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Droge v. AAAA Two Star Towing, Inc., 136 Nev. Adv. Op. 33 (Jun. 18, 2020)

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Droge v. AAAA Two Star Towing, Inc., 136 Nev. Adv. Op. 33 (Jun. 18, 2020)[1]

SELF-HELP REPOSSESSION: CLAIM AND TEST FOR BREACH OF PEACE

Summary

The Court determined that the test to determine if there was breach of the peace while undertaking self-help repossession considers: (1) repossession occurs at a reasonable time, (2) in a reasonable manner, and (3) that the objectives for self-help repossession are balanced to minimize violence in the act of and attempt to repossess. The Court also determined that the recovery from breach of peace in self-help repossession need not be brought only under NRS 104.9625. Recovery may be sought through a tort-based breach of peace claim.

Background

Russell Droge entered into a loan agreement for the purchase of a pickup truck. While Droge was incarcerated, the truck was stored at his parent's residence. During Droge's incarceration, Droge defaulted on the loan and the lender retained Zane Investigations ("Zane") to perform the repossession of the truck. Zane assigned Romans to be responsible for repossessing the truck.[2] Normally, the truck was parked in the fenced in portion of the parents' residence. But on the incident in question, the truck was parked in the driveway of the parents' residence which was not fenced in and accessible. Romans contacted AAAA Two Star Towing to provide towing services for this repossession. AAAA Two Star Towing dispatched Shupp to be the tow driver.

The sequences of events that comprise the incident that led to litigation are unclear and unresolved. After Shupp began to chain the truck to tow it away, the parents became aware of the events transpiring and confronted Romans and Shupp. At some point, an objection to the repossession was made but the attempt to repossess continued until the father attempted to move the truck to the fenced in part of the residence. Romans or Shupp eventually contacted 9-1-1 and law enforcement arrived. As a result of the father moving the vehicle, there is some dispute if Shupp was almost run over because he was still attaching chains at this time, and so, the father was charged with battery with a deadly weapon. The father was later acquitted of this criminal charge.

According to the parents, this is the sequence of events that occurred: The parents contend that they requested Romans' identification and documentation but were denied. The parents claim that they objected numerous times throughout the entire interaction. The parents claim that when the father moved the truck, the father saw Shupp at the back of the truck and so, moved forward to allow Shupp to stand up and get out of the way before backing up.

According to Romans and Shupp, this is the sequence of events that occurred: Romans and Shupp contend that they were never asked for identification or documentation. Romans claims that she identified herself and her purpose for being on the premises and as a result, the mother threatened to call 9-1-1. Romans contends that the parents never objected until after the truck was

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[1] By Rachael T. Gonzales.

[2] Zane and Romans are referred to collectively herein as Romans where appropriate.

moved to the fenced in portion of the residence. Shupp contends that he was still under the truck attaching the chains when the father was moving the truck and was struck by the rear wheel of the truck.

The parents filed this action, alleging the following causes of action: malicious prosecution; negligent hiring, training, and supervision; negligent infliction of emotional distress; negligent performance of an undertaking; nuisance; aiding and abetting; concert of action; intentional infliction of emotional distress; unreasonable intrusion upon the seclusion of another; and declaratory relief.

The District Court granted summary judgment in Romans' favor for the malicious prosecution and negligent hiring because it found that the parents had not established the required elements. After discovery, the District Court granted summary judgment in favor of Romans for all the remaining claims because the parents had not established the required elements for the claims they asserted. The parents appealed both summary judgment orders.

On appeal, the parents argued that (a) Romans and Shupp forfeit the protections offered by NRS 104.9609 because they breached the peace and (b) the tort claims are underpinned by the breach of peace and trespass theories.

On appeal, Romans and Shupp argued that (1) the entry onto the property was privileged under NRS 104.9609 and (2) the amended complaint did not prove the required elements for the claim.

The Court of Appeals in this case has answered three questions:

(A) What conduct, undertaken in the course of a self-help repossession of a vehicle constitutes a breach of peace that NRS 104.9609's privileges do not apply?
(B) Whether the tort claims for breach of peace and trespass may be cognizable claims if not plead separately or plead as a violation of NRS 104.9609?
(C) Whether summary judgment was warranted with the tort claims plead?

Discussion

NRS 104.9609 provides that when a default occurs, the secured party may take action to repossess the collateral without judicial process but may not breach the peace.[3] This appeal concerning the breach of peace language in NRS 104.9609 is a matter of first impression before the Court.

Whether Romans and Shupp forfeited the protections afforded by NRS 104.9609 by breaching the peace in their efforts to repossess

Ultimately, the Court adopts the majority approach for defining breach of peace by incorporating the Restatement (Second) of Torts reasonableness test with the addition of balancing the objectives of self-help repossession while minimizing violence.

[3] NEV. REV. STAT. 104.6609 (2019).

The Court rejects the definition of breach of peace provided in the criminal statute, codified as NRS 203.010, to apply to the breach of peace not defined in NRS 104.9609.[4]

The Court rejects a definition because the Court found that breach of peace is concept with a fluctuating standard similar to probable cause.[5] Provided that there is not a fixed definition, The Court considered the factual circumstances that other jurisdictions and courts have contemplated for breach of peace. The Court contemplated if violence should be a precondition, if trespass is required, if open and accessible areas on third party property still constitutes a breach, and if an objection is sufficient.[6] Courts were split on these considerations for what should be required for a breach of peace claim.

The Court clarified that mere objection may be sufficient to require the secured party to stop its repossession efforts to not breach the peace.

Then, the Court analyzed the Second Restatements of Tort test from § 198(1) that provided that privilege to enter another's land is if the entry is at a reasonable time and reasonable manner with the purpose to remove chattel. As for justifying and implementing the Restatements test, the Court considered the reasoning provided by the Wyoming Supreme Court because of how similar Wyoming's statute was to Nevada's statute and codified U.C.C. § 9-609.[7] The Wyoming Supreme Court reasoned that adopting the Second Restatement's reasonableness test was that the test balanced the secured party's right to enforce its security interest through self-help without disturbing tranquility and rights of those not party to the security agreement. Further, the Court justified that under the reasonableness test, the primary factors considered are still potential for violence.

To determine if the Court should adopt the Restatements test, the Court determined that the U.C.C. § 9-609 is the source for self-help repossession and that in U.C.C. § 9-601 comment 2 which provides that the self-help repossession is designed to protect the interests of a secured party, debtor, and general public.[8] The Court also adopted the Restatements test because NRS 104.9609 did not have legislative intent to suggest that deviate from the common law right to self-help that existed before the U.C.C..[9] The Court found that the Restatements test embodied the general majority approach to self-help repossession.[10]

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[4] NEV. REV. STAT. 203.010 (2020); NEV. REV. STAT. 104.6609 (2019).
[5] *See* Hopkins v. First Union Bank of Savannah, 387 S.E.2d 144, 145 (Ga. Ct. App. 1989).
[6] *See* Callaway v. Whittenton, 892 So. 2d 852, 854, 857 (Ala. 2003); Cottam v. Heppner, 777 P.2d 468, 472 (Utah 1989); Chrysler Credit Corp. v. Koontz, 661 N.E.2d 1171, 1173 (Ill. App. Ct. 1996); *See also* Davenport v. Chrysler Credit Corp., 818 S.W.2d 23, 29–30 (Tenn. Ct. App. 1991); Butler v. Ford Motor Credit Co., 829 F.2d 568, 569–570 (5th Cir. 1987); *See also* Reno v. Gen. Motors Acceptance Corp., 378 So. 2d 1103, 1103–05 (Ala. 1979); *See also* Hollibush v. Ford Motor Credit Co., 508 N.W.2d 449 (Wis. Ct. App. 1983); Chapa v. Traciers & Assocs., 267 S.W.3d 386, 395 (Tex. Ct App. 2008).
[7] Salisbury Livestock Co. v. Colorado Central Credit Union, 793 P.2d 470 (Wyo. 1990).
[8] U.C.C. § 9-601, comment 2 (AM. LAW INST. & UNIF. LAW COMM'N 1977).
[9] *See* Branch Banking & Tr. Co. v. Windhaven & Tollway, LLC., 131 Nev. 155, 158, 347 P.3d 1038, 1040 (2015).
[10] *See Salisbury*, 793 P.2d at 473; *See also* Giles v. First Va. Credit Servs., Inc., 560 S.E.2d 557, 565–66 (N.C. Ct. App. 2002).

Based on these considerations, the Court determined that any test to be adopted needed to balance the objectives of self-help repossessions while minimizing violence.[11] Therefore, the Court adopted the reasonableness test to require self-help repossession to be done at a reasonable time and in a reasonable manner. To be clear, the Court held that if the secured party fails in either of the reasonable time or a reasonable manner, or both, this is a breach of peace.

Not only has the Court adopted the Restatements reasonableness test, but the Court provided further direction to Nevada courts to additionally consider the balancing test for the objectives of self-help repossession and minimizing violence because NRS 104.1103(1) provides that the law may be liberally construed.[12] To be clear, both the reasonableness test and the balancing test of principles should be applied together when a court is analyzing a breach of peace claim.

The Court clarified its adoption of the Restatements test by analyzing what the Court will adopt by the comments section of Restatements Second of Torts Section 198. The Court expressly rejects comments h and I that allow breaking and entering and the use of force. The Court also declines to adopt comment d that allows the secured party to provide notice before entry onto the property to repossess.

Further, the Court clarified that although, reasonableness is a fact question, the district court may resolve a breach of peace claim before a trial is conducted if a reasonable jury could only reach one possible conclusion.[13] The Court also addressed that in summary judgment for breach of peace, it may be resolved in this phase because of the existence of disputed issues of material fact.

Whether genuine issues of material fact remain with respect to whether Romans' and Shupp's conduct breached the peace during the attempted self-help repossession

The Court noted that in analyzing this, the Court was solely focused on the reasonable manner of the conduct of Romans and Shupp in the attempt to self-help repossess.

The Court found that there were factual disputes concerning the majority of events that occurred during the incident and when viewed in a light most favorable to the parents, summary judgment was not appropriate.[14] The Court found that these factual disputes were material to the principles of self-help repossession as it affects all parties involved while minimizing violence and that the factual disputes raised questions to be resolved to determine if Romans and Shupp acted in a reasonable manner. Therefore, the district court erred in granting summary judgment in favor of Romans and Shupp.

Whether the parents failed to plead breach of peace and trespass as separate claims and therefore, the Court could not properly decide on these issues

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[11] *See* Clarin v. Minn. Repossessors, Inc., 198 F.3d 661, 664 (8th Cir. 1999); *see also Salisbury*, 793 P.2d at 475–76.
[12] NEV. REV. STAT. 104.1103(1) (2019).
[13] *See* Lee v. GNLV Corp., 117 Nev. 291, 296–97, 22 P.3d 209, 212–13 (2001).
[14] Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

Essentially, the Court rephrased the issue to ask if a plaintiff may recover from a breach of peace if the plaintiff only presents it as a tort claim, not under NRS 104.9625.

NRS 104.9625 provides a plaintiff a separate cause of action for liability when a secured party fails to comply with Article 9 of the U.C.C..[15] Courts have recognized that when a plaintiff brings a claim asserting NRS 104.9625 with a situation that is based on a breaching the peace argument which violates NRS 104.9609, this is considered a wrongful repossession claim. The critical part is that NRS 104.9625(3) sets forth that this claim is available only to debtors, obligors, and holders of security interest or lien on collateral.[16]

In considering the exclusivity of NRS 104.9625(3), the Court held that this is not an exclusive remedy.

The Court arrived at this conclusion based on comment 3 of U.C.C. § 9-625 which provides who may assert a claim. In comment 3, it clarified that persons eligible to assert this claim are able to recover for any loss that occurred as a result of the noncompliance with Article 9. Comment 3 went further and elaborated that principles of tort law supplement this section and that double recovery is prohibited. The indication that double recovery is prohibited was relevant to the Court because it suggested that if both a tort claim and wrongful repossession claim are brought, both may be premised on breach of the peace theory.

Other jurisdictions' approaches to determining who may assert a claim under an equivalent statute derived from U.C.C. § 9-625 as persuasive. The Court was persuaded by the reasoning that this remedy was considered cumulative to other remedies and that creditors that breach the peace are liable for any tort they commit.[17] Additionally, the Court was persuaded when other jurisdictions recognized and allowed plaintiffs to proceed on tort claims that arose from breach of peace theory.[18]

Additionally, the Court noted that it found NRS 104.9625 as nonexclusive because Romans and Shupp never argued that it was exclusive. By failing to assert this argument, argument is treated as waived.[19] Since it was waived, it can neither be considered on appeal.[20]

The Court also explained that it determined NRS 104.9625 was not exclusive remedy because the Court found that parties not entitled to statutory damages should have the opportunity to recover by pleading a tort claim.

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[15] NEV. REV. STAT. 104.9625 (2019).
[16] NEV. REV. STAT. 104.9625(3) (2019); Edelstein v. Bank of N.Y. Mellon, 128 Nev. 505, 523, 286 P.3d 249, 261 (2012).
[17] *See* Davenport v. Chrysler Credit Corp., 818 S.W.2d 23, 31 (Tenn. Ct. App. 1991); Gen. Elec. Credit Corp. v. Timbrook, 291 S.E.2d 383, 385 (W. Va. 1982); Whisenhunt v. Allen Parker Co., 168 S.E.2d 827, 831 (Ga. Ct. App. 1969).
[18] *See* Mauro v. Gen. Motors Acceptance Corp., 626 N.Y.S.2d 374, 377 (N.Y. Sup. Ct. 1995); Smith v. John Deere Co., 614 N.E.2d 1148, 1154–55 (Ohio Ct. App. 1993).
[19] *See* Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).
[20] *See* Powell v. Liberty Mut. Fire Ins. Co., 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011).

The Court clarified its determination by asserting that if the plaintiff is entitled to bring a claim under NRS 104.9625 or not, a plaintiff may still seek to recover through a tort claim for a breach of peace theory.

Whether the parents alleged sufficient facts to state claims based on their breach of the peace and trespass theories in light of the reasonable time and manner standard that the Court adopted as well as Nevada's liberal notice pleading standard

The parents' amended complaint alleged that Romans and Shupp entered the property and refused to leave after asked to leave by the parents.

Under Nevada's liberal notice pleading standard, the plaintiff need not use the precise legalese as long as the plaintiff as set forth facts to support a legal theory.[21] Further, Nevada Rules of Civil Procedure, Rule 8(a) only requires a short and plain statement that demonstrates the plaintiff is entitled to relief.

Under the adopted test for determining a breach of the peace, the parents must plead facts to indicate that Romans and Shupp acted to repossess the truck in an unreasonable manner. And for the parents to assert trespass, they must plead facts to indicate that there was an invasion of a property right.[22]

In the amended complaint, the Court found that the parents had plead facts that indicated these were the claims they were seeking recovery for because these allegations served as the primary foundation for most of the claims they asserted. The Court was further convinced that the allegations were plead sufficiently to put the defendants on notice because of the manner in which the parents conducted discovery, particularly, that they retained an expert in what constitutes a breach of the peace.

The Court also incorporated the analysis it conducted with determining that NRS 104.9625 was not exclusive, the Court determined that the parents had sufficiently stated their tort claim based on a theory of breach of the peace.

Further, the Court expressly distinguished this from *Sprouse.*[23] The Court distinguished on the grounds that the allegations made in this amended complaint were not scattered as they were in *Sprouse*. Instead, the allegations made by the parents were so ingrained in the complaint that under the notice pleading standard, the allegations sufficiently established a common law claims for wrongful repossession based on breach of the peace and trespass.

Therefore, the Court found that the parents had alleged breach of the peace and trespass properly.

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[21] Liston v. Las Vegas Metro. Police Dep't, 111 Nev. 1575, 1578, 908 P.2d 720, 723 (1995).
[22] *See* Lied v. Cty. Of Clark, 94 Nev. 275, 279, 579 P.2d 171, 173–74 (1978).
[23] Sprouse v. Wentz, 105 Nev. 597, 602, 781 P.2d 1136, 1139 (1989).

Whether summary judgment was warranted on the entirety of the parents' amended complaint, even though, genuine issues of material fact remain regarding whether Romans and Shupp breached the peace during the attempted repossession

The Court affirmed summary judgment on the negligent hiring, training, and supervision claim and the malicious prosecution claim because the parents expressly waived challenge to this on appeal.

The Court affirmed summary judgment on the negligent performance of an undertaking because the parents failed to address the arguments made in favor of granting summary judgment for Romans and Shupp and therefore, waived any challenge on appeal.[24]

The Court affirmed summary judgment on the negligent infliction of emotional distress because there was no evidence of injury and without injury, there could be no emotional distress as a result.[25]

The Court reversed the summary judgment for the remaining claims. The Court acknowledged the limitations because the district court did not establish undisputed material facts and legal determinations.[26] Ultimately, the Court found that genuine issues of material fact existed as to when the objection or objections were made, how Romans and Shupp responded to the objection, and if there was a violent incident. The Court also noted that as far as the contention that summary judgment was warranted in Romans and Shupp's favor because the parents did not suffer physical injury damages, the tort claims made do not require a physical injury damage.[27]

To clarify the Court's position on its reversal of summary judgment, the Court commented on three of the claims. The three claims are as follows: intentional infliction of emotional distress, malicious prosecution, and claim for punitive damages.

As to the intentional infliction of emotional distress, the Court clarified that intentional infliction of emotional distress is distinguished from negligent infliction of emotional distress. Under the Nevada Supreme Court, there is not a requirement to establish a physical manifestation if the conduct is sufficiently extreme and outrageous for an intentional infliction of emotional distress claim.[28] Under this, there remains a genuine issue of material fact as the extremeness and outrageousness of Romans and Shupp's conduct.

As to the malicious prosecution, the Court clarified that the independent determination rule does not apply if the defendant did not believe the information provided to authorities was true.[29] Here, there was a genuine issue of material fact as to whether the police report that Shupp had been struck with the truck was known to be false.

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[24] *See* Colton v. Murphy, 71 Nev. 71, 72, 279 P.2d 1036, 1036 (1955).
[25] *See* State, Dep't of Transp. v. Hill, 114 Nev. 810, 815, 963 P.2d 480, 483 (1998), *overruled on other grounds by* Grotts v. Zahner, 115 Nev. 339, 341, 989 P.2d 415, 416 (1999).
[26] NEV. R. CIV. PRO. 56(c); *see also* ASAP Storage, Inc. v. City of Sparks, 123 Nev. 686, 700, 356 P.3d 734, 746 (2007).
[27] *See* Land Baron Invs., Inc. v. Bonnie Springs Family Ltd. P'ship, 131 Nev. 686, 700, 356 P.3d 511, 521 (2015).
[28] *See* Chowdhry v. NLVH, Inc., 109 Nev. 478, 483, 851 P.2d 459, 462 (19993).
[29] *See* Lester v. Buchanen, 112 Nev. 1426, 1429, 929 P.2d 910, 912–13 (1996).

As to the claim for punitive damages, the Court clarified that punitive damages is not a cause of action but that punitive damages may be awarded if the plaintiff can show the defendant acted with oppression fraud, or malice during the attempted repossession.[30]

Conclusion

The Court concluded that the proper test for a breach of the peace claim with wrongful self-help repossession requires that a showing of unreasonable manner, unreasonable time, and that the objectives of self-help repossession do not balance to minimize violence. A showing of both unreasonable manner and unreasonable time is not required. Instead, a showing of either unreasonable manner or unreasonable time is sufficient. The Court further concluded that the claim need not only be brought under NRS 104.9625, instead, it may be a tort-based claim.

[30] 22 Am. Jur. 2d *Damages* § 567 (2013). *See also* Bongiovi v. Sullivan, 122 Nev. 556, 581, 138 P.3d 433, 450–51 (2006); *See also* Wolf v. Bonanza Inv. Co., 77 Nev. 138, 143, 360 P.2d 360, 362 (1961).