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NO. A05-1578

State of Minnesota
In Court of Appeals

Craig Johanns and Mary Johanns,

Respondents,

v.

Minnesota Mobile Storage, Inc.,

Appellant.

APPELLANT'S REPLY BRIEF AND APPENDIX

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ARGUMENT

The parties' rental agreement is clear and enforceable. Under well-established principles of contract interpretation, the specific damages limitation provision of Paragraph 6 controls the general exculpatory language Respondents cite. In addition, Minn. Stat. § 514.975 is equally clear, precluding consideration of Respondents' policy concerns. Finally, Respondents waived review of the bulk of their claims that the trial court dismissed on summary judgment by failing to argue them. To the extent that Respondents have briefed their claims for invasion of privacy, trespass to chattels and conversion, they are also subject to the damages limitation. Alternatively, the lower court properly dismissed these claims. In any case, Respondents are not entitled to recover duplicative damages for the same wrongful conduct.[1]

I. THE LIMITATION OF DAMAGES PROVISION IS CLEAR AND UNAMBIGUOUS.

In interpreting contracts, specific provisions control general ones. *Employers Liab. Assur. Corp. v. Morse*, 261 Minn. 259, 264-65, 111 N.W.2d 620, 624 (1961); *Brookdale Pontiac-GMC v. Fed. Ins.*, 630 N.W.2d 5, 10 (Minn. Ct. App. 2001); *Burgi v. Eckes*, 354 N.W.2d 514, 519 (Minn. Ct. App. 1984). Paragraph 6 of the parties' rental agreement is labeled "Limitation of Lessor's Liability; Indemnity." It explicitly states, "[t]enant agrees that Lessor's and

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[1] References to "R" are to Respondents' Brief. Respondents' Statement of Facts violates Minn. R. Civ. App. P. 128.02, subd.1's requirements that facts be stated fairly and with citation to the record.

Lessor's Agent's total responsibility for any Loss from any cause whatsoever will not exceed a total of $5000.00." (A.A.40) This sentence is clear and unambiguous.

In contrast, the exculpatory language elsewhere in the contract that Respondents cite as evidence of ambiguity is broad and general. (*See, e.g.* ¶¶ 6, 13, 25) Respondents did not even initial some of the exculpatory language on which they rely, indicating it did not mislead them. (*See, e.g.*, ¶ 5) The damages limitation provision in Paragraph 6 is followed by a sentence incorporating Chapter 514's bar on negligence exemptions. (A.A.40) The exculpatory language on which Respondents rely contains neither the damages limitation nor the reference to the negligence exemption bar. (*Id.*, ¶¶ 4, 6, 13, 25) Because the damages limitation provision in Paragraph 6 is more specific than the general exculpatory language on which Respondents cite, it controls. Accordingly, Respondents' argument that the contract is ambiguous fails.

II. THE PLAIN MEANING OF MINN. STAT. § 514.975 IS BINDING.

Respondents dislike the language of Minn. Stat. § 514.975, but do not succeed in showing that it is ambiguous. Respondents establish that in numerous contexts, parties use the terms "partly exempt" or "partial exemption" when they want to create an exemption that is less than complete. (R.25-26) This is exactly MMS's point. If the Legislature wanted to prevent lessors of mobile storage units from asking lessees to agree to damages limitations, it would have prohibited

lessors from using such partial exemptions. Moreover, Respondents' grievances with the statutory language cannot be redressed through interpretation, because the text is clear on its face. *Owens v. Water Gremlin Co.*, 605 N.W.2d 733, 737 (Minn. 2000) (where statutory language clear, Court "must not engage in any further construction"); *Mankato Citizens Tel. Co. v. Comm'r*, 275 Minn. 107, 108, 145 N.W.2d 313, 316 (1966) (counseling against assuming legislative intent in plain contradiction to words chosen by Legislature); *see also ILHC of Eagan, LLC v. County of Dakota*, 693 N.W.2d 412, 419 (Minn. 2005) (holding that Legislature is presumed to have understood the effect of its words). In addition, although Respondents cannot rationalize the Legislature's failure to preclude damages limitation clauses in Chapter 514, it is not for the Court to read into the statute a provision the Legislature "'purposely omits or inadvertently overlooks.'" *Met. Sports Facilities Comm'n v. County Of Hennepin*, 561 N.W.2d 513, 516-17 (Minn. 1997) (*quoting Green Giant Co. v. Comm'r*, 534 N.W.2d 710, 712 (Minn. 1995)). The Legislature may well have declined to bar damages limitation provisions in order to ensure that low cost storage services would be available to consumers. Respondents' complaint about the statute's application is properly addressed to the Legislature.

III. THE TRIAL COURT PROPERLY AWARDED SUMMARY JUDGMENT TO MMS ON MOST OF RESPONDENTS' CLAIMS BEFORE TRIAL.

The Trial Court correctly granted summary judgment to MMS on the bulk of Respondents' claims before trial.[2] (A.A.28-34) Respondents waived their challenge to dismissal of their claims for misrepresentation, consumer fraud, deceptive trade practices, negligent misrepresentation, intentional infliction of emotional distress, negligent misrepresentation, promissory estoppel, equitable estoppel, detrimental reliance, unjust enrichment, constructive trust, negligent selection, retention and supervision, violation of the Minnesota Franchise Act and "tort" by failing to specifically present legal argument or authority supporting their contention that the trial court improperly dismissed them. *See* Minn. R. Civ. App. P. 128.02(d); *City of Cloquet v. Cloquet Sand & Gravel, Inc.*, 312 Minn. 277, 279, 251 N.W.2d 642, 644 n.1 (1977); *Taubman v. Prospect Drilling & Sawing, Inc.*, 469 N.W.2d 335, 337 (Minn. Ct. App. 1991); *Maus v. Galic*, 669 N.W.2d 38, 47 (Minn. Ct. App. 2003). Arguably, Respondents fail to advance cognizable legal argument supporting their claim that the trial court erred in dismissing their invasion of privacy, trespass to chattels and conversion claims and waived these claims as well. (R.41) In any event, the invasion of privacy, trespass to chattels and conversion claims are subject to the damages limitation provision discussed

[2] While MMS denies any evidence of willfulness such that the exception to the exculpatory clause found at the first sentence of Paragraph 6 should apply, MMS does not assert the exculpatory clause as a defense in this appeal. Therefore, Respondents' arguments with regard to the exculpatory clause in Paragraph 6 are irrelevant.

above. In the alternative, the trial court properly dismissed these three claims. Moreover, Respondents are not entitled to duplicative damages.

A. Respondents Failed To Raise A Material Fact Dispute Regarding Their Invasion Of Privacy Claim.

The Minnesota Supreme Court recognized a cause of action for "invasion of privacy" in *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 234 (Minn. 1998). The *Lake* court noted that three causes of action fall under the rubric "invasion of privacy." *Lake,* 582 N.W.2d at 233. "Intrusion upon seclusion" occurs when one "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns . . . if the intrusion would be highly offensive to a reasonable person." *Id.* (citing Restatement (Second) of Torts, § 652B (1977)). "Appropriation" protects an individual's identity and is committed when one "appropriates to his own use or benefit the name or likeness of another." *Id.* (citing Restatement (Second) of Torts, § 652C). Finally, "Publication of private facts" is an invasion of privacy when one "gives publicity to a matter concerning the private life of another . . . if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." *Id.* (citing Restatement (Second) of Torts, § 652D). Respondents do not have a colorable claim under any of the three theories of "invasion of privacy" set forth in *Lake.*

Respondents have no viable "intrusion upon seclusion claim" since there is no evidence that MMS intentionally intruded upon Respondents' "private affairs

or concerns." MMS did not affirmatively act to obtain any private material from Respondents – Respondents sought out MMS and requested that it store their property. *See Lehman v. Zumbrota-Mazeppa Pub. Schools*, No. A04-1226, 2005 WL 894756 (Minn. Ct. App. April 19, 2005) (rejecting claim for intrusion upon seclusion where plaintiff himself supplied defendant with letter that defendant provided to media) (unpublished and appended at A.A.II.1). Moreover, the sale of Respondents' property after they defaulted on their payment obligation does not represent a "substantial" interference with Respondents' seclusion that would be "highly offensive" to a reasonable person. *Compare Lake,* 582 N.W.2d at 235 (holding case stated claim for invasion of privacy where store allegedly disseminated nude photos of plaintiffs) *with Phillips v. Grendahl,* 312 F.3d 357, 372-73 (8th Cir. 2002) (finder's report detective procured for daughter's mother did not contain information that would render its disclosure highly offensive to reasonable person even though it contained facts about his child support obligations and other private data). *See also Groeneweg v. Interstate Enterprises, Inc.*, No. A04-1290, 2005 WL 894768 (Minn. Ct. App. April 19, 2005) (unpublished and appended at A.A.II.7) (affirming dismissal of claim that firing of plaintiff at employee meeting intruded on her seclusion and citing *Patterson v. Augat Wiring Sys., Inc.*, 944 F.Supp. 1509, 1522 (M.D. Ala. 1996) (allowing a claim for intrusion upon seclusion based on acts representing sexual harassment); *Van Jelgerhuis v. Mercury Fin. Co.*, 940 F.Supp. 1344, 1368 (S.D. Ind. 1996) (noting that extremely personal questions and remarks of sexual nature invade

one's psychological integrity); *Benitez v. KFC Nat'l Mgmt. Co.*, 714 N.E.2d 1002, 1007 (Ill. Ct. App. 1999) (concluding voyeuristic acts represented intrusions upon seclusion)).

In addition, Respondents have no viable claim for "appropriation" because there is no evidence that MMS appropriated commercially beneficial likenesses of Respondents. *See Kovatovich v. K-Mart Corp.*, 88 F.Supp.2d 975, 986-87 (D. Minn. 1999) (holding that "appropriation" privacy tort required use of party's likeness based on its commercial value). Finally, Respondents have no viable claim for "publication of private facts" because there is no evidence MMS gave publicity to Appellants' private matters that "would be highly offensive to a reasonable person." *See Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 557 (Minn. 2003) (ruling "publicity" for purposes of invasion of privacy claim, means "'matter is made public by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge'") (quoting Restatement (Second) of Torts, § 652D cmt. A); *Robins v. Conseco Finance Loan Co.*, 656 N.W.2d 241 (Minn. Ct. App. 2003) (anticipating and applying *Bodah* standard). Because Respondents failed to raise a material fact question as to whether they could satisfy the elements of the three privacy torts recognized in Minnesota, the trial court correctly granted summary judgment on them.

B. The Trial Court Properly Dismissed Respondents' Trespass To Chattels And Conversion Claims, And In Any Event, Respondents Are Not Entitled To Recover Duplicative Damages.

Conversion and trespass to chattels are intentional torts. *See Herrmann v. Fossum*, 270 N.W.2d 18, 20 (Minn. 1978).

> One who dispossesses another of a chattel is subject to liability in trespass for the damage done. If the dispossession seriously interferes with the right of the other to control the chattel, the actor may also be subject to liability for conversion.

Id. at 20-21 (quoting Restatement (Second) of Torts, § 222). Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel. *Id.* at 21 (quoting Restatement (Second) of Torts, § 222A(1)); *Christensen v. Milbank Insurance Company*, 643 N.W.2d 639, 643 (Minn. Ct. App. 2002) (conversion claim requires evidence of intentional conduct). Respondents have no evidence that MMS intentionally interfered with their personal property without justification or inconsistent with their rights to its use, possession and ownership. Even assuming *arguendo* that there was intentional interference with Respondents' property, that interference was done with justification because Respondents had defaulted on their rental payments.

Regardless of the merits of Respondents' trespass to chattels and conversion claims, Respondents are not entitled to recover duplicative damages for the same conduct. *See Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 379

(Minn. 1990). Because their trespass to chattels and conversion claims are based on the same conduct as the bailment and contract claims for which the jury awarded Respondents damages, the trial court's dismissal of the claims is irrelevant.

CONCLUSION

The damages limitation provision that Respondents initialed is clear and unambiguous. Although Respondents argue that more general exculpatory language makes the contract ambiguous, it is well-established that specific contract language controls general terms. Because the damages limitation provision is significantly more specific than the general language Respondents cite, it controls, defeating Respondents' ambiguity argument. In addition, Respondents have failed to show any lack of clarity in the term "exempt" in Minn. Stat. § 514.975. The fact that other entities qualify the word "exempt" with the term "partly" when communicating a less than complete exemption supports MMS's position that Section 514.975 precludes only contracts absolving a party of all negligence liability.

Respondents waived their challenge to the pre-trial dismissal of their other claims by failing to offer argument or authority supporting their argument that the lower court erred in granting summary judgment on the claims. To the extent that Respondents have briefed their claims for invasion of privacy, trespass to chattels and conversion, these claims are also subject to the damages limitation. Alternatively, the lower court properly dismissed these claims. In any case,

Respondents are not entitled to recover duplicative damages for the same wrongful conduct.

Dated: January 19, 2006

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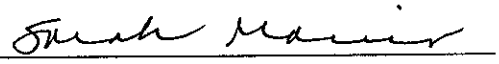
A Professional Association



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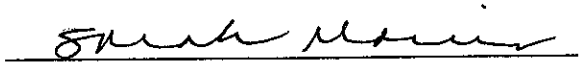
The undersigned acknowledges that pursuant to Minn. Stat. § 549.211, the Court may award to any opposing party costs, disbursements and reasonable attorneys' fees and witness fees if the party represented by the undersigned, or the undersigned, acts in bad faith, asserts a claim or defense that is frivolous and costly to the other party, asserts an unfounded position solely to delay the proceedings, or harasses or commits a fraud upon the Court.



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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).