

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

Respondent First State Bank of Fertile's ~~Amended~~ Brief

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Statement of Legal Issues

A. Repossession and Breach of the Peace

The trial court properly determined that there was no breach of the peace and that the repossession was lawful.

James v. Ford Motor Credit Co., 842 F.Supp. 1202, 1209 (D. Minn., 4th Div. 1994)

In Re Double D. Trading, Inc., 34 UCCRS 1762 (F BC DC Mass. 1982)

Wallace v. Chrysler Credit Corp., 743 F.Supp.1228 (W.D. Va. 1990)

First and Farmers Bank of Somerset v. Henderson, 763 S.W.2d 137 (Ky. App. 1988)

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Bloomquist v. First Nat'l Bank, 378 N.W.2d 81(Minn. App. 1985)

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

B. Attorney Client Privilege

The client had attorney client privilege for the phone call, but it was waived when attorney was called as a witness.

Swanson v. Downing, 86 N.W.2d 716 (Minn. 1957)

State ex rel. Schuler v. Tahash, 154 N.W.2d 200 (Minn. 1967)

Medtronic, Inc. v. Intermedics, Inc., 162 F.R.D. 133 (D. Minn., 4th Div. 1995)

C. Outstanding Promissory Notes

Promissory notes are still valid

James v. Ford Motor Credit Co., 842 F.Supp. 1202, 1209 (D. Minn., 4th Div. 1994)

D. Summary Judgment

Summary judgment was proper in this case.

DLH, Inc. v. Russ, 566 N.W.2d 60 (Minn. 1997)

Murphy v. Country House, Inc., 240 N.W.2d 507 (Minn. 1976)

Rogers v. Allis Chalmers Credit Corp., 679 F.2d 138 (8th Cir. 1982)

E. Proper Notice of Appeal

F. Thompson's Appeal is Time Barred

I. Statement of the Case

The First State Bank of Fertile (“the Bank”) contracted with Stuart Minske of Stuart’s Towing and Auto Repair to repossess a 1995 Chevrolet Tahoe on which the bank held a valid and enforceable security interest. The bank held this security interest (along with a security interest in a 1988 Toyota 4 Runner) against Brian K. and Sara M. Thompson (“the Thompson’s”). The Thompson’s defaulted on their obligation to the Bank and thus gave the Bank the legal right to seek the self-help remedy of repossession of the vehicles from the Thompsons.

Summary judgment was granted against the Thompson’s in this matter. The order granting summary judgment was signed by the Honorable Dennis J. Murphy, Judge of the District Court, Polk County, Minnesota on the 15th of February, 2005. (AA 308-315). The trial court issued a second, separate order on the 15th of March, 2005. The Thompson’s have appealed this matter for based on the following allegations: i.) Stuart Minske breached the peace when he repossessed their vehicle; ii.) the trial erred in granting summary judgment because it found no genuine issues of material fact; iii.) the trial court erred when it found that Brian Thompson had waived his attorney-client privilege; and iv.) the repossession was wrongful because of the breach of the peace.

Respondent First State Bank of Fertile requests that Oral Arguments be heard in the case, pursuant to Minnesota Rules of Civil Appellate Procedure Rule 133.03.

II. STATEMENT OF THE FACTS

On the 18th of February 2003, Stuart Minske, owner of Stuart's Towing and Repair, acting as an independent contractor for the First State Bank of Fertile, repossessed Plaintiff Brian Thompson's 1995 Chevrolet Tahoe. Mr. Minske backed his tow-truck into the driveway, attached the apparatus to the Tahoe and lifted the Tahoe off the ground, thus completing the repossession. (AA 134-135; Minske Depo. Pgs. 30-35) After completing the repossession, Mr. Minske noticed some personal items (including two child safety seats) in the Tahoe and walked to the Plaintiff's house. (AA 136; Minske Depo. Pgs. 37-39). Mr. Minske asked if Thompson wanted to remove personal effects from the vehicle. (AA 139; Minske Depo. Pg. 51-52)

Thompson then asked Minske to wait inside (inviting him in) while he called the First State Bank of Fertile. (AA 137; Minske Depo. Pg.43) While waiting for Thompson for approximately 15 to 20 minutes, (AA 137; Minske Depo. Pg. 42) Minske saw the some keys hanging up and procured the same. (AA 138; Minske Depo. Pg. 45). Minske inquired whether the keys were for the Tahoe and received an affirmative response. (AA 138; Minske Depo. Pg. 45). Minske then left the house and drove away with the repossessed vehicle. (AA 140; Minske Depo. Pg. 54). Thompson at this time declined to take the property from the Tahoe and indicated he would pick it up at a later time. (AA 138; Minske Depo. Pg. 45). Plaintiff's key witness, Mr. Fischer, did not remember hearing Brian Thompson ask Minske to leave. (AA 161; Fischer Depo. Pg. 35). According to the co-plaintiff, the ex-Mrs. Thompson, Mr. Minske was not asked to leave but to "step outside", at which time Mr. Minske left with the repossessed vehicle. (AA

207; S. Thompson Depo. Pg. 62). Thompson waited one month to call the police after this incident occurred. (Crookston Police Department Incident Report, AA 59)

III. SUMMARY OF THE ARGUMENT

The Appellants have failed to provide a completely accurate account of the facts in their appeal. Statements from individuals privy to the event were omitted when the value of the statement was not in the interest of the Appellants. Further, Appellants make a leap of faith when citing case law. Each case cited can be distinguished in one way or another from the present case. The plaintiffs have suffered no damages in this case and summary judgment was proper.

A. Repossession and Breach of the Peace: Self Help Repossession Was Complete Before Plaintiffs Had Any Knowledge of the Action

The repossession in this case was completed before Mr. Minske was invited into the house. The repossession took place on a driveway accessible by a paved alley, which was open for public use. Mr. Thompson did not ask for the vehicle to be put down until after the fact, making that request moot.

The private property distinction here is totally irrelevant. Most repossessions take place on private property, or repossessions would rarely if ever be accomplished. It would be an unwise public policy to allow a private/public distinction to seep into the law surrounding repossessions. As long as the repossession was complete (as in the present case) in a peaceable manner, there should be no difference between chattels repossessed on private or public land. Cases involving a breach of peace that occurred on private land were deemed to be

a breach of the peace because of some other factor, such as assault or other violence. See Bloomquist v. First Nat'l Bank, 378 N.W.2d 81 (Minn. App. 1985). (Where court found a breach of the peace existed when there was a forcible entry into the Plaintiff's premises).

The only issue in this case is one of law, not of fact. Appellants do not dispute that Mr. Minske had the Tahoe lifted onto the truck, pulled forward and had the vehicle under his dominion and control. The issue of whether or not this constituted a complete repossession is one of law, not of fact. Summary judgment was appropriate in this matter.

B. Attorney Client Privilege: The Attorney Client Privilege Was Invoked During the Phone Call and Should Not Re-Attach Since Plaintiffs Called Attorney as a Witness

The attorney client privilege was invoked during the phone conversation. There was a third party present, but he could not hear the conversation and in fact thought the conversation was between Thompson and the First State Bank of Fertile. (AA 137; Minske Depo Pgs. 43-44) Subsequently, the Appellants called attorney James Fischer as a witness, which destroys the attorney client privilege. Minn. Stat. Ann. § 595.02(1b); State ex rel. Schuler v. Tahash, 154 N.W. 2d 200, 205 (Minn. 1967).

The attorney client privilege was waived when Mr. Fischer was called as a witness. All documents pertaining to the issue at bar must be made available for discovery.

C. Outstanding Promissory Notes owed by the Thompson's are Valid

The repossession of the Chevrolet Tahoe did not breach the peace. Appellants did not make timely payments on their vehicles and as such, the First State Bank of Fertile had a right to self-help repossession. The Appellants are using the alleged breach of the peace as a smokescreen to confuse the issue at hand.

D. Summary Judgment was Proper in This Case

Summary judgment is proper when there are no genuine issues of material fact. Minn. R.Civ.P. 56.03. In order to establish a genuine issue for trial, the issue must be supported by substantial evidence. DLH, Inc. v. Russ. 566 N.W.2d 60, 69-70 (Minn. 1997)(quoting Murphy v. Country House, Inc. 240 N.W.2d 507, 512 (Minn. 1976)). Any party that objects to summary judgment must do more than rest upon the averments. Id. at 71. The Appellants in this case offer no substantial evidence of any genuine issue, only vain attempts to create confusion as to the events of that day. The repossession was complete, there was no breach of the peace, and summary judgment was proper.

E. Proper Notice of Appeal

Respondent First State Bank of Fertile adopts the argument put forward by Respondent Stuart's Towing and Auto Repair.

F. Thompson's Appeal Is Time Barred

Respondent First State Bank of Fertile adopts the argument put forward by Respondent Stuart's Towing and Auto Repair.

IV. ARGUMENT

A. Repossession and Breach of the Peace: Self-Help Repossession Was Complete Before Plaintiffs Had Any Knowledge of the Action

The trial court correctly held that there was no breach of the peace, and granted summary judgment. The only issue was one of law, not of fact. The issue of the repossession is central to this case. The vehicle was repossessed as a matter of law. Plaintiffs wish to obscure the facts and make the issue confusing. In Minnesota, self-help repossession is allowed under Minn. Stat. § 336.9-609. This statute is silent as to entry onto the property of another. Under Minnesota precedent, “[o]nce the repossession agent has gained sufficient dominion over collateral to control it, the repossession has been completed.” James v. Ford Motor Credit Co., 842 F.Supp. 1202, 1209 (D. Minn., 4th Div. 1994). Therefore, once the truck is lifted and moved forward, it is in possession of the reposessor, Mr. Minske. The vehicle can no longer be independently driven and is under the exclusive control of the reposessor. Other states have also made this distinction. A court in Massachusetts held In Re Double D. Trading, Inc., 34 UCCRS 1762 (F BC DC Mass. 1982) that control of the collateral is the key issue when deciding when repossession is complete. Minske had control of the collateral. The law considers the repossession to be complete. Case law supports this conclusion. Wallace v. Chrysler Credit Corp., 743 F.Supp.1228 (W.D. Va. 1990), 1234; First and Farmers Bank of Somerset v. Henderson, 763 S.W.2d 137, 139, fn. 3 (Ky. App. 1988).

Mr. Thompson could no longer object to the repossession; therefore breach of the peace is impossible. Tellingly, the James court refused to allow an after the fact objection to let the debtor regain access to the truck by assaulting (in this case, verbally objecting to the repossession) the repossessing agent. James v. Ford Motor Credit Co., 842 F.Supp. 1202, 1210 (D. Minn., 4th Div. 1994) (where the court recognized that breach of the peace does not exist as long as there is no objection by the debtor while the repossession is in progress). This decision is in line with sound public policy. It would be a mistake to provide debtors in default a loophole through which they could restrict a creditor's access to collateral.

The trespass allegation alone does not give rise to a breach of the peace charge. Mr. Minske peaceably entered the property and repossessed the vehicle without incident and without knowledge of the appellant, using his right to self-help repossession under Minn. Stat. § 336.9-609.

Even if there was a trespass, this does not make a breach of the peace. Some states have ruled that trespass alone is not a breach of the peace because the creditor's rights to collect the debt outweigh the trivialness of a trespass claim. Giles v. First Virginia Credit Services, Inc., 560 S.E.2d 557 (N.C. Ct. App. 2002) (holding that a breach of the peace did not occur when repossessor entered debtor's driveway in the morning when debtor was not present); Oaklawn v. Baldwin, 709 S.W.2d 91, 92 (Ark. 1986) (stating that the creditor's interest in satisfying the security interest is more important than trespass); Robertson v. Union Planters Nat. Bank, 561 S.W.2d 901 (Tex. Civ. App. 1978) (holding breach

of the peace did not occur when repossession occurred in the debtor's driveway without the debtor's knowledge).

Further, this case can be distinguished from Minnesota precedent outlined in the Bloomquist decision so heavily relied upon by the Appellants, as there was no forcible entry in the present case. Bloomquist v. First Nat'l Bank, 378 N.W.2d 81 (Minn. App. 1985). The present case is also distinguishable from Clarín v. Norwest Bank of Minnesota, No. 97-2003 (D. Minn March 9, 1999)(Lexis 20844), which the Appellants rely on to "clarify the often blurred and confusing lines regarding repossession and breach of the peace..." In Clarín, the repossession and objection to that repossession occurred on public property. The court in the Clarín decision ruled that objections were not relevant on public property. Id. This case has no bearing on the one at bar. Given the facts distinguishing this case from prior precedent and the fact that the repossession occurred before any objection was made, there was no breach of the peace in this case. The distinction is a matter of law, not of fact. The trial court properly decided this matter with its summary judgment decision.

The national trend on breach of the peace is illustrated in 25 A.L.R.5th 696 at § 49. Courts tend to find breach of the peace only where the reposessor has damaged the property of the debtor, threatens or assaults the debtor or illegally enters the premises of the debtor.

**B. Attorney Client Privilege: The Attorney Client Privilege Was Invoked
During the Phone Call and Should Not Re-Attach Since Plaintiffs
Called Attorney as a Witness**

The attorney client privilege was invoked during the phone conversation, as there was no third party present in the immediate vicinity. Minske was in the building but was not privy to the conversation between Thompson and Fischer. In fact, Minske thought the conversation was between Thompson and the First State Bank of Fertile. (AA 137; Minske Depo Pgs. 43-44). The attorney client privilege is personal to the client and may be waived if he so chooses. Swanson v. Downing, 86 N.W.2d 716 (Minn. 1957). Mr. Thompson took no action to waive the attorney client privilege at this time. He didn't make Mr. Minske privy to the conversation and Minske did not know whom Mr. Thompson was speaking with.

The Appellants called attorney James Fischer as a witness to the above-mentioned event, which destroys the attorney client privilege. Minn. Stat. Ann. § 595.02(1b); State ex rel. Schuler v. Tahash, 154 N.W. 2d 200, 205 (Minn. 1967).

If privilege was waived by calling the attorney as Appellants witness, then respondent First State Bank of Fertile fails to see where the attorney client privilege applies. The correspondence between Mr. Fischer and Mr. Hammarback should be open to discovery. The trial court accurately found that once the attorney client shield has been waved, it couldn't re-attach. Once the privilege is waived by calling the attorney as a witness, and then it is waived completely. Id. Appellants are attempting to be selective in determining what documents are open

to discovery. They have to choose to either completely waive the privilege, or to have complete protection. They cannot wield both the sword and the shield.

Medtronic, Inc. v. Intermedics, Inc., 162 F.R.D. 133, 135 (D.Minn., 4th Div. 1995).

Since the attorney client privilege was waived when Mr. Fischer was called to testify, all items pertaining to the case at bar must be made available for discovery.

C. Outstanding Promissory Notes Are Valid as a Matter of Law

The repossession of the Chevrolet Tahoe did not breach the peace. Once the vehicle was secured and hoisted by the tow truck, the repossession was complete. James v. Ford Motor Credit Co., 842 F.Supp. 1202, 1209 (D. Minn., 4th Div. 1994). Then and only then did Mr. Minske proceed, as personal and civic courtesy to the Thompson residence to ask if they wanted to retrieve their personal items from the vehicle. Two such items were child safety seats.

The Appellants admitted the legal obligation of the debt on the promissory notes. This is an issue of law, not of fact. Summary judgment is appropriate under these circumstances. Minn R.Civ.P. 56.03. There was no breach of the peace in this matter, Mr. Thompson was delinquent on his payments and the First State Bank of Fertile had a secured interest in the two vehicles, giving them the right to repossess them. Appellants are attempting to obscure the original reason for this matter. They did not pay their debts in a timely fashion, and are now using the repossession as a sword and a shield to relieve them of their obligations.

The Appellants suffered no damages in this matter. They did not pay for their vehicles, they were repossessed and they are now trying to make a financial gain from their own mistakes.

The conversion issue raised by appellants is not proper at this time. Any new issue must be raised at the trial court level.

D. Summary Judgment Was Proper In This Case as Appellants Have Not Given Evidence of a Genuine Issue of Material Fact

Summary judgment may be granted when there are no genuine issues of material fact. Minn. R.Civ.P. 56.03. In order for a summary judgment motion to be defeated, the non-moving party must put forth substantial evidence of a genuine issue of material fact. DLH, Inc. v. Russ. 566 N.W.2d 60, 69-70 (Minn. 1997)(quoting Murphy v. Country House, Inc. 240 N.W.2d 507, 512 (1976)).

Here, the Appellants are doing nothing more than resting upon allegations and averments. They are trying to suggest that the issue of what events transpired is an issue of fact that must be decided by a jury when, in reality, there is no real dispute as to what happened that day. The Appellants are also suggesting that the alleged breach of the peace is an issue for the jury to decide. To back up this contention, the Appellants rely on Rogers v. Allis-Chalmers Credit Corp., 679 F.2d 138, 141 (8th Cir. 1982). However, this case is easily distinguished in that the chattel in question was not readily accessible (the repossessor had to overcome a locked gate). The Tahoe in question in our case was, in fact, readily accessible.

In order to survive the summary judgment motion, must rely on more than averments. DLH, Inc. v. Russ. 566 N.W.2d 60, 71 (Minn. 1997). Clearly, the Appellants here can do no more than muster a few weak allegations. The summary judgment motion was proper and should stand.

E. Proper Notice of Appeal

Respondent First State Bank of Fertile adopts the argument put forward by Respondent Stuart's Towing and Auto Repair.

F. Thompson's Appeal Is Time Barred

Respondent First State Bank of Fertile adopts the argument put forward by Respondent Stuart's Towing and Auto Repair.

V.CONCLUSION

The record, statutes and case law surrounding this matter clearly show that summary judgment was proper. Mr. Minske acted reasonably when he entered the driveway, lifted the Tahoe and gained dominion over the collateral. He did not threaten, assault or verbally abuse anyone. The repossession was complete at this time as a matter of law. The fact that Mr. Thompson objected after the fact is irrelevant. The breach of the peace that Plaintiffs allege did not occur. Once the repossession was complete, Mr. Thompson could no longer object, thereby closing the door to a breach of the peace charge.

Respondent First State Bank of Fertile respectfully requests that the summary judgment order of the trial court from the 15th of February, 2005, entered and docketed on the 16th of February, 2005, be upheld and the

Thompson's appeal as related to the First State Bank of Fertile be denied in it's entirety.

Dated this 24th day of August, 2005.

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Certificate of Compliance

Pursuant to Rule 132.01 (3), the undersigned hereby certifies that the Respondent's Brief complies with the type-volume limitations. This document was prepared with Microsoft Word in 13 point font. The number of words in this brief is 3639, including headings, quotes, tables of contents and authorities and the statement of the case.

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