

NO. A05-1328

State of Minnesota
In Court of Appeals

Brian K. Thompson and Sara M. Thompson
Appellant,

vs.

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

Trial Court Case No.: C6-04-432

APPELLANT'S REPLY BRIEF

HAMMARBACK, DUSEK &
ASSOCIATES, PLC
Rex A. Hammarback (#167514)
712 DeMers Avenue
P. O. Box 4
East Grand Forks, MN 56721
(218) 773-6841

Attorneys for Appellants
Brian K. Thompson and Sarah M. Thompson

RAYMOND J. GERMAN, LTD.
Raymond J. German (#34277)
208 Third Avenue NW
East Grand Forks, MN 56721
(218) 773-7575

Attorney for Respondent First
State Bank of Fertile

Gerard D. Neil (#134879)
418 Third Street NW
East Grand Forks, MN 56721
(218) 773 -0808

Attorneys for Respondent
Stuart's Towing and Repair

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Minn. R. Fed. Civ. Pro. 104.014

STATEMENT OF LEGAL ISSUES

I. Whether the Appellants failed to give proper notice of their appeal and whether the Appellants' appeal is time barred?

The Appellants properly gave their notice of appeal after the final judgment in the above action. The final judgment in the above action was date May 16, 2005 and therefore, the Appellants' appeal is not time barred.

Minn. R. Civ. App. P. 58.01

Minn. R. Civ. App. P. 104.01

In re Commodore Hotel Fire & Explosion Case, 318 N.W.2d 244, 246-47 (Minn. 1982).

II. Whether Summary Judgment was proper in this case?

Summary judgment was not proper in the above action because there is a genuine issue of material fact as to whether a breach of the peace transpired during the course of a repossession.

Clarín v. Northwest Bank of Minnesota, No. 97-2003 (D. Minn. March 9, 1999) (Lexis, 20844).

STATEMENT OF THE CASE

On February 16, 2005 the Honorable Judge Dennis Murphy granted summary judgment regarding a breach of the peace and wrongful repossession of the Appellants' vehicle, in above matter in favor of the Respondents, First State Bank of Fertile and Stuart's Towing and Repair. On April 13, 2005 the Appellants filed an initial Notice of Appeal with the Minnesota Court of Appeals regarding that summary judgment decision in the above action. (See Appellate Court Record) The Appellants served both Respondents with this Notice of Appeal. On May 10, 2005 the Minnesota Court of Appeals dismissed the Appellants' initial appeal on the grounds that the judgment which the Appellants were trying to appeal from was not an official final judgment docketed/entered with the District Court signed by the Court Administrator and that therefore the Appellants' Notice of Appeal was premature. (See Appellate Court Record) On March 15, 2005 the final judgment and order in the above matter was signed by the Honorable Judge Murphy and subsequently docketed or entered by the Polk County Court Administrator on May 16, 2005. (See Appellate Court Record) The Appellants in this case then filed a second certified Notice of Appeal with the Court of Appeals in the above matter including a copy of the official final order or judgment in the above action which was signed by the Honorable Judge Murphy and docketed or entered the Polk County

Court Administrator. (See Appellate Court Record) At the same time, the Appellants served both Respondents with the Appellants' Notice of Appeal.

STATEMENT OF FACTS

Stuart's Towing and Repair was hired by First State Bank of Fertile to repossess the Appellant's vehicle, a Chevy Tahoe. On February 18, 2004 the Appellants had their vehicle parked entirely on their lawn or yard as the vehicle was setting alongside their home. On that same day, February 18, 2004, Stuart Minske of Stuart's Towing and Repair, entered upon the Appellants' lawn by driving through the private drive located at the rear of the Appellants' home and backed his entire tow truck onto the Appellants' lawn or backyard in order to repossess the Appellants' vehicle. Stuart Minske's tow truck at that time was not parked in the private drive behind the Appellants' home but was entirely parked on the Appellant's lawn.

Stuart Minske then attached a towing apparatus to the Appellants' vehicle and lifted the vehicle off the ground. At this point, Stuart Minske did not drive off of the Appellants' property or move his tow truck. Stuart Minske then knocked on the Appellants' door. The Appellant, Brian Thompson, answered the door. Brian Thompson asked Stuart Minske to wait inside the entryway of his home while Brian called the First State Bank of Fertile. After Brian Thompson got off of the telephone with a First State Bank of Fertile Representative, Stuart Minske was present when Brian

Thompson called his lawyer, James Fischer. Brian Thompson told Stuart Minske that he was on the telephone with his lawyer. (See AA – 161, 162, 298). James Fischer advised Brian Thompson to tell Stuart Minske that he could not take the vehicle. Brian Thompson told Stuart Minske that he could not take the vehicle and that he could not be in his home.

ARGUMENT

I. Whether the Appellants failed to give proper notice of their appeal and whether the Appellants appeal is time barred?

After the Honorable Judge Dennis Murphy granted Summary Judgment in favor of the Respondents in the above action on February 16, 2005, the Appellants appealed to the Minnesota Court of Appeals. The Minnesota Court of Appeals dismissed the Appellants' initial appeal pursuant to Minn. R. Civ. P. 58.01 Because the Appellants provided the Court of Appeals with a copy of an order for summary judgment executed February 16, 2005 and not a copy of the resulting final judgment of the above action entered by the Polk County trial court administrator. The Court of Appeals initially indicated that because the February 16, 2005 order grants judgment to the Respondents, "but does not determine First State Bank's damages....[and] because the February order only partially adjudicates the Counterclaim, a judgment, if any, entered on February 15 pursuant to the order would not be final and appealable." (See Appellate Court Record).

Minn. R. Civ. App. P. 103.03(a) provides that an appeal may only be taken from a **final** judgment. (See Appellate Court Record) (emphasis added). Additionally, the Minnesota Court of Appeals in dismissing the Appellants' initial appeal indicated that a holding without a determination of damages is a partial adjudication of a claim which is not appealable (See Appellate Court Record) (Citing In re Commodore Hotel Fire & Explosion Case, 318 N.W.2d 244, 246-47(Minn. 1982)).

The Minnesota Court of Appeal's dismissal of the Appellants' initial appeal because it was premature indicates that the Appellants had to wait until the final disposition and damage assessment in the above action had been ordered in order to appeal the District Court's February 16, 2005 summary judgment decision. The Polk County court administrator signed the final judgment in the above action on May 16, 2005. On July 5, 2005, the Appellants filed a Notice of Appeal with the Court of Appeals in the above action as well as serving the Respondents with copies of the Appellants' Notice of Appeal.

Minn. R. Civ. App. Pro., Rule 104.01 states that, "an appeal may be taken from a judgment within 60 days after its entry." Since the Polk County Court Administrator entered the final judgment in the above matter on May 16, 2005 and since the Appellants filed their Notice of Appeal with the Minnesota Court of Appeals on June 5, 2005, the Appellants' appeal is not time barred because it falls within the 60 day time period allowable for

appealing a final judgment. Since the Respondents in the above action were served with the Appellants' Notice to Appeal on July 5, 2005, the Respondents were properly served within the time frame allowed by the Minn. R. Civ. App. Pro.

Respondents would like the Court of Appeals to believe that there are two final judgments in this matter and that the Appellants have appealed to the wrong one. This is not the case. There is only one **final** judgment regarding the above matter that the Appellants may appeal from and that is dated May 16, 2006. If this is not the case, then the Appellants initial April 13, 2005 Notice of Appeal would **not** have been dismissed by the Minnesota Court of Appeals as being premature.

The Minnesota Court of Appeals has already determined the issue as to when the Appellants may appeal the above final judgment in this matter. (See Appellate Court Record).

II. Whether Summary Judgment was proper in this case.

There are **several** genuine issues of material fact in the above action that the Respondents' have either failed to address, misconstrued, or omitted in their brief.

First, the District Court in granting summary judgment has failed to address whether Stuart Minske was trespassing on private property when he repossessed the Appellants' vehicle. The Respondents have both indicated that they believe Stuart Minske was parked on a public alley

when he lifted the Appellants' vehicle off of the ground. Stuart Minske's deposition, along with the attached hand drawn exhibit where Stuart Minske indicated that his truck was parked on the Thompsons' lawn when he attached it to their vehicle indicates that Stuart Minske was on private property when he repossessed the Appellants' vehicle. Additionally, Brian Thompson's deposition indicates that his vehicle was parked on his back lawn adjacent to his home when it was repossessed. This alone makes the above action inappropriate for summary judgment.

Additionally, the District Court has failed to address whether Stuart Minske breached the peace when he trespassed onto the Appellants' private property. Although the Respondents have attempted to distinguish the facts of case from the facts of the case in Clarín v. Northwest Bank of Minnesota, they do not adequately address the underlying principal that a Minnesota District Court has addressed in Clarín; that trespass is a breach of the peace. No. 97-2003 (D. Minn. March 9, 1999) (Lexis 20844). (See AA-319-333). In Clarín the Court took two leading Minnesota cases and addressed the thus far blurred and confusing law regarding repossession and breach of the peace in Minnesota. In doing so the Clarín court is very clear to state that trespass onto private property during repossession constitutes a breach of the peace.

Respondents have indicated that to rule that any trespass onto private party during self-help repossession would cripple the legitimate

repossession rights of secured creditors. However, what both Respondents have failed to address is that the law has supplied an avenue for creditors to repossess defaulted property; these creditors may either go through the court system in order to regain their property or they may repossess defaulted property through self-help repossession when the repossessing agent had public access to the property. Additionally, if a repossessing agent is on private property and asked to leave, the action is still a trespass and still a breach of the peace regardless of the degree of completion of the repossession. At this time the repossessing agent should immediately stop the repossession and leave the property in place. To allow repossessing agents to trespass onto private property in order to regain defaulted property would fly in the face of the purpose of allowing self-help repossession without breaching the peace.

The Respondents have indicated that all parties are in agreement as to the facts of this case; however, the Appellants and the Respondents, including testimony by James Fischer about what transpired in the Thompson home indicate that this is not altogether true. For instance, Appellants do not agree with the Respondents as to the definition of "home". The Respondents believe that when Brian Thompson asked Stuart Minske to stand in his entryway, this limited permission gave Stuart Minske the right to walk freely about the Thompson home. The Thompsons believe that Stuart Minske did not have permission to walk

around the Thompson home. The Thompsons and James Fischer indicate that Brian Thompson repeatedly asked Stuart Minske to leave and that Stuart Minske was aware that Brian Thompson was speaking to his lawyer. Stuart Minske states that he was never asked to leave and had no idea who Brian Thompson was talking to on the telephone. Brian Thompson has stated the Stuart Minske roamed around his house and cursed at his children. Stuart Minske states that he stayed in the doorway and did not curse. Clearly there are genuine issues of material fact as to whether Stuart Minske's conduct on February 18, 2005, as alleged by the Thompsons, breached the peace.

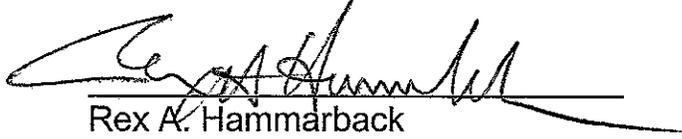
The alleged events that occurred in the Thompson home on February 19, 2005 are precisely the type of interaction with a debtor that the Clarín court seeks to avoid. It is the law in this state that a trespass onto private property is a breach of the peace. That is exactly what happened in this case. It is a clear misapplication of the law to state that the degree of completion of the repossession on private property somehow distinguishes or abrogates the holding in Clarín.

CONCLUSION

The Appellants Notice of Appeal is sufficient to allow the Court of Appeals review the summary judgment decision in the above matter. Additionally, summary judgment was not appropriate in this case because

there are genuine issues of material fact that need to be resolved between these two parties.

Respectfully submitted this 30th day of August, 2005



Rex A. Hammarback
MN License No.: 0167514
Hammarback, Dusek & Associates, PLC
712 DeMers Avenue
P.O. Box 4
East Grand Forks, MN 56721
Attorney for Appellants
Telephone : (218) 773-6841
Facsimile : (218) 773-2841

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 132.01(3) the undersigned hereby certifies that Appellants' Reply Brief complies with the word count limitation. The word processing system used to prepare this brief is Microsoft word, 13 point font. The number of words in this brief is in compliance with Rule 132.01(3), including all heading, quotations, table of contents, table of authorities, statement of the case, statement of the legal issues, argument and conclusion. Word Count: 2177



Rex A. Hammarback
MN License No.: 0167514
Hammarback, Dusek &
Associates, PLC
712 DeMers Avenue
P.O. Box 4
East Grand Forks, MN 56721
Attorney for Appellants
Telephone No.: (218) 773-6841
Facsimile No.: (218) 773-2845

STATE OF MINNESOTA

IN DISTRICT COURT

COUNTY OF POLK

NINTH JUDICIAL DISTRICT
Type of Case: Property Damage

Brian K. Thompson, and)
Sarah M. Thompson,)
)
Plaintiff,)

vs.)

First State Bank of Fertile)
and Stuart's Towing and Repair,)
)
Defendants.)

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 Reply Brief

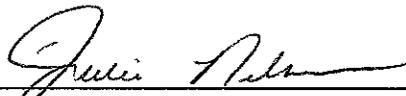
Were served on August 30, 2005, by placing true and correct copies thereof in an envelope as follows, to wit:

Mr. Raymond J. German
Raymond J. German, Ltd.
208 Third Avenue NW
East Grand Forks, MN 56721

Mr. Gerard D. Neil
418 3rd Street NW
East Grand Forks, MN 56721

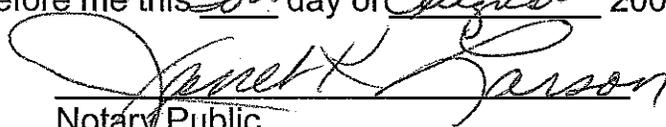
And depositing the same with prepaid postage in the United States Mail at East Grand Forks, Minnesota.

To the best of the affiant's knowledge, the address above given is the actual post office address of the party intended to be so served. The above documents are mailed in accordance with the provisions of the Minnesota Rules of Civil Procedure.



Julie Nelson

Subscribed and Sworn to before me this 30th day of August 2005.



Notary Public
My Comm. Expires: 1-31-07

