

NO. A05-1578

State of Minnesota
In Court of Appeals

Craig Johanns and Mary Johanns,

Respondents,

v.

Minnesota Mobile Storage, Inc.,

Appellant.

RESPONDENTS' BRIEF AND APPENDIX

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STATEMENT OF ISSUES

A. Whether district court erred, or not, in allowing Plaintiffs \$67,500 damages jury found they suffered and not just mere \$5,000 mentioned in contract amid lots of language mentioning liability which may be ambiguous or illegal limitation of liability.

B. Whether district court erred, or not, in allowing Plaintiffs their damages based on Minnesota statutes and principles of law.

C. Whether intentional improper conduct, recklessness, willful and wanton conduct, or gross negligence, which the district court found or said were possible, for which by law damages cannot be limited, bar limiting liability at this time, and during any further proceedings whether any wrongfully dismissed claims should be considered.

DISTRICT COURT HELD: Based on Minnesota law, and after specifically mentioning ambiguous language would be construed against the drafter, and that intentional conduct could be found, proven damages should be recovered.

NOTE: A Respondent's Notice of Review was filed and paid for by Respondents, to let Court of Appeals support the District Court using those grounds it thinks proper, and grant the other relief Respondent's requested, but limiting Appellant to the single issue it raised.

STATEMENT OF THE CASE

Respondents Craig Johanns and Mary Johanns sued Appellant Minnesota Mobile Storage, Inc. (MMS) on several legal theories after MMS took property of the Johanns which was entrusted to it to store and return under a Rental Agreement for self-storage and under Minnesota law, but where MMS then took the property of the Johanns and sold it without court involvement claiming it had met requirements to do so under Minnesota law. (A.A.1). The Honorable William E. Macklin, First Judicial District, granted MMS's summary judgment motion of claims for trespass (maybe including conversion), invasion of privacy, and other claims despite facts at issue. (A.A.28).

A trial was held on April 12-14, 2005, on claims of improper performance bailment duties and breach of contract. There was agreement by counsel on the court deciding most issues and agreement that if failure to do duties required were found liability would be clear and damages awarded. The jury decided the issues of damages and whether Mary Johanns had authority to sign the Rental Agreement, finding authority was present and awarding \$67,750 in damages. (A.A.36). On June 21, 2005, the court decided that MMS violated Minn.Stat. s 514.973 in enforcing its lien, and awarded the damages found. The court also ruled that the provision in the parties' Rental Agreement which arguably limited damages to \$5,000 violated Minn.Stat. s 514.978. (A.A.38-39).

The court also noted in a memorandum that ambiguous terms in a contract would be construed against the drafter, and that the conduct of MMS could be

seen as intentional (for which by law liability may not be limited). (A.A.38-39).

Appellant appealed only whether damages should have been limited. A Respondent's Notice of Review was filed and paid for to expand issues to allow further grounds to support the district court and other issues raised, but nothing further not raised by Appellant's appeal.

STATEMENT OF FACTS

Liability and damages have been established in this case, and the single issue appealed is whether given the documents used and Minnesota laws drafted by the legislature and basic legal principles. This issue of whether shown damages should be limited based on Minnesota law and the Rental Agreement at issue in this case is the only issue appealed.

Damages for emotional distress given Minnesota's limitations on claims for "just" property damage, and claims for attorneys fees causes are not being made. Appellant is already avoiding much of the costs its conduct caused, and wants to avoid even more by arguing despite the ambiguous or unclear language in a rental agreement, or Minnesota statutes that this should be allowed.

Despite the claims in Appellant's Brief after a surprising trial, with the headquarters attorney actually testifying and claiming what newly found computer records showed, the District Court did clearly find against Minnesota Mobile Storage which was entrusted with most of the property the Johans family had, but failed to do as required by Minnesota statutes to lawfully act. Thus wrongful was the ending and performance of the bailment, and the foreclosure and auction of the Johans' family's property, which by law should still have been kept where the Johans could have still have paid and saved all their property, thereby avoiding absolutely all their harm.

Given the limited appeal, which Appellant chose to bring as it did, not really relevant to this appeal are the factual findings outside of the written Rental

Agreement which speaks for itself. These include the violations found by the District Court of auctioning property before one could lawfully take the property of another due to not waiting enough after any mailed notice to the Johanns. Also not relevant are the many other violations of required Minnesota statutes that govern how one may store, foreclose, and auction property known to be owned by another.

Violations besides the clear violations found by the District Court judge that could also have been found include: - - using a "boilerplate" description of property used every week in the published ad that doesn't alert bidders to any valuable property, - - using the completely wrong name for all owners in the published notice of auction (using "Gregg" Johanns), - - no evidence of whether mailings had required notice of legal rights to contest taking or pay, and - - not commercially reasonably displaying property to bidders at all but keeping property in whatever boxes there may be in the storage unit which was open but could not be entered. All the violations were duties imposed by law the failure to do was not shown to be an accident caused by unavoidable things.

At trial Appellant Minnesota Mobile Storage, Inc. admitted, despite being the one storing property, holding the auction, and contracting, and despite the statutes placing duties on it, to doing little and having little idea if requirements were met. Instead they assumed many if not most things and that the separate headquarters franchise was doing things, and even this was barely checked (with some things never checked) showing little if any concern by Minnesota Mobile

Storage, Inc. It was admitted Minnesota Mobile Storage, Inc. knew there were rules and laws that probably applied to it, or at least it was said they knew they had to do some things.

The procedures and steps used in this case, or lack thereof, were standard ones which would be repeated for all other self-storage customers. The Rental Agreement used was a form contract with no modifications made, and all customers would fact this same contract, and same conduct

ARGUMENT MENT AND AUTHORITIES

STANDARD OF REVIEW

If the trial court arrives at a correct decision, that decision should not be overturned regardless of the theory upon which it is based. *Schoeb v. Cowles*, 279 Minn. 331, 336, 156 N.W.2d 895, 898 (1968); 1B Dunnell, Dig. (3 ed.) s 421(a correct decision will not be reversed on appeal simply because it is based on incorrect reasons); *Morrow v. St. Paul City Ry. Co.*, 65 Minn. 382, 67 N.W. 1002 (Minn. 1943); *State, by Clark, v. Wolkoff*, 250 Minn. 504, 85 N.W.2d 401 (Minn. 1954). On appeal, taking the trial courts findings and comments, as a whole, issue is whether District Court clearly erred in its legal conclusions. *Richards Asphalt, Co., v. Bunge Corp.*, 339 N.W.2d 188 (Minn.App. 1987).

Because the facts in this case are undisputed, except for those findings not yet made, for most claims only questions of statutory and contract interpretation remain; these are questions of law subject to de novo review. *Hertz Corp. v. State Farm Mut. Ins. Co.*, 573 N.W.2d 686, 688 (Minn.1998). On ambiguousness, since the trial court considered only documentary evidence, this court may review the facts de novo. *Northern States Power Co. v. Williams*, 343 N.W.2d 627, 630 (Minn.1984).

A Respondent's Notice of Review was filed and paid for by Respondents, specifically is made to let Court of Appeals support the District Court using those

grounds it thinks proper, and grant the other relief Respondent's requested, but limiting Appellant to those issues raised.

I. CONTRACT CONTAINS AMBIGUOUS OR LANGUAGE THAT ILLEGALLY ATTEMPTS TO LIMIT LIABILITY WHICH MAY NOT BE ENFORCED

A. EXCULPATORY LANGUAGE IS STRICTLY CONSTRUED, AND AMBIGUOUS LANGUAGE STRICTLY CONSTRUED AGAINST DRAFTER

As the Minnesota Supreme Court has said, "Even though we have recognized the validity of exculpatory clauses in certain circumstances, they are not favored in the law. A clause exonerating a party from liability will be strictly construed against the benefited party." *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920 (Minn. 1982). Thus if contract language can be read so that the effect is that limitations on liability will be ineffective, then that is the interpretation that will be chosen.

Ambiguities in contract language must be resolved against the drafter, in this case against Appellant. See *Current Technology Concepts, Inc. v. Irie Enters., Inc.*, 530 N.W.2d 539, 543 (Minn. 1995) (concluding that court must give contract language its plain and ordinary meaning, but any ambiguity must be construed against drafter). Ambiguity exists in a contract whenever good arguments can be made for either of two contrary positions as to the meaning of the term in a document. *Heitkamp v. Milbank Mut. Ins. Co.*, 383 N.W.2d 834, 836 (N.D.1986). A contract is ambiguous if the written document, "by itself, is reasonably susceptible to more than one meaning." *Trondson v. Janikula*, 458 N.W.2d 679, 681 (Minn. 1990). It is thus enough if more than one reasonable meaning can be found, and not required that possible meanings be likely, and

not relevant if one could guess as what probably was meant, and the possible meaning in favor of the non-drafting party is followed.

Ambiguity can arise from many grounds. *Farmers Insurance Exchange, v. Versaw*, 99 P.2d 796, 99 P.3d 796, 507 Utah Adv. Rep. 13, 2004 UT 73, *(Ut. 2004) (An ambiguity in a contract may arise (1) because of vague or ambiguous language in a particular provision or (2) because two or more contract provisions, when read together, give rise to different or inconsistent meanings, even though each provision is clear when read alone.) *Duke v. Mutual Life Ins. Co. of New York*, 210 S.E.2d 187, (N.C., 1974)(In cases of ambiguity, contradiction, or uncertainty of language used in insurance contracts, the term should be construed most strongly against the insured, and if a provision in the policy is reasonably susceptible to different interpretation, then interpretation which is most favorable to the insured should be accepted.) As Minnesota Supreme Court has said in a case, "The very fact that their respective positions as to what this policy says are so contrary compels one to conclude that the agreement is indeed ambiguous." *Northwest Airlines, Inc. v. Globe Indem. Co.*, 225 N.W.2d 831 (Minn. 1975).

It is the "ordinary person" who is judged to be the reader seeing if her or she possibly could not be certain what a contract meant, due to contradictions, ambiguous terms, or often just not enough words to do away with possibilities which vague words raise. "A contract is ambiguous if it is unclear, omits terms, has multiple meanings, or is not plain to a person of ordinary intelligence and

understanding." *Utah Farm Bureau Ins. Co. v. Crook*, 1999 UT 47, 6, 980 P.2d 685 (Ut. 1999). Again, ambiguity is measured from the standard of an ordinary person, not that of lengthy legal analysis and study even if a contract uses legal words or words from statutes.

The English language and some words just are not so precise just "one" word can show clearly what is meant, and more than one word is often needed to unambiguously hold a reader to just one meaning. *Greenly v. Mariner Management Group, Inc.*, 192 F.3d 22 (C.A.1 (Me.),1999)(ambiguity as to the captain's status; no less an authority than the Supreme Court observed some six decades ago that courts historically have been unable to attach "an absolutely unvarying legal significance" to the word "crew." ; *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 258, 60 S.Ct. 544, 84 L.Ed. 732 (1940).").

Contradictions in a contract will not be ignored, and only unclear but uncontradictory language can be overcome by applying parts of a contract to other parts. *Weidman v. Erie Ins. Group*, 745 N.E.2d 292 (Ind.App. 2001)(saying, unclear terms in insurance policy can be clarified by reading the entire contract; however, where a policy contains inconsistent and contradictory provisions, that provision most favorable to the insured will be adopted.). A court's function in construing contract is to determine parties' intent from what they said and not from what they meant to say; if any ambiguity is created by incorporation of seemingly contradictory clauses in contract, ambiguity must be resolved against drafter of contract. *Johnson Controls, Inc. v. City of Cedar*

Rapids, 713 F.2d 370, 375 (C.A. Iowa 1983); Richard A. Lord, Williston on Contracts § 30:4 (4th ed., 1999) (“Ambiguity may exist where two contractual provisions are in conflict with each other.”).

With clauses attempting to limit liability, the above legal principal are fair: do not use so few words, or just one word, that might reassure an ordinary person that claims can still be brought, or might reassure that the law requires the other party pay if they are negligent. If you want to get an agreement spend time using a few clear sentences and blunt words to make clear what is being agreed to.

B. CONTRACT THAT AMBIGUOUSLY APPEARS IT MAY OVERSTEP AND ILLEGALLY BAR CLAIMS FOR INTENTIONAL, OR WILLFUL AND WANTON CONDUCT IS UNENFORCEABLE, INCLUDING IN THIS CASE CLAIMS FOR NEGLIGENCE

A contract which misleads people that ambiguous maybe claims for intentional, or willful and wanton claims may not be made, basically “oversteps” what is legal to claim and such a contract’s limits will not be enforced.

Schlobohm v. Spa Petite, Inc., 326 N.W.2d 920, 923 (Minn.1982). An exculpatory clause is unenforceable if it purports to release the benefited party from liability for intentional, willful or wanton acts or contravenes public policy. *Id.*; *See also Wu ex rel. Tien v. Shattuck-St. Mary's School*, 393 F.Supp.2d 831, 839 (D.Minn. 2005) (saying, because the Enrollment Contract’s exculpatory provision purports to release SSMS from liability for intentional, willful, or wanton acts, the Court finds that the Enrollment Contract is not enforceable as a matter of law);

McCarthy Well Co., Inc. v. St. Peter Creamery, Inc., 389 N.W.2d 514 (Minn.App. 1986)(saying, "the exculpatory clause was not strictly limited to liability for acts of negligence, but provided exculpation from "any * * * damage or liability of any nature whatsoever arising or growing out of [McCarthy Well's] work hereunder." The wording of this clause apparently covers damages arising from even recklessness or intentional conduct of McCarthy Well. Strictly construed, this clause is not limited to the permissible exoneration from liability for negligence and hence is invalid.).

Also, in this particular case due to Minn.Stat. s 514.975, Rental agreements, a contract may not try to "exempt" from claims for negligence, although Appellant says this means only "all" negligence rather than, say, a 90% exemption or some other amount. Thus, as even Appellant should admit a contract would be illegal if it ambiguously appears it may be claiming all liability for negligence is being limited.

C. AGREEMENT AMBIGUOUS ABOUT WHETHER NEGLIGENCE, WILLFUL AND WANTON OR INTENTIONAL CONDUCT CLAIMS ARE BARRED, MAKING CONTRACTS'S LIMITS UNENFORCEABLE

1. GENERAL INFORMATION ON RENTAL AGREEMENT

An examination of all the exculpatory language in the Rental Agreement is hard to do now, even now, when (unlike the ordinary consumer) we can make notes and take weeks to try to do so. This is the document an ordinary consumer would normally have a minute or so to read and, Appellant claims,

would always come to one single conclusion about what the document means, such that it is lawful to enforce it. (All references to any Agreement, Paragraphs, or any contract, are to the Rental Agreement, and no other document). (A.A. 40).

The font the Agreement uses is extremely small, and single spaced. (R.A.12). The Agreement is a legal-sized document, and despite it being a no-carbon-required (NCR) triplicate form where pages must be kept together the second page apparently is on the backside of the first page, even after signature. (R.A.12). A "super-enlarged" copy of the Agreement has been made and is found in Respondent's Appendix to make the words legible. (R.A.6) To try to even locate all the exculpatory language has such language searched for and underlined or circled. (R.A.1) (all underlining and circling has been added by Respondent's counsel, to try to show all exculpatory language).

The language dealing with liability is not found in one or even a few places so that they may be understand together, but are in about two dozen sentences spread throughout a half-dozen paragraphs, which given the separate paragraphs ambiguously may or may not be read together. Compare this to the case in *Beehner v. Cragun Corp.* where the court properly noted that an exculpatory clause was "one sentence long" making it hard in that case to argue for ambiguity. 636 N.W.2d 821, 835 (Minn.App. 2001) (saying, "I AGREE THAT: I ... do agree to hold harmless, release and discharge THIS STABLE, ... of and from all claims, demands, causes of action and legal liability, whether the same be known or unknown, anticipated or unanticipated, due to THIS STABLE's

and/or ITS ASSOCIATES' ordinary negligence; and .. that except in the event of THIS STABLE's gross negligence and willful and wanton misconduct, I shall not bring any claims,..."). The *Beehner* case shows how language limiting liability can be drafted so it is easier for ordinary reader (and ordinary drafter) to not be confused about, especially by its having language modifying next to it.

Exculpatory language is found in numerous place in the Agreement, making the full Rental Agreement relevant as this is the document which it is claimed fairly and unambiguously conveys a proper limitation on liability under Minnesota law , which is the issue on appeal, along with what Minnesota statutes allow. Appellant also in Appellant's Brief specifically discussed and quoted several paragraphs, and argues that Respondent agreed and initialed several "relevant provisions", and that all of them make Respondents understand what was being agreed to.

In this case, blocking the argument that paragraphs can be read together, the Agreement says or at least ambiguously appears to lead a reader to think each separately numbered "paragraph" (called "Sections" in some places) has its own provisions one agrees to. Each separately numbered paragraph ends by saying clearly:

"By placing INITIALS HERE _____, Tenant acknowledges that he understands the provisions of this paragraph and agrees to these provisions and agrees to comply with its requirements."

(R.A.1). A person before initialing was not told to read entire agreement because other paragraphs would affect “the provisions of this paragraph.”

In the Rental Agreement the paragraphs do have titles, with paragraph 6 being titled: “Limitation of Lessor’s Liability; Indemnity”, and Paragraph 4 “Use of Unit and Compliance with Law”, and Paragraph 5 “Insurance.” But left totally unambiguous is what titles mean, or whether the normal legal rule of titles being only evidence of what a paragraph means but not controlling is changed, which a ordinary reader would not know about anyway. Despite titles many paragraphs do get Tenant to agree to limited liability. See, e.g., (“Tenant acknowledges...Lessor shall not be liable for any damage to Tenant’s property for any reason including damage incurring [when Lessor is acting and moving goods]” Paragraph 4; “[If a landlord has Lessor store Tenant’s property the Lessor] absolves Lessor of any liability for any resulting damage to Tenant’s property.” Paragraph 25; “[Tenant] agrees that lessor does not represent or guarantee the safety or security of the Unit[.]” Paragraph 12; “Tenant assumes full risk for damage and relieves Lessor from any responsibility for damage.” Paragraph 8.)

Before proceeding one needs to mention insurance. Appellant did not appeal about insurance, assert any counterclaims, or go into insurance at trial, and objection is made to this issue if it is raised. If this were done earlier defenses of unconsciousability, clear waiver, or impossibility could have been raised as maybe Appellant knew. As the district court noted insurance is

probably impossible for the non-accidental illegal taking.

2. PARAGRAPH 4

Analysis of the Rental Agreement will take some time, which one almost wishes to apologize for, however it is Appellant who drafted so much exculpatory language to assault the reader, and Appellant who appealed trying to enforce this contract. All underlining to contract language is added by Respondents' Counsel, which should be kept in mind. First, looking at the Rental Agreement, in Paragraph 4, towards its end it says:

"Tenant further acknowledges, except for damages caused by Lessor's negligence, Lessor shall not be liable for any damage to Tenant's property for any reason [including damage occurring during over the road transportation when the Unit is moved by Lessor for failure of payment by Tenant]."

(underlining added, here and in all contract quotes). The very first clause limiting damages does appears to properly limit negligence but improperly does attempt to limit liability for intentional and willful and wanton claims. There is no other limitations language in this Paragraph, nor is Paragraph 4 ever specifically modified by another paragraph.

3. PARAGRAPH 5

In Paragraph 5 (which Mary Johanns did not initial) it says:

"ALL PROPERTY IS STORED BY TENANT'S AT TENANT'S SOLE RISK."

This just wrongly is not limited but appears to cover all risks. This is said when talking about insurance in Paragraph 5, but as rest of the paragraph shows covers things done by Appellant not real just accidents one would insure against, so any claim that this is just an "insurance" paragraph given the language limiting liability is false.

Paragraph 5 further says, improperly not limited to not cover negligence or intentional or willful and wanton conduct,

"[T]enant will assume all risk of loss, including damage by burglary, fire, vandalism, or vermin."

These are things Defendants have some duty to control, including if done by their employees, so putting all risk on this on tenants is not minor.

Paragraph 5 in its middle then confuses even more, after saying Insurance should be obtained:

"[Lessor's Agents] will not be responsible for, and Tenant hereby releases Lessor and Lessor's Agents from any responsibility for any loss, liability, claim, expense, damage to property or injury to persons ("Loss") that could have been insured including, without limitation, any Loss arising from the active or passive acts, omission or negligence of Lessor and Lessor's agents ("Released Claims"). Tenant waives any right of recovery against Lessor or Lessor's Agents for the Released claims, and Tenant [agrees not to allow subrogation, and Lessor is not involved with the insurance]. The provisions of this paragraph will not limit the rights of Lessor and Lessor's Agents under paragraph 6."

This improperly not limited to not cover negligence or intentional or willful and wanton conduct, at all. The reference to paragraph 6 not being affected says and reinforces the reader's idea that this paragraph will not affect another

paragraph, and just says Lessor's (not Tenant's) rights are not being limited.

There is no other limitations language in this Paragraph, nor is Paragraph 5 ever specifically modified by another paragraph.

4. NUMEROUS OTHER PARAGRAPHS

Before discussing Paragraph 6, more paragraphs which all have limitations language the drafter put in need to be considered. Paragraph 25 ends:

"[If a landlord has Lessor store Tenant's property the Lessor] absolves Lessor of any liability for any resulting damage to Tenant's property."

This clause improperly appears to cover intentional misconduct, willful and wanton conduct, and all negligence.

Paragraph 8 discussing Appellant driving the storage unit to a place and says:

"Tenant assumes full risk for damage and relieves Lessor from any responsibility for damage."

Again, this clause clearly improperly appears to cover intentional misconduct, willful and wanton conduct, and all negligence.

Paragraph 12, maybe is just a disclaimer of what has been represented, but also improperly disclaims without limitation guarantees which seem to cover duties one would expect Appellant to perform, when it says:

“[Tenant] agrees that lessor does not represent or guarantee the safety or security of the Unit[.]”

Paragraph 13, dealing with actions Appellant could take to collect and foreclose says seeming to improperly limit all claims, without limit,

“[Lessor may act] without being liable for prosecution or any claim of damages[.]”

Paragraph 15, dealing with Lessor foreclosing or moving property, again appears to improperly not limit all claims, saying:

“Lessor shall not be liable for any damage to Tenant’s property for any reason including occurring during over the road transportation when the unit is moved by Lessor[.]”

Overall, including Paragraph 6 discussed below, not one, or two, but 8 or more paragraphs have language drafted that limits liability. It is not known why these limits on liability could not be put in one location, for the benefit of the ordinary reader, and the ordinary drafter. It is not the reader or Respondent who should be blamed for the amount of language to consider, and keep clear or not keep clear to not have contradictions or have only one possible meaning.

5. PARAGRAPH 6

Paragraph 6, which is in middle of the front page, and is not put all in bold or the first or last paragraph to make it stand out, says:

Lessor and Lessor’s Agents will have no responsibility ... for any loss, liability, claim, expense, damage to property or injury to

persons ("Loss") from any cause, including, without limitation, Lessor's and Lessor's Agents active or passive acts, omissions, negligence or conversion, unless the Loss is directly caused by Lessor's fraud, willful injury or willful violation of law. Tenant shall indemnify and hold Lessor and Lessor's Agents harmless from any loss incurred by Lessor's or Lessor's Agents in any way arising out of Tenant's use of the Unit or Project. Tenant agrees that Lessor's and Lessor's Agents total responsibility for any Loss from any cause whatsoever will not exceed a total of \$5,000..... Regardless of anything stated in this Section 6 to the contrary and as required by Minnesota Statutes Section 514.976, Lessor is not exempt from liability for damage to Tenant's personal property caused by Lessor's negligence.

First, in the first sentence of paragraph 6, it says "without limitation"

Appellant will have no responsibility, but then it does admittedly say "fraud, willful injury or willful violation of law" are excluded from this. But improperly not mentioned are intentional acts, which after a broad denial of responsibility should be mentioned to overcome this denial, and also not excepted is indirectly caused damage. Second, in the second sentence of paragraph 6, concerning indemnification it is improperly not made clear the broad indemnification for "any loss" sought is not for things Lessor does wrong including intentional, and willful and wanton conduct which arise out of Tenant's use. Third, in the second paragraph 6, it says responsibility "for any Loss from any cause whatsoever will not exceed a total of \$5,000" which improperly seems a completely broad dollar cap on all claims which improperly seems to including intentional, and willful and wanton claims although "maybe" negligence claims are party excepted from by the final sentence which is next (but this is arguable).

Fourth, in the fourth sentence paragraph 6, there is language which says:

“Regardless of anything stated in this Section 6 to the contrary and as required by Minnesota Statutes Section 514.976, Lessor is not exempt from liability for damage to Tenant’s personal property caused by Lessor’s negligence.”

This language does helpfully say it will control even any contrary language in Section 6 (so for this paragraph contradiction is avoided, since it is made clear which controls), but other paragraphs are not mentioned which seems needed to cover them after specifically mentioning only Section 6. Because of this failure to mention other paragraphs the other paragraphs’ illegal broad limits on negligence are not corrected, at all. Then in this fourth sentence of Paragraph 6, “Minnesota Statutes Section 514.976” is mentioned (apparently to provide some information) along with the mentioning of Section 6 and later the exemption for negligence. But incredibly even if an ordinary person had the statutes available, mentioning “514.976” seems to create more confusion and ambiguity since it is the wrong statute chosen by the drafter and refers to posting the manager’s name not to liability (it is 514.975 that refers to liability).

All of the above review of the Rental Agreement using an ordinary person standard, seems to make clear the Agreement oversteps by claiming to illegally limit all claims, and also contradicts itself at the very least meaning construing things against the drafter a meaning that allows all negligence claims will be adopted. As shown, although there is language in Paragraph 6 “un-disclaiming” some avoidance of liability as shown above, first, it does not say it covers other paragraphs, or , second, says it controls over contradictory disclaimers leaving

instead just a contradiction at best.

6. IN PARAGRAPH 6, ORDINARY READER WOULD FIND “MAY NOT EXEMPT” LANGUAGE UNAMBIGUOUS WITH ONE POSSIBLE MEANING

If the above issues were not enough to invalidate this contract’s limitations language, an ordinary reader simply would not all be clear what the final phrase saying “Lessor is not exempt” meant. Again, the provision in Paragraph 6 reads:

“Regardless of anything stated in this Section 6 to the contrary and as required by Minnesota Statutes Section 514.976, Lessor is not exempt from liability for damage to Tenant’s personal property caused by Lessor’s negligence.”

This word “exempt” is taken from Minn.Stat. s 514.976 however this does not change the standard which is that of an ordinary reader.

The dictionary meaning of “exempt” does not indicate the common meaning of this “one” single word is either a narrow or a broad one, either always covering only complete 100% exemption, or meaning exemption generally.

Black’s Law Dictionary which would mention an important distinction like this (if it were common) only says “exempt” (apparently defining only the noun, not even the verb) means “free or released from a duty or liability to which others are held.” Black’s Law Dictionary, (8th ed. 2004).

As shown below, even detailed legal analysis of the meaning of “exempt” (which is a higher standard than whether an ordinary reader could find language ambiguous) indicates the likely meaning of this is not a ridiculously narrow one

covering only 100% exemptions, but that meaning exemption generally.

PLEASE SEE THE DISCUSSION BELOW.

Research shows there are many uses found on the internet and everyday life of “partial exemptions” which according to Appellant would be an absolute oxymoron and should not be seen (it would be claimed one cannot be “partially-completely freeing”). Despite this, “partial exemptions” and being “partly exempt” does occur and ordinary persons who read the Rental Agreement would see this and be aware a ban on exemptions include partial exemptions. See Minn.Stat. s 297A.81 (Uncollectible debts; offset against other taxes. Subdivision 2, (c) If the uncollectible debt arose with respect to a sale partly subject to the tax imposed under chapter 297A and partly exempt); ONTARIO APPLICATIONS FOR FULL AND PARTIAL EXEMPTION FROM PREPARATION AND MAILING OF INTERIM SECURITIES STATEMENTS

http://www.osc.gov.on.ca/Regulation/Rulemaking/Current/Part5/pol_20010420_52-601_osc_26.jsp; APPLICATION FOR CERTIFICATE OF FULL OR PARTIAL EXEMPTION (FROM WITHHOLDING ON HOUSE SALE PROCEEDS) http://forms.marylandtaxes.com/04_forms/MW506AE.pdf. ; PARTIAL EXEMPTIONS FROM CONNETICUT ATTORNEY CLIENT TRUST FUND SECURITY FEE <http://www.jud2.state.ct.us/webforms/forms/gc014e.pdf>.

There are also hundreds, if not thousands, of tax references to “partial exemptions” which taxpayers read about, so most people learn that “exempt” does include partial exemptions.

Overall, despite all this the Appellant in its brief argues the seemingly “reassuring” language about negligence claims being available, is “somehow” a warning that only 100% avoidance of liability is being avoided by this provision. Frankly, if Appellant wanted to say that, words saying “exactly” this should have been stated, and Appellant has no reason to complain. This “un-reassuring” meaning Appellant wants to be the only possible meaning, basically also seems to go contrary to the lack of any dollar amount in this reassuring language, and contrary to at least the ambiguous language given ordinary understanding of words.

II. INTENT OF STATUTE SAYING MAY NOT EXEMPT FOR NEGLIGENCE, AND PRINCIPLES OF PROPERTY AND LEGAL SYSTEM, DO NOT ALLOW NEGLIGENT FORECLOSING PARTY TO NOT RETURN PROPERTY OR PAY DAMAGES

A. LEGISLATIVE INTENT AND LEGAL PRINCIPLES WOULD NOT LET FORECLOSING NEGLIGENT PARTY NOT PAY DAMAGES

The Minnesota Legislature when writing a system of basic minimum set of rules for access, notice, and foreclosure and auction, “knew” it was involving ordinary small consumers, without any special bargaining ability, storing their person property the loss of which would cause great harm the legislature took great pains to try to avoid. See Minn.Stat. s 514.970 (saying 514.970 to 514.979 may be cited as the “Minnesota Liens on Personal Property in Self-Service Storage Act.”); Minn.Stat. s 514.971, Definitions. (limiting Act to type of ordinary self-storage units people have personal access to, not warehouses). Proof that

the legislature knew how much was at stake, and the situation ordinary persons would be in is found in the provision guaranteeing right to remove small irreplaceable items. See Minn.Stat. s 514.972, Lien against property, Subd 5.

Access to certain items, saying:

Subd. 5. Access to certain items. The occupant may remove from the self-service storage facility personal papers, health aids, personal clothing of the occupant and the occupant's dependents, and personal property that is necessary for the livelihood of the occupant, that has a market value of less than \$50 per item, if demand is made to any of the persons listed in section 514.976, subdivision 1. The occupant shall present a list of the items, and may remove them during the facility's ordinary business hours prior to the sale authorized by section 514.973. If the owner unjustifiably denies the occupant access for the purpose of removing the items specified in this subdivision, the occupant is entitled to an order allowing access to the storage unit for removal of the specified items. The self-service storage facility is liable to the occupant for the costs, disbursements and attorney fees expended to obtain this order.

Considering this clear humanitarian statutory commandment of allowing access, even in general just looking at the Act, it is just not thought this basic statutory rights and standards the legislature wanted could be "contracted away" by letting there be contracted little or no damages for avoidable negligent violation. It must be kept in mind that Minn.Stat. s 514.975 is "exactly" a limit on freedom of contract, and the only question is whether a normal or a narrow meaning would have been meant by the legislature. Merely reciting the phrase "freedom of contract" ignores that in this case the legislature is saying, "no", in this case freedom to contract is not seen as best.

At absolutely no time is the property put in storage stop being "owned" and the legal property of the people renting, and any taking of this property in any

legal situation would involve rights to "due process" and basic fairness. It is not known, just looking at the Self-Storage Act in general, how this Act unlike 1) the real estate foreclosure laws, 2) or the personal property (car) repossession laws, should have its statutory requirements be violated for no good non-negligent excuse yet not call for return of improperly taken property or equivalent damages. See Minn.Stat. s 336.9-625 (setting damages for wrongful repossession if statutes not followed, with no mention of allowing contractual limits to block damages if "repo" foreclosure and auction statutes not followed); See *Farmers and Merchants Bank of Center v. Hancock*, 506 So.2d 305, 3 UCC Rep. Serv. 2d 1983 (Ala. 1987) (punitive damages and damages for mental anguish awarded in a wrongful repossession case). Taking of property outside the strict requirements to do so set forth in statutes is theft, for which criminal charges and rights to restitution would be given, making it hard to see how less than can be what the legislature intended, or for legal principles what would be proper.

Cases in other jurisdictions seem to strongly act, and even bar limits on damages, if a statutorily standard of conduct is set in statute. See Restatement (Second) of Contracts § 195(2)(b) (1981) (stating that "[a] term exempting a party from tort liability for harm caused negligently is unenforceable on grounds of public policy if * * * the term exempts one charged with a duty of public service from liability to one to whom that duty is owed."). 57A Am.Jur.2d, Negligence, § 57. ("It is said that no person can, by agreement, exempt himself from liability for his negligence in the performance of a duty imposed upon him by law, especially

a duty imposed upon him for the benefit of the public, independently of the contract.") *Washington v. Equine Reproductive Concepts*, UNPUBLISHED, 2002 WL 32126309, August 15, 2002 (Virginia Circuit Court, Rockingham County 2002) (veterinarians, as a profession regulated by statute, cannot escape liability through a release document; Virginia Supreme Court has stated that a contract made in violation of a statute is void).

Other cases also indicate rules concerning auctions are meant to be standards which are simply not meant to be flexible and negotiable. See *In re Grant*, 182 B.R. 709, 27 UCC Rep.Serv.2d (569 Bkrcty.E.D.Pa., 1995) (saying, "As stated in the Uniform Commercial Code Comment accompanying § 7210, subsection (b)"embraces principally storage of household goods by private owners". The requirements of § 7210(b) are stricter than those in § 7210(a), particularly as they relate to notice and publication. The reason expressed for § 7210(b)'s strict requirements is that "[n]onvariable rules prevent storers and transporters from overreaching their customers and discriminating between them."). Other states also seem worried about letting completely illegal taking of property occur without serious consequences. *Mineika v. Union National Bank of Chicago*, 30 Ill.App. 3d 277, 332 N.E.2d 504 (1st Dist. 1975). "Any wrongful act which negatives or is inconsistent with the... [property-owner's] right is per se a conversion." ; *Gaynor v. Union Trust Co.*, 216 Conn. 458, 475-476, 582 A.2d 190 (1990)("strict compliance with statutory provisions [for] informational content of retail installment contracts is mandatory. . . . defendant nonetheless statutorily

forfeited its right to recover both its repossession and its storage costs because of the inaccuracy of its notice... court should have reduced the defendant's recovery to reflect this statutory mandate in its entirety.”)

Besides determining what statutes and principles of law require, courts must determine as a basic issue in each case whether a contract exculpatory clause violates public policy and thus should be unenforceable. *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 923 (Minn. 1982). If the type of services being sufficiently provided are public or essential, a contract clause may be overcome, however admittedly usually examination of bargaining power is also done. *Id.* In this case however self-storage companies foreclosing and auctioning without court involvement, or involvement of a sheriff, are doing public duties by nature and duties which one would not think public policy would let be done improperly or prematurely with someone else's property without compensation. In this case, to the extent any limit on liability for wrongful doing of a public or semi-public duty is released here, it is requested all limits on damages for foreclosing and auctioning improperly be overcome as against public policy.

Well, this situation with small consumers facing having their property lost by self-storage companies acting without court involvement and doing wrong foreclosures and auctions to the public, any maybe caused great avoidable harm taking treasured property, was the situation the legislature faced. The legislature acted, clearly meaning to limit freedom to contract in some way, and wrote: Minn.Stat. s 514.975 Rental agreements. "... A rental agreement may not

exempt an owner from liability for damages to an occupant's personal property caused by the owner's negligence." This provision, yet again, is intended to be a limit on freedom of contract that the legislature insisted be enforced with self-storage contracts. For all the reasons given above, including the seriousness of property being taken from owners, the burden in every case of having to "negotiate" damages to encourage statutes to be followed, knowledge that one was dealing with ordinary consumers and self-storage companies, and given the language itself and statutes which seem to want to set up clear rules to be followed not unclear rules always to be negotiated, the likely intent seems clear. When clearly deciding to limit freedom of contract, by far a general ban on all amounts of exemption for proven avoidable damages caused by an acting self-storage company would have been intended, and not a mere ban on only 100.000% exemptions leaving all else, 90% or other, to be fought in unequal negotiations.

B. INTENDED STATUTORY MEANING OF "MAY NOT EXEMPT...FROM LIABILITY FOR DAMAGES...CAUSED BY...NEGLIGENCE NOT THAT OF ONLY BARRING 100% EXEMPTIONS LEAVING ALL OTHERS AMOUNTS ALLOWED

1. SITUATION ALONE SHOWS PROBABLY INTENDED TO BAR ALL ATTEMPTS TO AVOID LIABILITY FOR PROVEN NEGLIGENCE

Again, Minn.Stat. s 514.975 Rental agreements, says "... A rental agreement may not exempt an owner from liability for damages to an occupant's personal property caused by the owner's negligence." The meaning of this provision is not judged like an ambiguous contract under an

ordinary reader, but instead the most likely meaning intended by the legislature.

To state the obvious, Minn.Stat. s 514.975 is a clear statutory limit on the right to contract, so references to “freedom to contract” are misplaced. Also to state the obvious, this statute is not banning avoidance of liability for true accidents, but only those damages proven to be caused by a negligent mini-storage company (negligence by definition means lack of ordinary care, with the harm done to an innocent person that which could have been avoided without this negligence, and for other persons will with ordinary care being avoidable in future cases if there is incentive to take more care). Given even just this general situation, this obviously seems a case where the legislature intended for proven avoidable negligence which caused damages to not allow any limits on liability. Compare this to, as Appellant suggests, the alternative almost “irrational” interpretation of the legislature bothering to act but banning only complete 100.00% avoidance of liability while leaving 90% or other amounts of avoidance still having to be fought for and negotiated and allowed so long as not a 100.000% total exemption. As just discussed the situation and risks at stake were also high, the difficulties of negotiating damages to encourage mandatory statutes to be followed, further making it clear real action would be taken by the legislature.

2. ONLY VAGUE DICTIONARY MEANING, AND STATUTE APPEARS TO BE BAN ON ACTION WHICH WOULD INCLUDE PARTIAL EXEMPTIONS

Looking at the statutory wording, it should be strongly noted, that unlike the clause in the Rental Agreement which reads “Lessor is not exempt from liability” which is a state of being, the statute declares what action the rental agreement may not do, saying a rental agreement “may not exempt an owner from liability for damages”. Minn.Stat. s 514.975. Saying an agreement may not engage in the action of “exempting” prohibits partial exemptions as well since all actions of “exempting” would be forbidden. This should end any debate.

Despite being cited in Appellant’s Brief, as discussed above, the dictionary meaning of “exempt” does not have an accepted either narrow or broad meaning. As cited above, like the word “crew” sometimes one single word does not convey a precise or at least narrow legal meaning, but it takes 2 or 3 words to do this, which is not a heavy burden. Using a general word indicates that that in general any exemption is barred, not a specific type or amount of exemption.

3. WORDS SIMILAR TO “EXEMPT” DO NOT REQUIRE OTHER WORDS TO BE EFFECTIVE BANS ON PROHIBITED ACTION

Despite being cited in Appellant’s Brief the phrase “eliminate or limit” obviously does not involve the word “exempt” or even cases where the meaning of absence of words is addressed. Actually, the 4 instances of the phrase

“eliminate or limit” found by Appellant all come from just 1 instance (so just one example) where this language is used in the Delaware Corporations Act or similar Model Corporations Act, from which the 4 Minnesota Statutes about “directors liability” are apparently copied. See Delaware General Corporation Law (GCL), codified at Del. Code Ann. title 8. GCL § 102(b)(7).

To counter the example of the word “eliminate” raised by Appellant one can look at a similar word, “avoid”, and see the Minnesota legislature when it acts to ban any attempts to “avoid” does not intend to still allow acts to partly avoid (this entire line of argument is almost too illogical or contrary to the language at issue, it is hard to see how this could be). See Minn.Stat. s 18D.111, Agricultural Chemical Liability Incidents, Liability for costs, ...”Subd. 4. Avoidance of liability. (a) A responsible party may not avoid liability by means of a conveyance of a right, title, or interest in real property, or by an indemnification, hold ...”; Minn.Stat. s 115B.10, No avoidance of liability; insurance and subrogation - - - (same)...”; Minn.Stat. s 115C.04, Liability for response costs - - - “...Subd. 2. Avoidance of liability. (a) (same).

4. “EXEMPT” LANGUAGE USED IN STATUTES AND CASES SHOW IT INCLUDES PARTIAL EXEMPTIONS NOT JUST 100% EXEMPTIONS

If one does research one can, indeed, find examples in statutes directly on the issue of limiting avoidance for liability using the very word “exempt” which is seen as a ban on partial attempts to exempt not just 100% attempts. (The word “exempt” seems to be more in use in the United Kingdom where there are more

examples, strangely). California Civil Code s 1668 (Miche 1999) provides: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his [or her] own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." (underlining added). As explained by a commentator in California, "But there can be no exemption from liability for intentional wrong, gross negligence, or violation of law." (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 631, p. 569 . . See now 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 660, pp. 737-738, italics omitted.); also see *Lund v. Bally's Aerobics Plus, Inc.* (2000) 78 Cal.App.4th 733, 739.)(Cal.App. 2000).

Common carrier law has changed over years due to policy considerations, but in cases which turn on just the meaning of "exempt" found in a statute, the result is clear. In the Supreme Court of Appeals of Virginia case in *Chesapeake & O. Ry. Co. v. Beasley, Couch & Co.*, 52 S.E. 566, 104 Va. 788, 52 S.E. 566, 3 L.R.A.N.S. 183 (Va. App. 1906), it was said, helpfully talking at length about how "exempt" in a statute should be interpreted:

The decision of this case must depend upon the meaning to be attributed to the word "exempt" in our statute. If the carrier may limit its liability, though disabled by statute from exempting itself from liability, then the act of the Legislature is of little worth. The common law imposes upon railroad companies, as common carriers, the obligation to pay in full for property lost by them, which they have undertaken to transport, or damages to the extent of any injury which such property may have sustained. *St. Louis Ry. Co. v. Sherlock* (Kan. Sup.) 51 Pac. 899.

It is conceded that a contract, though resting upon a consideration mutually agreed upon between the parties and fairly entered into, would be void if it exempted the carrier from all liability. The value of the property lost in this case is fixed by the verdict of the jury at something more than \$600; the recovery is limited by the contract to \$100. The common-law liability, therefore, of the carrier is, by virtue of this contract, if it be sustained, effaced and obliterated, to the extent of \$500, or five-sixths the value of the property. It seems to us that to the extent to which the carrier is relieved from liability which the law would otherwise have imposed upon it, it is to be considered and treated as having undertaken to exempt itself, by force of its contract.

But it is said the limitation must be a reasonable one. If, in the teeth of the statute, we are permitted to indulge in argument or conjecture as to what is in a particular case reasonable, where would the line be drawn? In the case before us the recovery is diminished from \$600 to \$100. Is that the limit of reasonableness? By what standard is five-sixths of the valuation determined upon as a reasonable limitation or restriction? Could not the estoppel upon the conscience of the shipper be urged with as much force if the value of the goods had been fixed by the contract at \$50 or \$20? It would still have been an agreement between parties capable of contracting, fairly entered into, and for a valuable consideration. It is void, not because it is unreasonable, but because the Legislature has seen fit to declare that all such contracts, whether reasonable or unreasonable, are invalid.

We do not perceive the force of the reasoning which would give operation and validity, by way of estoppel, to a contract which the lawmaking power has declared to be void as repugnant to public policy. In the case of *Hart v. Penn. R. Co.*, supra, there was, as we have said, no statute affecting the contract. We do not believe that the Legislature, in passing the statute, either as it appears in the Code of 1887, or in that of 1904, meant to strike at contracts which exempt from liability, and leave untouched and in full force those which by limitation and restriction accomplish substantially the same purpose. Experience has shown that the shipper does not stand upon an equal footing with the carrier. He is at a disadvantage in contracting with the carrier. This the Legislature well knew, and this was the evil which it intended to suppress. The statute was designed to go to the very root of the trouble, and to declare all such contracts invalid; and it was not contemplated, in our judgment, by the Legislature, that any such halting and half-hearted remedy should be applied to the situation as a prohibition upon contracts which exempt, while leaving the carrier free to impose such terms of restriction of liability as would still leave the shipper at its mercy.

The above result, and meaning of the bar on "exemption" was not seen to change decades later, in a similar case. See *C. & O. Ry. Co. v. Osborne* 154 Va. 477, 153 S.E. 865 (Va.App. 1930) (saying, Sections 3930 and 3926 of the Code of 1919. -- Section 3930 of the Code of 1919 provides that no exemption from liability for injury or loss occasioned by the neglect or misconduct of a common carrier shall be valid, and section 3926 of the Code of 1919 provides that: 'No contract, receipt, rule, or regulation shall exempt any such common carrier, railroad or transportation company from the liability of a common carrier which would exist had no contract been made or entered into.' *Held:* That under these provisions no contract, receipt, rule, or regulation, even though approved by the State Corporation Commission, is effective to relieve, in whole or in part, a carrier from any liability as a common carrier for loss or damage which would exist had no such contract, receipt, rule, or regulation been made. - - A limitation by rule, regulation, notice, contract or receipt of the amount of recovery which may be had for the loss of a shipment or damage thereto, whether it is attempted to make the limitation by a declared or agreed value of the property or by some other means, constitutes such an exemption from liability).

5. STATUTORY INTENT LIKELY WAS THAT OF PLACING REAL BAR TO ALL ATTEMPTS TO AVOID LIABILITY

Given all of the above, one has to decide the most likely intended meaning of the statute. We should not easily interpret a statute to avoid giving relief to a

party. *Harrison v. Schafer Constr. Co.*, 257 N.W.2d 336 (Minn.1977)(saying, when engaging in statutory construction, we interpret remedial legislation broadly to better effectuate its purpose.); *Nordling v. Ford Motor Co.*, 231 Minn. 68, 77, 42 N.W.2d 576, 582 (Minn. 1950)(saying, we interpret exceptions contained within remedial legislation narrowly); see *State ex rel. McCubbin v. McMillian*, 349 S.W.2d 453, (Mo.App. 1961)(" The legislature clearly recognized the end it sought to achieve and it would be violative of the most elemental rules of statutory construction if we were now to say that they intended only to partially accomplish their objective.").

The alternative to not barring most attempts to limit liability for negligence is that consumers will have to seek to modify probably "form contracts", or seek insurance for another's intentional improper taking (which would be theft) which insurance probably is not available. Consumers will be trying to bargain for some incentive or real amount of damages to get some incentive for self-storage companies to follow the basic statutory standards of foreclosing and auction the lessor's property, which the law already "supposedly" requires. This includes the strange idea of hoping that given how little worry a mini-storage company might have if a cap on damages exists, that with so little worry they will not be worried about forgetting to properly run your account and bother to call you before an auction. This all seems to be exactly the kind of situation one cannot expect real bargaining, and when it is just not right or at least best that the right to recover for

negligence in foreclosing and auctioning self-storage companies cannot be bargained away.

Furthermore, if a low cap on available damages is set through bargaining of \$5000 or, say, \$1000 there is little incentive to change from doing avoidable harm for self-storage companies who by avoidable negligence are causing harm to hundreds of Minnesota families to change, for years. For public policy reasons, this should not be desired.

If bargaining concerning liability amounts is allowed, in all lawsuits each case may involve seeking to find the contract limits reached unenforceable due to unequal bargaining. As a result each case, and each judge, will have to spend discovery and trial time investigating at length bargaining power of the industry, expert testimony on alternative self-storage companies, and the bargaining that went on in each case. This is the opposite of the clear duties and seeming clear allowance of claims for negligence the statutes set forth.

For all these reasons discussed above, the most likely if not only reasonable interpretation is that for damages caused by the negligence of the self-storage operator liability may not be exempted against in contract in any amount. After the legislature has clearly decided to limit freed of contract, any other construction does not make as much sense.

III. IN THIS CASE DAMAGES CANNOT BE LIMITED NOW (WITHOUT FURTHER PROCEEDINGS) SINCE DISTRICT COURT SAID GREATER MISCONDUCT COULD BE FOUND FOR WHICH LIABILITY MAY NOT BE LIMITED, AND DURING ANY PROCEEDINGS CLAIMS WRONGLY DISMISSED SHOULD BE RESOLVED

By Minnesota law a party may not limit liability for gross negligence, willful or wanton conduct, or intentional conduct, so damages may not be limited now at this time, if possibly such degrees of fault are possible in this case. This issue was raised with the district court, at trial and in letters, and the district court in the final memorandum did indicate maybe intentional conduct could be found, thus clearly leaving this still at issue. See *Arrowhead Elec. Coop. v. LTV Steel Mining Co.*, 568 N.W.2d 875, 880 (Minn.App.1997) (saying, would remand for trial where issue of material fact existed as to willful conduct of party benefited by exculpatory clause). See *Schlobohm*, 326 N.W.2d at 923 (stating, an exculpatory clause may not shield a party from intentional, willful, or wanton acts); *Beehner v. Cragun Corp.*, 636 N.W.2d 821 (Minn.App.,2001) (saying, given exculpatory clause releasing party from liability for ordinary negligence, summary judgment is appropriate only when it is uncontested that party benefited by exculpatory clause has committed no greater than ordinary negligence.) The district court did in the memorandum attached to the final judgment say possibly conduct could be found, and did not address one way or other whether say gross negligence or willful and wanton conduct would be found (despite these being relevant and

requested). Damages even if possibly to be limited, cannot be limited at this time, without further proceedings to resolve these issues.

As part of any further proceedings, if the full damages are not awarded now, claims improperly dismissed on summary judgment should be considered. These including claims for invasion of privacy dismissed on grounds that property was turned over as part of the self-storage relationship ignoring the limited nature of access with a padlock on the storage unit, and ignoring the later totally premature and improper auction which resulted in personal papers and photographs being given to third parties. (A.A.28)

Also included to be raised are claims for trespass, which possibly included a claim for conversion not officially dismissed, which given the nature of the relationship and at time of summary judgment no evidence of mailing or any attempt to meet requirements while taking intentional action was raised. (A.A.28, 47). Also supporting the trespass and conversion claims, and the reckless or intentional conduct, was admissions made that Appellant itself despite it holding the property and auction did not attempt any acts of mailing notice, did not describe goods but others used boilerplate description in published notice of auction, and proper name of all owners of property in published notice of auction was not used and instead "Gregg Johannis" alone was named. Showing intentional conduct and recklessness it was admitted Appellant had no knowledge of most matters improperly assumed this had been done by a third

party, the franchise headquarters. All these claims were dismissed for improper legal grounds.

CONCLUSION

The Rental Agreement does use vague words or single words at least ambiguously possibly indicating claims for negligent performance of duties required may be allowed, is contradictory and thus ambiguous sometimes barring all claims yet in others saying claims for negligence or intentional or willful and wanton claims may be allowed, and does in many place at least ambiguously appear to seek illegal limits on liability. The Rental Agreement's language on liability is not enforceable and the damages found caused by Appellant of \$67,500 plus interest and costs should finally be awarded.

For negligent foreclosure and auctioning leading to improper illegal taking of another's property which is theft, under principles of law, and given the statutory limit on freedom of contract barring any attempt to exempt for negligence which most likely was intended to bar not only complete exemptions of 100% of liability but partial ones, the damages found caused by Appellant of \$67,500 plus interest and costs should finally be awarded.

If full damages are not being awarded at this time, further proceedings are required before damages may possibly be limited to determine if gross negligence, willful or wanton conduct, or intentional conduct was present, which findings were requested and the district court indicated such could be found, since if such degrees of conduct may be present no contractual limit on liability is effective under Minnesota law. In any further proceedings if full damages are

not being awarded claims improperly dismissed of trespass, conversion, and invasion of privacy should be considered.

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Respectfully submitted,

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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).