

NO. A05-1328

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Brian K. Thompson and Sara M. Thompson,
Appellants

v.

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

Trial Court Case No. C6-04-432

**RESPONDENT STUART'S TOWING AND REPAIR'S
BRIEF**

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STATEMENT OF LEGAL ISSUES

1. Was summary judgment proper?

The trial court properly determined: i) no genuine issues of material fact were left in dispute between the parties; ii) the Bank lawfully repossessed the subject vehicles; and iii) no breach of peace occurred during the repossession.

Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1989);

Grandnorthern, Inc., v. West Mall Partnership, 359 N.W. 2d 41 (Minn. App. 1984)

State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990).

Whisler v. Findeisen, 160 N.W.2d 153, 155 (Minn. 1968).

2. Did the Thompsons fail to give proper notice of their appeal?

Fladland v. Northway Construction, Inc., 343 N.W.2d 687, 688 (Minn.App.1984).

Johnson v. Nessel Town, 486 N.W.2d 834, 837 (Minn.App.1992)

Ullman v. Lutz, 55 N.W.2d 57, 58 (Minn.1952).

Rule 103.01 of the Minnesota Rules of Civil Appellate Procedure

3. Is the Thompsons' appeal from the order dated February 15, 2005, and the judgment docketed February 16, 2005, time-barred?

Myers v. Winslow R. Chamberlain Company, 443 N.W.2d 211, 214 (Minn.1989)

Setter v. Mauritz, 351 N.W.2d 396, 398 (Minn.App.1984).

Ullman v. Lutz, 55 N.W.2d 57, 58 (Minn.1952).

In re Welfare of J.B., Jr., 623 N.W.2d 640 (Minn.App.2001)

Rule 104.01 of the Minnesota Rules of Civil Appellate Procedure.

Rule 126.02 of the Minnesota Rules of Civil Appellate Procedure.

4. Did Stuart's Towing breach the peace during the repossession of the Thompsons' vehicle?

The trial court determined: i) the repossession was complete before the parties had any contact with each other; ii) no breach of the peace occurred as a result of the repossession; iii) after the repossession Stuart's Towing & Repair was invited into the home of Brian Thompson and Sarah Thompson; and iv) no breach of peace resulted from Stuart's Towing & Repairs act of taking the keys for the repossessed vehicle.

Bloomquist v. First National Bank of Elk River, 378 N.W.2d 81 (Minn.App. 1985)

James v. Ford Motor Credit Company, 842 F.Supp. 1202, 1208 (U.S. Dist. Ct. Minn. 1994)

Wallace v. Chrysler Credit Corp., 743 F.Supp. 1228, 1233 (W.D.Va, 1990)

M.S.A. §336.9-503

5. Did the Thompsons waive their attorney-client privilege?

The District Court found the Appellants waived their attorney-client privilege when they allowed their former attorney to testify on their behalf.

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

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

M.S.A. §595.02

STATEMENT OF THE CASE

Respondent First State Bank of Fertile, (hereafter "Bank"), held a valid, enforceable security interest in a 1998 Toyota 4 Runner SR5 and a 1995 Chevrolet Tahoe LT which were owned by the Appellants Brian K. Thompson and Sara M. Thompson, (hereafter "Thompsons"). The Thompsons defaulted on their contractual obligations to the Bank, giving the Bank the legal right, under their loan documents, to repossess the subject vehicles. The Bank hired Respondent Stuart's Towing and Repair, (hereafter "Stuart's Towing"), to repossess the subject vehicles from the Thompsons.

On February 15, 2005, the Honorable Dennis J. Murphy, Judge of the District Court, Ninth Judicial District, Polk County, Minnesota, signed and issued an order granting summary judgment against the Thompsons, and in favor of the Bank and Stuart's Towing. (AA308-AA315). A judgment was subsequently entered and docketed on February 16, 2005. A certified copy of this judgment, as required by *Rule 103.01(d)(2)* of the *Minnesota Rules of Civil Appellate Procedure*, has never been provided to the Court of Appeals by the Thompsons. Copies of the order dated February 15, 2005, and the judgment docketed on February 16, 2005, (hereafter referred to as "February Judgment"), are included in Stuart's Towing's Appendix on pages RSTA1-RSTA11.

On March 15, 2005, the trial court signed and issued a second and separate order in favor of the Bank entitled *Judgment for Defendant Against Plaintiff(s) for Taxation of Costs and Third Party Counterclaim Award*. (AA316). Judgment was entered and docketed on this order on May 16, 2005. Stuart's Towing had no interest or involvement

in the trial court's issuance of the order dated March 15, 2005, and subsequent judgment docketed May 16, 2005.

The Thompsons have filed an appeal based upon the following allegations and claims: i) Stuart's Towing breached the peace when it repossessed their vehicle; ii) the trial court erred when it found there were no genuine issues of material fact; iii) the trial court erred when it found Brian Thompson waived attorney client privilege; and iv) the repossession was wrongful as a result of the alleged breach of peace.

STATEMENT OF FACTS

Stuart's Towing lawfully repossessed the 1995 Chevrolet Tahoe LT, (hereafter "Tahoe"), which was parked in the alley near the Thompsons' home, (Deposition of Stuart Minske, RSTA16-RSTA17), and the 1998 Toyota 4 Runner SR5, (hereafter "4 Runner"), which was located at Crookston Auto Salvage, (Deposition of Stuart Minske, Respondent Stuart's Towing's Appendix "RSTA"23), at the request of and on behalf of the Bank. (Affidavit of Stuart Minske, AA51-AA54).

Representatives from Crookston Auto Salvage advised Mr. Minske of the location of the 4 Runner, and requested that Stuart's Towing pick it up, (Affidavit of Stuart Minske, AA51-AA54). Stuart's Towing did not have any contact with the Thompsons before, during or after picking up the 4 Runner from Crookston Auto Salvage.

Stuart's Towing repossessed the Tahoe from an alley near the Thompsons' home. Stuart's Towing acquired possession of the Tahoe by dropping his lift, hooking up the scoops, locking the scoops into place and raising the Tahoe up two feet off the ground. (Deposition of Stuart Minske, RSTA18). At this point, Stuart's Towing was in complete

possession and control of the Tahoe and ready to leave with it. (Deposition of Stuart Minske, RSTA18). Stuart Minske, of Stuart's Towing, did not see or talk to the Thompsons during the repossession. (Deposition of Stuart Minske, RSTA18). Mr. Thompson also testified he had not seen or talked to Mr. Minske until Mr. Minske came to his door. (Deposition of Brian Thompson, RSTA26). The repossession of the Tahoe was complete before any contact was made between the Thompsons and Stuart's Towing.

After the Tahoe was in the exclusive possession of Stuart's Towing, Mr. Minske noticed personal property in the Tahoe, including two children's car seats. (Deposition of Stuart Minske, RSTA19). As a courtesy, Mr. Minske went and knocked on the Thompsons' door. (Deposition of Stuart Minske, RSTA19). Nobody answered the door. As Mr. Minske was walking away from the house, he heard a tapping on the glass of one of the windows. Mr. Thompson motioned for Mr. Minske to come to the door. (Deposition of Stuart Minske, RSTA19, Deposition of Brian Thompson, RSTA28). Mr. Minske advised Mr. Thompson he was there to repossess the Tahoe and gave him the opportunity to remove his personal property, (Deposition of Stuart Minske, RSTA20; Deposition of Brian Thompson, RSTA26).

Mr. Thompson asked Mr. Minske to come into his home, (Deposition of Brian Thompson, RSTA 28), and requested that Mr. Minske wait while he called the Bank. (Deposition of Brian Thompson, RSTA26) After waiting approximately 15 minutes, (Deposition of Stuart Minkse, RSTA20; Deposition of Sarah Thompson, AA203), Mr. Minske noticed the keys for the Tahoe hanging above his head. (Deposition of Stuart Minske, RSTA21). Mr. Minske asked Mr. Thompson if the keys were for the Tahoe. Mr.

Thompson said no. Mr. Minske asked again, and indicated they looked like keys for a Tahoe. Mr. Thompson then said yes they were the keys for the Tahoe. (Deposition of Stuart Minske, RSTA21).

At this point, Mr. Minske indicated he could not wait any longer. Mr. Minske advised Mr. Thompson he needed to remove his personal property from the vehicle because he was going to leave. (Deposition of Stuart Minske, RSTA21). Mr. Thompson declined to remove any of his personal property from the Tahoe and indicated he would get it later. (Deposition of Stuart Minske, RSTA21). Mr. Minske then left with the keys for the Tahoe. (Deposition of Stuart Minske, RSTA22).

LAW & ARGUMENT

1. Was summary judgment proper?

A motion for summary judgment may be granted when the pleadings, depositions, responses to interrogatories and admissions on file, together with affidavits, show there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. *Rule 56.03, Minnesota Rules of Civil Procedure, Grandnorthern, Inc., v. West Mall Partnership*, 359 N.W. 2d 41 (Minn. App. 1984). A genuine issue of material fact must be established by substantial evidence. *Whisler v. Findeisen*, 160 N.W.2d 153, 155 (Minn. 1968).

Summary judgment is available when a trial on the issues would obviously be futile. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts.

Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1989); Johnson v. Van Blaricom, 480 N.W.2d 138, 140-47 (Minn. App. 1992).

If it is determined the appellate court has jurisdiction in this matter, the appellate court must determine 1) whether any genuine issues of material fact exist; and 2) whether the trial court erred in its application of the law. State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990). The *Affidavit of Stuart Minske*, (AA51-AA54), and the depositions of Stuart Minske, (RSTA12-24), Brian Thompson, (RSTA25-RSTA30), and Sarah Thomson, (AA192-AA218), specifically outline the facts and the events which support the summary judgment granted in favor of the Bank and Stuart's Towing. There is no real dispute regarding the events which transpired. There is no genuine issue of fact or law before the court. The Bank and Stuart's Towing were entitled to summary judgment as a matter of law.

In addition to their allegations regarding the existence of genuine issues of material facts, and the trial court's error in the application of law, the Thompsons also claim the issue of whether or not Stuart Towing's unknown entry onto private property constituted a breach of the peace was a jury issue, not a matter of law for the court to decide. (Appellant's Brief, Page 6). The Thompsons' rely on Rogers v. Allis-Chalmers Credit Corp., 679 F.2d 138, 141 (8th Cir. 1982), to support their claim. In Rogers, the bulldozer that was repossessed was not openly accessible, and required the parties to go through at least one gate.

The Rogers court did not determine that all breach of peace claims involving an entrance onto private property must be submitted to a trier of fact for determination, as

the Thompsons suggest. The facts submitted by the parties in the Rogers case were in sharp contrast with each other. The bulldozer that was repossessed was not openly accessible. Additionally, the parties offered widely differing testimony of the events which took place. The Rogers court indicated that although the facts “presented a rather close question,” based upon the circumstances, the issue of whether repossession constituted a breach of the peace was properly submitted to and considered by a jury. Id at 141.

The facts presented by the parties to this action are not in sharp contrast with each other, and do not widely differ. The Tahoe was openly and easily accessible. All of the parties agree there was no contact between the Thompsons and Stuart’s Towing until after Stuart’s Towing had possession and control of the Tahoe. The trial court properly determined no genuine issues of material facts existed, and granted summary judgment in favor of the Bank and Stuart’s Towing.

2. Did the Thompsons fail to give proper notice of their appeal?

In April, 2005, the Thompsons served a *Notice of Appeal* upon the adverse parties to appeal from the order dated March 15, 2005. (AA317-AA318). This *Notice of Appeal* was dismissed by the Court of Appeals as being premature. It was determined no judgment had yet been entered and docketed on the order dated March 15, 2005. Subsequently, on May 16, 2005, the trial court entered and docketed a judgment on the order dated March 15, 2005.

On July 5, 2005, the Thompsons served a *Notice of Appeal* upon the adverse parties. The *Notice of Appeal* specifically states the Thompsons are appealing from an

order dated May 20, 2005. The *Statement of the Case* attached to the Thompsons' *Notice of Appeal* also references an order dated May 20, 2005. There were no orders or judgments entered in this action on May 20, 2005.

The court noticed the inconsistencies in the Thompsons' appeal documents. As part of the *Appellate Court Notice of Case Filing*, (RSTA32), the court included the following reminder and instruction for the Thompsons' attorney:

"Mr. Hammarback: Please either file a certified copy of an order dated 5/20/05, or, a letter indicating this appeal is taken from the 3/15/05 order included with the notice of appeal (judgment being entered 5/16/05)."

Despite the court's instructions, *Appellant's Brief*, dated July 18, 2005, states the Thompsons are appealing from the February Judgment. (*Appellant's Brief*, Page 2). It appears the Thompsons now want to appeal from the February Judgment, rather than the judgment they actually appealed.¹ The Thompsons have failed to provide proper notice to appeal from the February Judgment.

Rule 103.01 of the *Minnesota Rules of Civil Appellate Procedure*, sets forth the exact manner in which an appeal must be made. *Rule 103.01(a)* states the appellant must serve upon the adverse parties "[a] statement specifying the judgment or order from which the appeal is taken...." *Rule 103.01(d)(2)* requires that a "certified copy of the judgment or order from which the appeal is taken" to be filed with the clerk of the appellate court. Johnson v. Nessel Town, 486 N.W.2d 834, 837 (Minn.App.1992)

¹ Stuart's Towing notes all documents filed by Appellants in this action reference Appeal Case No. A05-0754, which has been dismissed. The Notice of Case Filing assigns Appeal Case No. A05-1328 to this action.

(dismissing an appeal for failure to serve an adverse party with notice). In Fladland v. Northway Construction, Inc., the appellate court addressed a similar issue, and dismissed an appeal when the statement of the case and the notice of appeal were inconsistent. 343 N.W.2d 687, 688 (Minn.App.1984).

The Thompsons have not filed a certified copy of the February Judgment they are attempting to appeal. Additionally, the *Notice of Appeal* and *Statement of the Case* filed by the Thompsons are inconsistent. The Thompsons have failed to provide proper notice of their appeal.

In Ullman v. Lutz, the Supreme Court held that "curative" amendments can only be allowed if the court already has jurisdiction. The court can only obtain jurisdiction when proper notice has been given to the adverse parties and the requisite documents have been filed with the trial court and the appellate court, including a "certified copy of the judgment or order from which the appeal is taken." 55 N.W.2d 57, 58 (Minn.1952) (interpreting M.S.A. § 605.03, repealed and replaced by Minn.R.Civ.App.P. 103.01). Thompsons' *Notice of Appeal* failed to provide the adverse parties with sufficient notice of the order or judgment being appealed, making the notice wholly ineffective. As a result, the court does not have jurisdiction to hear this appeal.

3. Is the Thompsons' appeal from the order dated February 15, 2005, and the judgment docketed February 16, 2005, time-barred?

The order dated March 15, 2005, and docketed May 16, 2005, does not involve or affect Stuart's Towing. (AA316). It is an order granting the Bank a monetary judgment for all unpaid debts and costs incurred in the defense of the Thompsons' Complaint in the

amounts of \$9,090.40 and \$4,292.04 respectively. Stuart's Towing has no interest or involvement in a monetary judgment in favor of the Bank that is addressed in the trial court's order dated March 15, 2005.

The Thompsons cannot now attempt to appeal from the February Judgment. If the Thompsons' intend to appeal from the February Judgment, the Thompsons' appeal must fail. An appeal from the February Judgment is time-barred by *Rule 104.01* of the *Minnesota Rules of Civil Appellate Procedure*. The only appeal not time-barred, and available to the Thompsons, is an appeal from the order dated March 15, 2005, and subsequent judgment entered May 16, 2005, as noted in the court's *Appellate Court Notice of Case Filing*. (RSTA32).

Stuart's Towing anticipates Thompsons will argue their appeal should be allowed to stand because they appealed from the wrong judgment. A similar situation was addressed in Myers v. Winslow R. Chamberlain Company, 443 N.W.2d 211, 214 (Minn.1989) (review denied). In this case, the Supreme Court allowed an appeal to proceed when the appellant appealed the wrong judgment. The appellant appealed a judgment relating to costs and disbursements instead of a judgment from a jury verdict. This case appears to describe the Thompsons' situation. However, in Myers, the judgment relating to costs and disbursements and the judgment from the jury verdict were both still within the sixty day statutory period of limitations for filing an appeal under *Rule 104.01* of the *Minnesota Rules of Civil Appellate Procedure*.

The Thompsons are well outside the sixty day statutory period of limitations for an appeal from the February Judgment. The sixty day time period expired on April 18, 2005.

The Thompsons served their current *Notice of Appeal* on July 5, 2005. This is almost three months beyond the sixty day statutory period of limitations.

The court in Myers determined that allowing the appeal to go forward would not prejudice the appellee. Id at 214. This is not so in the present case. Stuart's Towing would be gravely prejudiced if the court allowed Thompsons' to proceed with an appeal almost three months past the sixty day statutory period of limitations. The appellate court is strictly prohibited from extending the time limit for filing an appeal under *Rule 126.02* of the *Minnesota Rules of Civil Appellate Procedure*. "The appellate court may not extend or limit the time for filing the notice of appeal...;" "[i]t is elementary that an appellate court cannot assume or acquire jurisdiction by extending the time for appeal." Ullman v. Lutz, 55 N.W.2d 57, 59 (Minn.1952). The statutory time period for appealing the February Judgment involving Stuart's Towing has expired and cannot be revived.

In Setter v. Mauritz the appellate court did not allow an appeal from an unappealable order. 351 N.W.2d 396, 398 (Minn.App.1984). The court said, "Where the original judgment is not appealed and an issue is left undisturbed in an amended judgment, that issue is not reviewable on appeal from the amended judgment." Id. (citing Dennis Frandsen & Co. v. Kanabec County, 306 N.W.2d 566 (Minn.1981)). The February Judgment has never been disturbed, and was left unchanged by the order dated March 15, 2005, and subsequent judgment docketed May 16, 2005.

All issues affecting Stuart's Towing in this action have been fully and completed adjudicated by the judgment docketed on February 16, 2005. The only action taken by the trial court in issuing the order dated March 15, 2005, was to quantify the costs that

had already been awarded. If the Thompsons dispute the money judgment, the reviewable issue on appeal must be limited to the dollar amounts awarded to the Bank. The order granting summary judgment is beyond the reach of the Thompsons' appeal.

Stuart's Towing is not a proper adverse party to the Thompsons' appeal from the order dated March 15, 2005. An adverse party is one who, if a judgment or order is modified, changed, or overruled would suffer "prejudice" and injury from such change. In re Welfare of J.B., Jr., 623 N.W.2d 640 (Minn.App.2001) and Peterson v. Joint Independent Consol. School Dist. No. 116 of Nobles County & No. 136 of Jackson County, 58 N.W.2d 465 (Minn.1953). There is no valid reason for Stuart's Towing to defend its interests in this appeal since the order dated March 15, 2005, exclusively granted a money judgment in favor of the Bank. The order dated March 15, 2005, does not include, affect or involve Stuart's Towing.

The appellate court lacks jurisdiction in this case as it relates to the summary judgment order dated February 15, 2005, and subsequent judgment entered and docketed on February 16, 2005. The Thompsons' appeal, as it relates to Stuart's Towing and the February Judgment, is time-barred, and must be dismissed in its entirety.

4. Did Stuart's Towing breach the peace during the repossession of the Thompsons' vehicle?

In the event the Court of Appeals allows the Thompsons to appeal the February Judgment, by a *Notice of Appeal* dated July 5, 2005, which is almost three months beyond the statutory period of limitations, no breach of peace occurred during the repossession. In Bloomquist v. First National Bank of Elk River, 378 N.W.2d 81 (Minn.App. 1985), the

Court of Appeals noted that Minnesota had not specifically delineated a test to determine whether a breach of peace has occurred. The Bloomquist Court relied on case law from other jurisdictions and adopted the following two part test to determine whether a breach of peace has occurred.

1. Was there entry by the creditor on the debtor's premises?
2. Did the debtor, or one acting on his behalf, consent to the entry and repossession?

This test adopted by the Bloomquist Court implies that under certain circumstances there can be a breach of peace by operation of law, even if no actual breach of the peace occurred. James v. Ford Motor Credit Company, 842 F.Supp. 1202, 1208 (U.S. Dist. Ct. Minn. 1994).

However, the James Court has found no case which holds that repossession from a public street constitutes a breach of peace. The James Court also stated the Eighth Circuit, in applying Arkansas law regarding *U.C.C. §9-503*, had determined that taking a car from a driveway did not constitute a breach of peace because the debtor did not object, and the repossession agent did not provoke violence. The James Court indicated the Eighth Circuit has also relied on Arkansas case law to hold there is no breach of peace even when the debtor does not consent to the repossession, so long as the debtor does not object to the repossession while it is in process. James @ 1208, citing Manhattan Credit Co., Inc. v. Brewer, 341 S.W.2d 765 (1961); Rutledge v. Universal C.I.T. Credit Corp., 237 S.W.2d 469 (1951).

Since there was no contact between the Thompsons and Stuart's Towing until after the repossession had been completed, (Deposition of Stuart Minske, RSTA18; and Deposition of Brian Thompson, RSTA26), it is impossible for the Thompsons to claim they objected to the repossession, or that the repossession agent provoked violence during the repossession. Regardless of whether the Tahoe was in an alley, a privately owned alley, a driveway or the backyard, if there was no objection before or during the repossession, and the repossession agent did not provoke violence during the repossession, there can be no breach of peace. James v. Ford Motor Credit Company, 842 F.Supp. 1202, 1208 (U.S. Dist. Ct. Minn. 1994). The Tahoe was completely hooked up, secured and ready to be moved by Stuart's Towing. These undisputed facts surrounding the repossession prevent a determination of breach of peace under Minnesota law. If, for argument's sake, it is determined the repossession was not complete when Mr. Minske made contact with the Thompsons, there was still no breach of the peace. Mr. Minske entered the Thompsons' home at the request and invitation of Mr. Thompson.

The Thompsons base their breach of peace claim upon Mr. Thompson's allegation that he told Mr. Minske he could not take the Tahoe, (Deposition of Brian Thompson, RSTA28), and the allegation that Mr. Minske entered the Thompsons' house without the Thompsons' permission, and took the keys for the Tahoe. However, the Thompsons' current version of the facts does not match the testimony taken at the depositions. The deposition testimony indicates the Thompsons and Stuart's Towing did not engage in any communication until after the repossession was complete. Testimony also indicated Mr. Thompson asked Mr. Minske into his home, and requested that Mr. Minske wait while he

called the bank, (Deposition of Brian Thompson, RSTA26). The Thompsons cannot now claim Stuart's Towing breached the peace by entering and waiting in their home at Mr. Thompson's request, after the repossession had already occurred.

The deposition testimony of all parties clearly indicates i) the repossession of the Tahoe was completed before Mr. Minske had any contact with the Thompsons, and 2) Mr. Minske entered the Thompsons' home at Mr. Thompson's request, (Deposition of Stuart Minske, RSTA19-RSTA20; Deposition of Brian Thompson, RSTA26 & RSTA28) Accordingly, the Thompsons' breach of peace claim is limited to Mr. Thompson's allegation that he told Mr. Minske not to take the keys for the Tahoe. Mr. Minske did not need the keys. He already had the vehicle in his complete possession and control. Mr. Thompson's unsupported allegations regarding the Tahoe keys is insufficient under the law to allow a determination of breach of peace.

The Thompsons' have cited various cases to support their claim that a breach of peace occurred during the repossession. However, the facts present in the cases cited by the Thompsons are not even remotely similar to the present case. The Thompsons cited Clarín v. Norwest Bank Minnesota, to "clarify the often blurred and confusing lines regarding repossession and breach of the peace..." (Appellant's Brief, Page 7). Clarín v. Norwest Bank Minnesota is easily distinguished. In Clarín, the repossession agent began to repossess the debtor's vehicle in a public parking lot when the debtor ran out and objected to the repossession. U.S. Dist.Lexis 20844, 7, 8 (Dist.Minn.1999). (AA319-AA333). The Clarín court held that the debtor's objections to the repossession while in process were not effective on public property.

The Thompsons argue it is immaterial whether the repossession was complete before any trespass happened. (Appellant's Brief, Page 6). This is not the case. The decision issued by the Clarín court requires the repossession to be in progress when revocation occurs. The Clarín court states "[t]he commission of [trespass]. . . **during** repossession. . . constitute[s] breach of the peace. Clarín at 16. (emphasis added). This point is of extreme importance. In order for any trespass to have occurred, it would have had to occur "during" the repossession, not "after" the repossession. The Thompsons and Stuart's towing had no contact with each other until after the repossession was complete.

The Thompsons also rely heavily on Brinkman v. MidAmerica Bank and Minnesota Recovery Bureau, U.S. Dist. Lexis 20845 (Dist.Minn.1999), (AA334-AA345), to raise a question regarding the conduct of Stuart's Towing. The Thompsons have attempted to convince the court that Brinkman directly controls the present case. The facts of the Brinkman case are notably different from the present case.

In the Brinkman case, the repossession agent walked up to a running car that had a sleeping baby in it and drove away, knowing full well that the owners of the car were unloading their "U-haul" van only a few feet away, and they were likely to come back to the car and find it and the baby missing. The agent did not see the baby sleeping in the back seat, but was negligent in his duty of care when he failed to look in the back seat and see the baby. This is clearly a different fact situation.

The Thompsons have also misconstrued the law set forth in Brinkman. Based upon their interpretation, the Thompsons suggest a trespass, occurring at any time, before, during, or after repossession would constitute a breach of the peace. In contrast, what

the Brinkman court actually stated was, "the probability of violence at the **time of or immediately prior to** the repossession is sufficient [to constitute breach of the peace]. Brinkman at 7, 8 (quoting Chrysler Credit Corp. v. Koontz, 661 N.E.2d 1171, 1173 (Ill.Ct.App.1996). (emphasis added).

If, for argument's sake, Stuart's Towing trespassed after he had hooked up the vehicle and completed the repossession, it is irrelevant to the issues before the court. Essentially, the Thompsons are attempting to create a new rule of law which says that any "self-help" repossession that transpires on private property is a trespass. There is no authority for such a claim. If the court follows the Thompsons' "new rule of law," secured creditors would not be able to use self-help repossession as a recourse on private property.

The true facts in this case are not in dispute. The repossession was complete before the Thompsons and Stuart's Towing had any contact with each other. Stuart's Towing lawfully repossessed the Thompsons' vehicles at the request and instruction of the Bank. The Thompsons have not provided any evidence or testimony to support their claims of wrongful repossession or breach of peace.

5. Did the Thompsons waive their attorney-client privilege?

During the discovery period, the Thompsons identified attorney James Fischer as a fact witness. Mr. Thompson also testified regarding a telephone conversation he had with Mr. Fischer during his deposition on December 13, 2004. Mr. Fischer also provided an affidavit (AA60-AA61) regarding events which transpired. The Bank took the deposition of attorney James Fischer on December 13, 2004. (RSTA33-RSTA47). During the

deposition, the Thompsons' attorney, Rex Hammarback, instructed Mr. Fischer not to answer certain questions relating to his telephone conversation with Mr. Thompson, and invoked attorney-client privilege. (RSTA33-RSTA47).

Attorney-client privilege is personal to the client and may be waived. When the client voluntarily testifies to statements alleged to have been made to an attorney, or statements made by an attorney to the client, the client waives the attorney-client privilege as to the matters testified to by the client, and cannot prevent the adverse party from calling the attorney to rebut or complete the conversation on that matter. Swanson v. Domning, 86 N.W.2d 716, (Minn. 1957).

Mr. Thompson and Mr. Fischer have offered testimony and affidavits regarding their telephone conversation in an attempt to bolster the Thompsons' claims against the Bank and Stuart's Towing. However, the Thompsons now seek to prevent the Bank and Stuart's Towing from obtaining complete information from Mr. Fischer regarding the events which occurred.

In the event the court determines the Thompsons did not expressly waive their right to attorney-client privilege, the Thompsons impliedly waived attorney-client privilege. There is no settled rule finding implied waiver of attorney-client privilege. Common factors identified in finding an implied waiver of attorney-client privilege are as follows: (1) the assertion of the privilege is a result of an affirmative act; (2) through the affirmative act, the asserting party has placed the protected information at issue by making it relevant; and (3) the application of privilege would deny the opposing party access to information vital to its defense. Medtronic, Inc. v. Intermedics, Inc., 162 F.R.D. 133, (D.Minn, 4th Div. 1995).

In the present case, the Thompsons introduced evidence related to Mr. Thompsons' telephone conversation with Mr. Fisher, and made it relevant. If the Thompsons are now allowed to invoke attorney-client privilege, the Bank and Stuart's Towing would be denied access to information vital to their defense.

The Thompsons are attempting to use attorney-client privilege as both a sword and a shield. Fairness required the Thompsons to choose a single course of action, either complete waiver or complete protection. Medtronic, Inc. v. Intermedics, Inc., 162 F.R.D. 133, 135 (D.Minn, 4th Div. 1995). In this case, complete waiver is the only option available. The Thompsons chose to introduce and rely on evidence related to Mr. Thompson's telephone conversation with Mr. Fischer, and by doing so, have waived their attorney-client privilege with respect to all matters relating to Mr. Thompson's conversation with Mr. Fischer.

CONCLUSION

The Thompsons' Notice of Appeal is insufficient for the Court of Appeals to acquire jurisdiction under Minnesota law. Any attempt by the Thompsons to appeal the summary judgment order dated February 15, 2005, and the subsequent judgment entered and docketed February 16, 2005, is time-barred.

If it is determined the Court of Appeals has jurisdiction, and the Thompsons' have a right to appeal from the summary judgment order dated February 15, 2005, and the subsequent judgment entered and docketed February 16, 2005, is not time-barred under the *Minnesota Rules of Civil Appellate Procedure*, the Thompsons have failed to provide any evidence of the existence of genuine issues of material fact, or show the trial court erred in its application of the law.

Stuart's Towing respectfully requests the trial court's order for summary judgment, dated February 15, 2005, and the subsequent judgment entered and docketed on February 16, 2005, be upheld, and the Thompsons' appeal, as it relates to Stuart's Towing, be in all things denied.

Dated this 16th day of August, 2005.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 132.01(3), the undersigned hereby certifies Respondent Stuart's Towing and Repair's 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 the words in this brief is 6,093, including all headings, quotations, table of contents, table of authorities, statement of the case, statement of legal issues, law and argument and conclusion.

GERARD D. NEIL, P.C.

A handwritten signature in cursive script, reading "Gerard D. Neil", written over a horizontal line.

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AFFIDAVIT OF SERVICE BY MAIL
Appeal Case No. A05-1328
Trial Court Case No. C6-04-432

STATE OF MINNESOTA

COUNTY OF POLK

The undersigned, being first duly sworn, deposes and states two (2) copies of the following:

- 1. Respondent Stuart's Towing and Repair's Brief; and**
- 2. Respondent Stuart's Towing's Appendix**

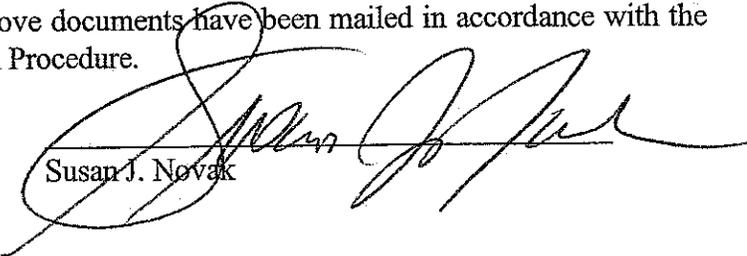
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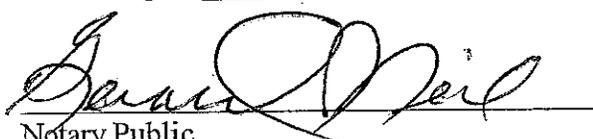
Raymond J. German
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by enclosing the same in an envelope addressed to the above-named individuals at their above-named addresses with postage fully pre-paid, and by depositing said envelope in a United States Postal Service Mailbox in East Grand Forks, Minnesota, on August 16, 2005.

To the best of affiant's knowledge, the addresses stated above are the actual post office address of the parties intended to be served. The above documents have been mailed in accordance with the provisions of the Minnesota Rules of Civil Procedure.


Susan J. Novak

Subscribed and sworn to before
me on August 16th, 2005.


Notary Public

