

A05-1328

State of Minnesota
In Court of Appeals

Brian K. Thompson and Sara M. Thompson
Appellant,

original

vs.

Stuart's Towing and Repair and First State Bank of Fertile
Respondents.

Trial Court Case No.: A05-1328

APPELLANT'S BRIEF

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STATE OF MINNESOTA)
) ss.
COUNTY OF POLK)

AFFIDAVIT OF SERVICE BY MAIL
Appeal Case No.: A05-0754
Trial Court Case: C6-04-432

The undersigned, being first duly sworn, deposes and states that 2 copies of:

Appellant's Brief and Appendix

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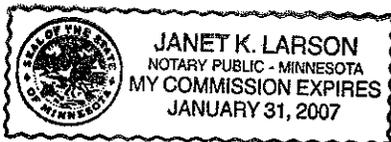
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STATEMENT OF LEGAL ISSUES

- I. The District Court incorrectly held that there were no genuine issues of material fact as to whether Stuart Minske breached the peace when he repossessed the Appellants' property while on private property.**

The district court held that there were no material facts supporting the Appellants' claim that Stuart Minske breached the peace when he entered the Appellants' private property to repossess the Appellants' vehicle.

1. Wallace v. Chrysler Corp., 743 F. Supp. 1228, 1233 (W.D.Va. 1990)
2. James v. Ford Motor Credit Co., 842 F. Supp. 1202 (D. Minn. 1994)
3. Clairin v. Northwest Bank of Minnesota, No. 97-2003 (D. Minn. March 9, 1999)(Lexis, 20844)
4. Bloomquist v. First Nat'l Bank, 378 N.W.2d 81 (Minn. App. 1985)

- II. The District Court incorrectly held that the attorney client privilege had been waived by the Appellants.**

The District Court found that the Appellants waived their attorney client privilege when they allowed their former attorney to testify on their behalf regarding conversations that were spoken in the presence of and for the purpose of communicating to third parties.

1. Brown v. St. Paul City Ry. Co., 62 N.W.2d 588, 700 (Minn. 1954)
2. United States v. (Under Seal), 748 F.2d 871 (4th Cir. 1984)
3. Unites States v. Spector, 793 F.2d 932, 938 (8th Cir. 1986)
4. Minn. Stat. Ann. §595.02(1b)

- III. The District Court incorrectly held that the Appellants are liable for the notes remaining due on the repossessed property.**

The District Court found that the Appellants were liable for the remaining sum due on the notes of the repossessed vehicle because the District Court found that the vehicle was repossessed without breach of the peace. If it had been done with a breach of the peace, the repossession would have been wrongful.

1. Nichols v. Metropolitan Bank, 435 N.W.2d 637 (Minn. App. 1989)
2. Bloomquist V. First Nat'l Bank, 378 N.W.2d 81 (Minn. App. 1985)
3. Larson v. Archer-Daniels-Midland Co., 32 N.W.2d 649 (1948)
4. Cobb v. Midwest Recovery Bureau Co., 256 N.W.2d 142 (1934)

STATEMENT OF THE CASE

Summary judgment motions were heard by the Honorable Dennis J. Murphy, Judge of District Court, 9th Judicial District, Polk County, Minnesota. (February 3, 2005). Summary Judgment was granted to Defendants, First State Bank of Fertile and Stuart's Towing and Repair in an Order by the Court dated February 15, 2005.

Appellants commenced this action against Respondents, First State Bank of Fertile and Stuart's Towing and Repair alleging that Stuart's Towing and Repair breached the peace when Stuart Minske unlawfully entered the Appellants' private property to repossess their vehicle as an agent of First State Bank, and making First State Bank of Fertile also liable for this breach of the peace since repossession without breach of peace is a non-delegable duty. The Appellants allege that the District Court erred when it found that there were no genuine issues of material fact on this matter.

Additionally, Appellants allege that the District Court erred when it found that Appellant, Brian Thompson, waived attorney client privilege by asking a former attorney to testify to the contents of a conversation that transpired in the presence of a third party.

Appellants also allege that because the repossession transpired while Stuart Minske was breaching the peace, the repossession was wrongful. As a result of the wrongful repossession, the Appellants allege that the First State Bank of Fertile converted their property when they sold the repossessed vehicle to a third party, making the Defendant, First State Bank of Fertile liable for the conversion. The Appellants allege, therefore, that they are not liable for any remaining amounts owed on a note for the converted property.

STATEMENT OF FACTS

On or about February 18th, 2004, Defendant Stuart Minske of Stuart's Towing and Repair acting on behalf of Defendant First State Bank of Fertile attempted to repossess the Plaintiffs', Mr. Brian K. Thompson and Mrs. Sarah M. Thompson, 1995 Chevy Tahoe. Mr. Minske entered upon the Plaintiffs' private property in Crookston, Minnesota by backing his tow truck onto the Plaintiffs' lawn to bring his vehicle next to the Tahoe which was parked beside the back of the Plaintiffs' house. Stuart Minske then began to repossess the Chevy Tahoe and while in the process of repossessing the vehicle Minske stopped and knocked on the door to the Plaintiffs' residence. Plaintiff Brian Thompson answered the door whereupon Minske informed Thompson that he would be

repossessing the Tahoe. Mr. Thompson asked Minske to wait in the entry of the porch while he called Defendant First State Bank of Fertile. Mr. Thompson called First State Bank of Fertile and discovered that his loan officer was not available and was on vacation. Next, Mr. Thompson called attorney James Fischer. Mr. Fischer and his son, Trent, had represented Mr. Thompson in other legal matters in the past and Mr. Fischer advised Mr. Thompson to request that Minske stop the repossession. Mr. Fisher told Brian Thompson to tell Mr. Minske to leave the premises and to leave the vehicle. Mr. Minske, who moved from the porch to the kitchen, was now inside the Thompson residence at this time without permission looked around and saw some keys that he believed might be for the vehicle, he took the keys to the Tahoe from where they were hanging on the wall and removed the Tahoe from the Thompson's' property despite Brian's refusal to grant him permission to do so. During the time that Minske was in the kitchen doorway, Thompson's 6-year old daughter came into the kitchen, Minske told the 6-year old girl to "get the fuck out of the way". (Affidavit of Brian Thompson, AA24 - AA26) Brian Thompson had respectfully asked Minske to leave his premises and to leave the Tahoe.

It is not disputed that Minske had attached the towing equipment to the Tahoe and had raised the rear wheels of the Tahoe with the hydraulic lift. It was after this had been accomplished that he went to the house to get the keys to the vehicle. It is undisputed that the tow truck and the Tahoe remained on private property while all of the events occurred.

ARGUMENT

SCOPE AND STANDARD OF REVIEW

On appeal from summary judgment, there are two questions that the Appellate court must ask: “(1) whether there are any genuine issues of material fact and (2) whether the lower courts erred in their application of the law.” State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990).

The Minnesota Supreme Court has characterized summary judgment as a “blunt instrument” to be employed “only where it is perfectly clear that no issue of fact is involved.” Nord v. Herreid, 305 N.W.2d 337, 339 (Minn. 1981) (citations omitted). A motion for summary judgment should be granted only if a reasonable person could not reach different conclusions after reviewing the evidence and only if there is no genuine issue of material fact. Celotex v. Catrett, 477 U.S. 317 (1986). Summary judgment is only appropriate where there can be only one reasonable conclusion to the dispute. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). Summary judgment is not appropriate, “if reasonable persons could differ as to the conclusions to be drawn from the evidence.” Bevan v. Honeywell, Inc., 118 F.3d 603, 613 (8th Cir. 1997). In ruling on summary judgment, the court must view the evidence in a light most favorable to the non-movant as well as draw all reasonable inferences in the non-movant’s favor. United State v. Diebold, Inc., 369 U.S. 654, 655 (1962); Wall v. Fairview Hospital and Healthcare Services, 584 N.W.2d 385 (Minn. 1998).

In Rogers v. Allis-Chalmers Credit Corp., when faced with a summary judgment motion regarding breach of the peace, the United States Court of Appeals for the 8th Circuit stated,

In the instant case, we are not prepared to say that the evidence was insufficient to establish a question that the repossession amounted to a breach of the peace...the repossession required entry onto private property...[W]e believe the issue whether repossession in these circumstances constituted a breach of the peace was properly submitted to and considered by the jury.

679 F.2d 138, 141 (8th Cir. 1982).

In other words, the issue of whether or not private property was entered and was a breach of the peace was a jury issue, not a matter of law for the Court to decide.

I. REPOSSESSION AND BREACH OF THE PEACE

A. WHETHER THE REPOSSESSION WAS COMPLETE BEFORE STUART MINSKE ENTERED THE PLAINTIFF'S HOME IS IMMATERIAL BECAUSE THE REPOSSESSION ENTIRELY TRANSPIRED ON PRIVATE PROPERTY.

The District Court awarded summary judgment on the issue of breach of the peace primarily on precedent that suggested that as long as the repossessing agent had "sufficient dominion over collateral to control it, the repossession has been completed." Wallace v. Chrysler Corp., 743 F.Supp. 1228, 1233 (W.D.Va. 1990) quoting James v. Ford Motor Credit Co., 842 F. Supp. 1202, 1209 (D. Minn. 4th Div. 1994). The court found that since the repossession had been completed, there could not be a breach of the peace regarding subsequent acts by the repossession agent.

However, a 1999 Minnesota case, Clarín v. Northwest Bank of Minnesota, has interpreted the James court's decision and the Bloomquist court's decision in order to clarify the often blurred and confusing lines regarding repossession and breach of the peace to find a standard that would best follow the intentions that the legislature had when they enacted this law. No. 97-2003 (D. Minn. March 9, 1999) (LEXIS, 20844). (AA319 - AA333).

Bloomquist limits the doctrine of breach of peace by operation of law to those attempts at self-help repossession where the creditor enters the debtor's private residence or business property in the face of the revocation of consent to repossession....James found that **'such a limitation would be consistent with the law's aversion to trespass'**....The public/private distinction set forth in James and recognized in White & Summers is not insignificant, as **the unauthorized entry onto private property constitutes the underlying offense of trespass**. Bloomquist cites with approval Ohio precedent defining breach of the peace as: 'a violation of the public order, a disturbance of public tranquility, by an act or conduct inciting to violence or tending to provoke or excite others to breach the peace [including] any violation of any law enacted to preserved peace and good order'....Interpreting the above definition in light of the facts in Bloomquist, this Court finds that Bloomquist stands for the proposition that **absent violence or the threat of violence, the commission of an underlying offense during repossession, such as trespass, which violates a law 'enacted to preserved peace and good order,' suffices to constitute a breach of the peace**. This court finds implicit support for this interpretation both in Bloomquist and in the majority of the cases cited therein, **in which the repossessions at issue, though not involving violence or threat of violence, occurred through the commission of an underlying offense and was thus found to constitute a breach of the peace.**"

Id. at 14 - 17. (emphasis added). Even the James v. Ford Motor Credit Co. case, cited repeatedly by the District Court and the Defendants, embraces the legislative purpose behind breach of the peace decisions that favor the debtor. “The basis of favoring debtors over creditors in these circumstances appears to be ‘the law’s historical...aversion to trespass.’” 842 F.Supp. 1202, 1208 (D. Minn. 1994) (citing Bloomquist v. First Nat’l Bank, 378 N.W.2d 81, 85 (Minn. App. 1985)).

It is undisputed from the facts of the present case that Stuart Minske entered the Thompson’s’ private property to repossess their vehicle. (AA24 - AA26; AA295 - AA299; AA291- AA293). His tow truck was entirely on private property when he attached and lifted the Tahoe’s tires off of the ground. (AA291 - AA293). In actuality, the vehicle that was being repossessed was parked beside the Plaintiffs’ home, on the Plaintiffs’ lawn or private property and was never, in effect, parked on a driveway or public land. In effect, throughout the entire repossession Stuart Minske was on private property and trespassing. “Any unauthorized entry upon the premises of another is a trespass.” Whittaker v. Stangvick, 111 N.W.295 (Minn. 1907).

The Clarín court, synthesizing the Bloomquist opinion, the James opinion, and the intention of the legislature when creating a law such as “breach of the peace”, found that even in the absence of violence or threat of violence, if an underlying offense such as trespass transpires during the repossession process,

the act of trespass constitutes a breach of the peace. Therefore, as soon as Stuart Minske entered the Plaintiffs' private property to repossess, he was trespassing and violating and underlying law that was designed to keep peace. He was breaching the peace as a matter of law.

B. THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER STUART MINSKE BREACHED THE PEACE WHEN HE DISRUPTED THE PLAINTIFFS' HOME WHILE THE VEHICLE'S REPOSSESSION WAS IN PROGRESS.

Even if this court should find that a breach of the peace cannot transpire after repossession is complete, there would still remain a genuine issue of material fact as to whether Stuart Minske completed repossession before he breached the peace.

In James v. Ford Motor Credit Co., the court found that there was no breach of the peace because the repossession had been completed and the court found that once the repossession agent gained sufficient dominion over the vehicle to control it, the repossession was completed. 842 F.Supp. 1202, 1209 (D. Minn. 1994). However, the James court is distinguishable from the Plaintiffs' case in a several ways. In the James case, the Defendants did not repossess the car from the Plaintiff's private property but removed the car from a public parking lot. In the James case, the repossession agent had driven the repossessed car around town for an hour before the Plaintiffs protested to the repossession. In the instant case, both the tow truck and the Plaintiffs' vehicle were still on private property and had not been moved when Stuart Minske

decided to knock on the Plaintiffs' door. At the very least, there is a genuine issue of material fact as to whether Stuart Minske had enough dominion and control over the Plaintiffs' vehicle in order to assert that the repossession was complete before he breached the peace. What constitutes sufficient dominion and control has not been specifically defined by courts thus far.

The James court recognized that there is no breach of peace so long as the debtor does not object to the repossession while it is in process. Id. at 1208. (citing Manhattan Credit Co. v. Brewer, 341 S.W.2d 765 (1961)). The District Court, as part of its reasoning as to why there was no breach of the peace throughout this repossession in the present case, suggested that the Plaintiffs did not protest or object to the repossession. "At no time did the Plaintiff state that he asked Defendant to leave his house during this period." (AA-308-315). "It is reasonable to believe that if Defendant had engaged in [breach of the peace] that Plaintiff would have asked him to leave his house....In addition, Plaintiff at no point asked him to leave." (AA308 - AA315). "Also, according to depositions by Plaintiff and Defendant, Plaintiff asked Defendant into the house and at no point asked him to leave." (AA308 - AA315). "Because Plaintiff asked Defendant into his house and at no point asked him to leave...." (AA308 - AA315). The facts cited by the Court are simply not correct. In Brian Thompson's deposition that was introduced to the court, he states that he **repeatedly** told Stuart Minske to leave his home and to leave the vehicle on his property.

Q: Did you ever tell him not to come into the home?

A: Quite a few times.

Q: Was that after he was inside the home or before?

A: Both.

Q: So you invited him into the porch and you told him not to come in your house. And how many times did you tell him that?

A: **10, 15 times.**

Q: Why did you tell him so many times?

A: Because he came in on his own.

(AA295 - AA299) (emphasis added). Additionally, Brian Thompson's affidavit that was submitted to the court states, "[t]hat when I told the representative from Stuart's Towing and Repair **to get out of my home** he said that he didn't have to because the bank sent him to repossess my vehicle." (AA24 - AA26) (emphasis added). Brian Thompson's affidavit submitted to the court also states,

[t]hat the representative from Stuart's Towing and Repair was insulting and used profanity toward me, my wife, and my children while he was in my home....That the representative...searched through my kitchen looking for the keys to the vehicle despite being **told he was not allowed in my home, and that he was not allowed to take my vehicles.**

(AA24 - AA26) (emphasis added). Additionally, throughout the course of this interchange between the Brian Thompson and Stuart Minske, Brian Thompson was on the telephone with his lawyer, James Fischer. James Fischer's deposition confirms that Brian Thompson told Stuart Minske to leave his home, his private property, and to leave the vehicle in place.

Q: ...What did you hear Mr. Thompson say? Did he say to you, or did you hear him say to the repo man, you cannot come into my house?

A: Yes...Words to that effect.

Q: Okay. What do you remember? What words do you remember him saying?

A: I believe it was prefaced with something like I'm talking to my attorney and he says **you can't come into my house**....My recollection is Mr. Thompson made a statement to the repo man **that he did not have permission to come into his house**.

(AA27 - AA28).

Although the Bloomquist court states that repossession is not wrongful if the debtor, or one acting on his behalf, consents to the entry and repossession, there is a very substantial difference between consenting to let someone stand in the entryway of your home while you call the bank, to consenting to let someone enter your home entirely, walk from room to room, and rummage through your personal possessions. 378 N.W.2d 81 (Minn. App. 1985). As soon as Brian Thompson told Stuart Minske that he had to leave his home and Stuart Minske remained in the home searching for the set of keys, Stuart Minske was breaching the peace because whatever consent he had to stand, at a minimum, in the entryway of the home, had been revoked at that time. The District Court states that there could not have been a forcible entry on the part of the Defendant because the Plaintiff asked the Defendant into his home. (AA308 - AA315). Yet, the Bloomquist court specifically states that revocation of consent is grounds for breach of the peace. "Entering a debtor's property after consent is revoked constitutes a breach of the peace." Id. at 84.

Viewed in the light most favorable to the nonmoving party, at a minimum, there is a genuine issue of material fact as to whether Stuart Minske's actions

within the Plaintiffs' home throughout the repossession and after consent was revoked constitutes a breach of the peace. Minn. Stat. § 336.9-503 states, "In taking possession a secured party may proceed without judicial recourse if this can be done without breach of the peace." A breach of the peace includes engaging in brawling or fighting or engaging in offensive, obscene, abusive, boisterous, or noisy conduct or in offensive, obscene, or abusive language tending reasonably to arouse alarm, anger, or resentment in others. Minn. Stat. § 609.72 subd. 1. (West 2003).

The District Court states, "that if the Defendant had engaged in brawling or fighting or engaged in offensive, obscene, abusive boisterous, or noisy conduct or in offensive, obscene, or abusive language tending reasonably to arouse alarm or anger, or resentment in others, that the Plaintiff would have asked him to leave his house." (AA308 – AA315). It appears as though the District Court's conclusion, that there was no offensive conduct, is based on the theory that the Plaintiff never asked the Defendant to leave his premises. But as stated previously, both Brian Thompson's deposition and affidavit submitted to the court repeatedly state that he asked the Defendant to leave his home and to leave his vehicle on his property. Additionally, Brian Thompson's affidavit attests to the Defendant's obscene language and insulting behavior while within the Plaintiff's home. (AA24 – AA26). It is hard to discern how summary judgment can be appropriate when viewing the affidavits, facts of the case, depositions of parties involved, and cited case law. Clearly there is a genuine issue of material fact as

to what transpired within the Thompson home and whether those actions constituted a breach of the peace as the legislature intended it to be defined.

In Brinkman v. MidAmerica Bank and Minnesota Recovery Bureau, a Minnesota District Court stated, "At common law, 'the offense known as breach of the public peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others.'" No. 98-2396, 6 (D. Minn. Sept. 21, 1999) (LEXIS, 20845) (citing Bloomquist v. First Nat'l Bank of Elk River, 378 N.W.2d 81 (Minn. Ct. App. 1986)). (AA334 – AA345)The Brinkman court, which found a breach of the peace occurred when the repossession was done in a public parking lot, focused on the knowledge that a repossessing agent should have regarding how his behavior may menace the public order or tranquility. Id. Distinguishing those cases where the probability of confrontation was high from those where the probability of confrontation and thus a breach of the peace was not likely to happen, this court defined the scope of breach of the peace within the range of how high the risk may be of menacing the public order through the repossession agent's actions.

For example, in Ragde v. People's Bank...the court held that the repossession of an automobile from a debtor's driveway at 5 a.m. did not breach the peace, reasoning that 'at that hour, a confrontation with the debtor is likely avoided, and the debtor is not subjected to the humiliation of having his or her automobile repossessed from a public place'....Here, in contrast...Plaintiffs have also introduced evidence that [repossessing agent] realized that the Buick was packed with a number of

personal belongings that would have increased the stakes in the event of an encounter with plaintiffs. In short, a jury might properly find that [the repossessing agent's] decision to, in essence, snatch the car from under plaintiff's noses unreasonably risked provoking a violent response...this court believes that the circumstances of this repossession are, 'sufficiently distinct...that the jury should weigh the reasonableness of this [repossession] or whether the peace may have been breached by a real possibility of imminent violence.'

Brinkman at 9-10. (citations omitted).

The Brinkman court weighed reasonableness and risk so heavily as to make it possible for a breach of the peace to occur on a public parking lot merely because of the heightened risk of confrontation when a repossessing agent has knowledge that his or her behavior is likely to provoke a debtor. In the case before the court, surely it is a genuine issue of material fact as to whether Stuart Minske knew that his actions, purposefully confronting the Plaintiffs by knocking on their door, entering the Plaintiffs' home and walking throughout the rooms of a private home to search through the Plaintiffs' personal belongings, were likely or reasonably to cause the Plaintiffs undue provocation. repossession of a person's vehicle, in itself, is a situation where there may be heightened frustration or anger. A reasonable person under the circumstances would have been aware that entering someone's private property, hooking up their vehicle to a tow truck, knocking on their door to inform them that an agent is about to repossess their vehicle, entering their home, walking throughout the house, sifting through private possessions within the home, and disrupting someone's

family is well beyond the range of breaching the peace because of the reasonable likelihood that such actions would cause provocation. This type of behavior, throughout a repossession, flies in the face of the legislature's intention to offer creditors a self help remedy as long as the public peace and tranquility are not disturbed. It is specifically for this reason that the legislature favors debtors over creditors when we examine the law of breach of the peace and why breach of the peace is a non-delegable duty on the part of a creditor. When faced with retrieving their property by disrupting the peace and tranquility of the public or traversing other legal avenues to retrieve their property, they have a duty to choose the latter.

Viewed in the light most favorable to the nonmoving party, a breach of the peace occurred in this situation, and is not appropriate for summary judgment.

II. CONVERSATIONS THAT TRANSPIRE BETWEEN AN ATTORNEY AND A CLIENT IN THE PRESENCE OF A THIRD PARTY DO NOT INVOKE THE ATTORNEY CLIENT PRIVILEGE; THEREFORE, SUBSEQUENT ATTORNEY TESTIMONY ON BEHALF OF THE CLIENT REGARDING THIS CONVERSATION DOES NOT WAIVE ALL ATTORNEY CLIENT PRIVILEGES.

The trial court granted Defendants' summary judgment because it had found that once the attorney client privilege is waived and an attorney testifies on behalf of the client, the client is not allowed to again seize the shield of his privilege and shut out all testimony to communications between his attorney and himself. (AA308 – AA315) The Plaintiffs don't dispute that once the attorney client privilege is waived, the privilege cannot be reassumed for the benefit of the

Plaintiff. However, the Plaintiffs contend that in this instance, the attorney client privilege was never invoked because the conversation transpired in the presence of a third party. Therefore, if the attorney client privilege was never invoked, it could not later be waived through attorney testimony and the scope of all other attorney client communications is still protected under the privilege.

“The attorney client privilege adheres 1) where legal advice of any kind is sought 2) from a professional legal advisor in his capacity as such, 3) the communications related to that purpose, 4) made in confidence, 5) by that client, 6) are at his instance permanently protected 7) from disclosure by himself or by his legal advisor, 8) except where the protection is waived.” Brown v. St. Paul City Ry. Co., 62 N.W.2d 688, 700 (Minn. 1954).

In order to invoke the attorney/client privilege, a client must show that the communication was made to his representing attorney with the intention that it be confidential. Id. at 700. The rationale supporting the attorney/client privilege is upheld only if the parties have intended and have expected confidentiality throughout the course of their communications. US v. (Under Seal), 748 F.2d 871 (4th Cir. 1984).

If the communication was intended for the purpose of conveying information to third parties or for publication, then the attorney/client privilege has not been invoked. **Communications in the presence of third parties are ordinarily not considered confidential** unless the third party is an employee of the attorney or someone who is necessary to help communicate information

regarding the client to the attorney in the capacity of representation. In re: Bretto, 231 F. Supp. 529 (D.C. Minn. 1964) (emphasis added).

In this case, Brian Thompson telephoned his attorney, James Fischer, to seek legal advice regarding the repossession of his property. However, Thompson discussed this information in the presence of third parties. Not only was Sara Thompson present throughout the course of Brian Thompson's communications with Fischer, but Stuart Minske was also present while this communication was taking place. Stuart Minske was a third party who represented the bank that was repossessing Thompson's vehicle. Minske was certainly a third party who was not acting as a necessary individual under Minnesota law to make the communication that transpired in front of him confidential.

The determination of confidentiality turns on a client's reasonable expectations and intent as evidenced by the form of the communication as well as the circumstances and nature of the exchange. "Communication not intended to be disclosed to third persons outside the attorney-client transaction is considered confidential." US v. Spector, 793 F.2d 932, 938 (8th Cir. 1986). Consequentially, communication that is intended to be disclosed to third persons who are outside the scope of privileged communications would not be covered by the attorney/client privilege.

It is clear that Brian Thompson did not intend or expect that the conversation between James Fischer and himself would remain confidential.

The Supreme Court Standard 503(a)(4) states, 'A communication is *confidential* if not intended to be disclosed to 3rd persons'...the essence of the privilege is the protection of what was 'expressly made confidential' or should have been 'reasonably assume[d]...by the attorney as so intended.' In determining whether it was to be reasonably 'assumed that confidentiality was intended,' it is the unquestionable rule that the mere relationship of attorney/client does not warrant a presumption of confidentiality.... With this principle in mind, we held that if a client communicates information to his attorney with the understanding that the information will be revealed to others, that information...will not enjoy the privilege.

US v. (Under Seal), 748 NW 2d at 874, 875 (1984).

Clearly, a communication between an attorney and a client cannot be considered confidential if the client telephones his attorney for the specific purpose of seeking advice regarding what he should say at the present time to a third party regarding the client's rights; this is especially true if both the client and the attorney expect that the communication will be conveyed to a third party. When Brian Thompson called James Fischer to ask what he should tell Stuart Minske regarding the repossession of Brian Thompson's vehicle and James Fischer responded with advice intended to be communicated to Stuart Minske, a third party, then that communication, at that present moment, can hardly be considered confidential. If that communication is not confidential, then it does not invoke the attorney/client privilege. If the attorney/client privilege regarding this communication is not invoked, then it certainly cannot be waived by subsequent attorney testimony given on behalf of the client regarding that communication. A

client cannot waive his rights to a privileged communication when that communication was not intended to be confidential in the first place.

Minn. Stat. Ann. § 595.02(1b) states that a, "Client can waive attorney-client privilege either by explicit consent or by implication." In almost all instances, when an attorney testifies on behalf of the client regarding privileged communications, the attorney/client confidentiality is considered waived. However, this rule only pertains to the information that has already fallen under the attorney/client privilege. If a communication does not fall under the attorney/client privilege because it is not considered confidentially communicated in the first place, then logically it cannot be waived. And if the attorney/client privilege has not been waived then all communication between the attorney and the client that is not included within the scope of those third party communications is still protected by the attorney/client privilege. Thus, any other communications Brian Thompson made to his attorney privately and outside the presence of Stuart Minske remains confidential between the attorney and the client. James Fischer, as Brian Thompson's attorney, at any time during the course of his representation (other than the phone call noted above) must keep all other matters confidential unless Brian Thompson expressly waives the attorney/client privilege which he has not done throughout the entire course of these proceedings. (AA24 – AA26).

III. ANY AND ALL SIGNED NOTES OWING ON THE REPOSSESSION CLAIM ARE NOT APPROPRIATE MATTERS FOR SUMMARY JUDGMENT BECAUSE THE REPOSSESSION WAS DONE WHILE A

BREACH OF THE PEACE OCCURRED AND THEREFORE THE REPOSSESSION WAS WRONGFUL.

A secured party may repossess property without judicial process if this can be done without breaching the peace. Minn. Stat. § 336.9-503. When a secured party seeks a self help remedy to repossess collateral pursuant to Minn. Stat. § 336.9-503, the secured party has a non-delegable duty to ensure that repossession efforts do not breach the peace. Nichols v. Metropolitan Bank, 435 N.W.2d 637 (Minn. App. 1989). The creditor who is guilty of wrongful repossession has a duty to return the collateral in the same condition it was in when it was repossessed. Bloomquist v. First Nat'l Bank, 378 N.W.2d 81 (Minn. App. 1985).

In the case before the court, Brian K. Thompson and Sarah M. Thompson allege that the First State Bank of Fertile through Stuart's Towing and Repair wrongfully repossessed their Tahoe when Minske breached the peace while in the process of repossessing their vehicle. In the event that a repossession transpires and a breach of the peace occurs, repossession then becomes wrongful and the Bank had a duty to return the collateral (the Tahoe) in the same condition it was in when it was repossessed. When the bank did not return the vehicle to the Thompsons, the vehicle became converted property that rightfully belonged to the Thompsons. (The vehicle was later sold with no notice of the sale to the Thompsons.) (Affidavit of Brian Thompson). (AA24 – AA36).

Wrongfully refusing to deliver property upon demand by the owner constitutes conversion. McKinley v. Flaherty, 390 N.W.2d 31 (Minn. App. 1986). Conversion is an act of willful interference with chattel, done without lawful justification, by which any person entitled thereto is deprived of use and possession. Larson v. Archer-Daniels-Midland Co., 32 N.W.2d 649 (1948). "In order for there to be an act of conversion of personal property of another, there must be some exercise of the right of complete ownership and dominion over it, to the total exclusion of the rights of the owner...or in some way deprives the owner of it permanently or for an indefinite length of time." Bloomquist v. First Nat'l Bank, 378 N.W.2d 81 (Minn. App. 1985). In the case before the court, when the First State Bank of Fertile, acting through Stuart Minske, wrongfully repossessed the vehicle because Minske breached the peace by attempting repossession while entirely on the Plaintiffs' private property, the Defendants deprived the Thompsons of ownership and enjoyment of the vehicle for an indefinite length of time and in fact, permanently because of the subsequent sale of the vehicle. The measure of damages for willful conversion of personal property is the value of the property at the time and place plaintiff makes the demand. Mineral Resources, Inc. v. Mahnomen Construction Co., 184 N.W.2d 780 (1971). Brian K. Thompson and Sarah M. Thompson should not have to pay the First State Bank of Fertile any existing notes on the vehicle when it has yet to be determined what the value of the converted property was at the moment that it was wrongfully possessed.

Damages for wrongful repossession may include lost profits, loss of personal possessions, and repossession charges. Cobb v. Midwest Recovery Bureau Co., 295 N.W.2d 232 (Minn. 1980); See also Saunders v. Commercial Credit Trust, 256 N.W.2d 142 (1934).

When this court finds that First State Bank of Fertile breached the peace through its non-delegable duty to control the actions of Stuart Minske who attempted a repossession while trespassing on private property, then the court must also find that the First State Bank of Fertile wrongfully repossessed the Thompsons' vehicle. This wrongful repossession became a conversion when the Bank did not immediately return the vehicle to Brian K. Thompson and Sarah M. Thompson after the Thompsons repeatedly requested that Minske leave their property. (AA24 – AA26; AA295 – AA299). Because this repossession was wrongful, Brian K. Thompson and Sarah M. Thompson may be awarded the balance on the notes owed to the bank because Minnesota courts allow damages in the form of lost personal possessions, or in this case, the value of the vehicle that was taken from the Thompson home.

In addition, the purchase contract between the Thompsons and the First State Bank of Fertile includes a provision that, the bank acknowledged that in the event of a default on the loan and subsequent repossession of the vehicle, the bank would, "take immediate possession of the Property, but in doing so [they] would not breach the peace or unlawfully enter onto [Thompsons'] premises." (AA294)). Ronald D. Hanson, president of the First State Bank of Fertile has

stated that he is aware of this provision on the back of his contractual agreement with Brian K. Thompson and that he believes such documents to be, “a binding obligation between the banker and the [borrower].” (AA294).

The Clarín court has already determined that trespass onto private property constitutes a breach of the peace, “the repossessions at issue, though not involving violence or threat of violence, occurred through the commission of an underlying offense [trespass] and was thus found to constitute a breach of the peace.” Clarín at 16,17 (LEXIS, 20844, 1999). (AA319 – AA333). Since Minske was trespassing on private property when he attempted to repossess the Thompsons’ vehicle, he was committing an underlying offense, making that repossession a breach of the peace. The repossession was wrongful and the Thompsons should be awarded damage for conversion of this property.

This contractual promise or obligation between the First State Bank of Fertile and Brian Thompson creates a genuine issue of material fact as to whether the First State Bank of Fertile is allowed a remedy when they breached the peace through the actions of Minske. Viewed in the light most favorable to the non-movant, when the court has determined that the repossession was done while in breach of the peace, the court cannot allow First State Bank of Fertile to recover any unpaid loan related to this case.

CONCLUSION

The summary judgments should be reversed, breach of the peace should be found as a matter of law, and the case should be remanded for trial on the remaining claims.

DATED this 13 day of May, 2005

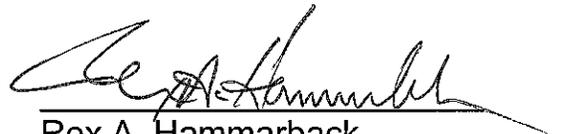
Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 132.01 (3), the undersigned hereby certifies that the brief of Appellant complies with the type-volume limitation. The word processing system used to prepare this brief is Microsoft word – 13 pt. The number of words in the brief is 6,893, including headings, quotations, table of contents, table of authorities, and statement of the case.


Rex A. Hammarback

STATE OF MINNESOTA)
) ss.
COUNTY OF POLK)

AFFIDAVIT OF SERVICE BY MAIL
Appeal Case No.: A05-0754
Trial Court Case: C6-04-432

The undersigned, being first duly sworn, deposes and states that 2 copies of:

Appellant's Brief and Appendix

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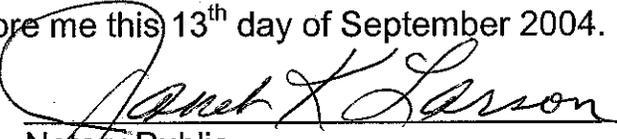
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Karen A. Wood

Subscribed and Sworn to before me this 13th day of September 2004.



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