible evidence and must be disregarded on a motion for summary judgment"). We agree that the portion of the Holb affidavit was not based on personal

## II. Challenge to the Decision Awarding Attorney Fees without a Jury Trial

Sea-Legs argues that the district court erred by awarding attorney fees without a jury trial because Sea-Legs did not waive its right to a jury trial. We agree with Sea-Legs, reverse the award of attorney fees, and remand for further proceedings on this issue.[7]

A party has the right to a jury trial on a claim for contract-based attorney fees. *United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equip., LLC*, 813 N.W.2d 49, 63 (Minn. 2012). A party may waive a jury trial in a contract action by "(a) failing to appear at the trial; (b) written consent . . .; or (c) oral consent in open court." Minn. R. Civ. P. 38.02. Whether a party has a right to jury trial or can waive this right are questions of law that we review de novo. *United Prairie Bank-Mountain Lake*, 813 N.W.2d at 63; *Abraham v. County of Hennepin*, 639 N.W.2d 342, 348 (Minn. 2002).

IFP argues that Sea-Legs waived its right to a jury trial for two reasons: (1) it did not timely demand a jury trial; and (2) it did not pay the jury fee by the deadline in the scheduling order. We acknowledge that at one point, a party could implicitly waive a jury

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knowledge and the attached exhibits in question contained inadmissible hearsay. Thus, we discern no abuse of discretion in the district court's decision to exclude this evidence.

[7] The parties do not agree whether the appeal concerns the original August 2018 order awarding attorney fees or the January 2019 order denying Sea-Legs' first rule 60.02 motion to vacate the August 2018 order. "As a general rule, an order denying a motion to vacate a final judgment is not appealable," and "[t]he proper appeal . . . is from the underlying judgment itself." *Carlson v. Panuska*, 555 N.W.2d 745, 746 (Minn. 1996). In this case, due to the parties' ongoing trade-secret dispute, the actual final judgment in this consolidated case did not occur until January 2022. Sea-Legs moved to vacate the August 2018 order and appealed the denial of this motion, but it also appealed directly from the final judgment. Pursuant to *Carlson*, because the district court's August 2018 order is directly reviewable by Sea-Legs' appeal from the January 2022 final judgment, we review that order and do not address whether the district court abused its discretion when it applied the *Finden* factors and denied Sea-Legs' first rule 60.02 motion.

trial "by failing to demand one and failing to pay the requisite jury fee." *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 728-29 (Minn. 1990).[8] However, rule 38.02 was amended, and the rule now states that "[n]either the failure to file any document requesting a jury trial nor the failure to pay a jury fee shall be deemed a waiver of the right to a jury trial." Minn. R. Civ. P. 38.02. Indeed, the comments to the 1993 amendment note that the amendment "should obviate any confusion or inadvertent waiver of the constitutionally protected right to a jury trial," citing *Schweich*. Based on the plain language of the amended rule 38.02, Sea-Legs' failures to make a timely demand and timely pay the fee cannot, by themselves, be deemed a waiver of its right to a jury trial.[9]

## III. Challenge to the Decision Not to Require Delivery of Remaining Goods

Sea-Legs argues that pursuant to the plain meaning of the UCC, the district court should have required IFP to tender the 821 unmanufactured Best Metal cylinders. We agree, reverse the decision not to require delivery of the unmanufactured cylinders, and remand for the district court to enter judgment consistent with section 336.2-709(2),

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[8] IFP relies on two other precedential cases: *Parsons Elec. Co. v. Vill. of Watertown*, 169 N.W.2d 20, 23 (1969) and *301 Clifton Place L.L.C. v. 301 Clifton Place Condo. Ass'n*, 783 N.W.2d 551, 562 (Minn. App. 2010). Neither case impacts our application of the current rule. Like *Schweich*, *Parsons* also predates the 1993 rule amendment, and the appellants in *Clifton* allegedly stipulated to a court trial off the record, participated in a court trial without objection, and did not assert their right to a jury trial until "after the district court issued its findings/conclusions/order deciding the case." *Clifton*, 783 N.W.2d at 562.

[9] To the extent that portions of IFP's brief could be construed as arguing that, apart from failing to timely demand a jury trial and pay the jury fee, Sea-Legs unequivocally conducted itself in such a way as to impliedly waive its right to a jury trial right, we are not convinced. The additional conduct described in IFP's brief falls short of an unequivocal waiver. Likewise, to the extent that IFP argues that Sea-Legs forfeited appellate review of the district court's decision to award attorney fees without a jury trial, we disagree because Sea-Legs raised the issue before the district court prior to appealing the attorney fees award.

requiring IFP to tender all products in its control for which it was awarded the contract price.[10]

Under Minn. Stat. § 336.2-709(2), when a seller sues for the contract price of goods, "the seller must hold for the buyer any goods which have been identified to the contract and are still in the seller's control" unless the seller resells the goods and credits the proceeds to the buyer. Here, on summary judgment, the district court awarded IFP the contract price of the cylinders, and subsequently modified the summary judgment decision to require IFP to tender all of the goods from its noncancelable contracts and non-resalable inventory except for the 821 cylinders that Best Metal had not yet produced. The parties disagree whether the UCC requires IFP to tender the remaining 821 cylinders. "The interpretation and application of the UCC is a legal question that we review de novo." *Vermillion State Bank v. Tennis Sanitation, LLC*, 969 N.W.2d 610, 620 (Minn. 2022); *see also Montemayor*, 898 N.W.2d at 628 (noting that appellate courts review de novo a district court's application of law in a summary judgment decision).

Sea-Legs contends that UCC remedies must be administered so that "the aggrieved party may be put in as good a position as if the other party had fully performed," avoiding

[10] As a threshold matter, we note that the district court's July 2018 summary judgment order did not expressly require IFP to tender goods to Sea-Legs. When Sea-Legs moved to amend that order in its second rule 60.02 motion, the district court modified the July 2018 summary judgment decision. IFP argues that we are reviewing the denial of Sea-Legs' rule 60.02 motion for an abuse of discretion and that we must apply the *Finden* factors. However, because the district court's May 2019 order modified the summary judgment decision, and because the summary judgment decision is within the scope of review on appeal from final judgment, pursuant to *Carlson*, 555 N.W.2d at 746, the *Finden* factors do not apply to our review of the modified summary judgment decision.

any consequential, special, or penal damages. Minn. Stat. § 336.1-305(a) (2022). Sea-Legs argues IFP will obtain a windfall: IFP will receive the contract price from Sea-Legs as well as the cylinders themselves. In response, IFP argues that the unmanufactured cylinders are not "in the seller's control" because although its contract with Best Metal cannot be canceled, Best Metal might increase the price to manufacture these cylinders.[11]

We conclude that IFP remains in control of the 821 unmanufactured cylinders because the uncertainty in the ultimate cost to manufacture the 821 cylinders does not relate to control, but to damages. The parties do not dispute the fact IFP cannot cancel its contract with Best Metal or that Best Metal has the unique parts needed to manufacture the cylinders. We also note that the district court awarded IFP the full contract price for all of the cylinders ordered, including the 821 unmanufactured cylinders, plus an additional 18% annual interest. The district court also granted IFP's request for damages specifically relating to lost profits. Should IFP incur additional costs or additional profit losses, nothing in this opinion would preclude IFP from requesting a modification to the judgment based on new evidence. For these reasons, we reverse the district court's decision and remand for the district court to modify the July 2018 summary judgment order consistent with this opinion and section 336.2-709(2).

**Affirmed in part, reversed in part, and remanded.**

[11] The parties do not argue that the statute is unambiguous, and they do not dispute the meaning of "control" or any other aspect of section 336.2-709(2). Given the arguments presented to us, we need not engage in statutory interpretation and apply the plain meaning of the words used in the relevant statutory provisions. *Shire v. Rosemount, Inc.*, 875 N.W.2d 289, 292 (Minn. 2016).