No. 10-138

IN THE
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

MINNESOTA NIGHTINGALE SOCIETY,

Appellant,

v.

GIANT CHICAGO BANK, INC.,

Appellee.

ON NOTICE OF APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

BRIEF FOR THE APPELLANT

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QUESTIONS PRESENTED

I. Did the District Court err in ruling that Giant Chicago Bank had a valid security interest when the security agreement was unilaterally amended after it was signed and the collateral was described as "Nimbus X-Ray Machine and Building" while Nightingale owns a Nimbus MRI machine and an X-ray machine housed in similar buildings?

II. Did the District Court err in ruling that Giant Chicago Bank did not breach the peace when it hired a woman to fake a seizure, continued repossession after a Nightingale employee shouted "Stop, thief," and severed an electrical wire connecting the MRI building to the clinic?

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OPINION BELOW

The opinion of the United States District Court for the District of Minnesota is unreported and contained in the Joint Appendix. J.A. at 42.

STATEMENT OF JURISDICTION

The judgment of the United States District Court for the District of Minnesota was entered on September 20, 2010. Minnesota Nightingale Society's notice of appeal was submitted on October 6, 2010. The jurisdiction of this court is invoked under 28 U.S.C. section 1291.

STANDARD OF REVIEW

A court should grant summary judgment if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S.

317, 322 (1986). The standard of review for mixed questions of law and fact is thus *de novo*. *See Salve Regina Collage v. Russell*, 111 S. Ct. 1217, 1224 (1990). Motions for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a) follow the same standards as motions for summary judgment. *Anderson v. Liberty Lobby*, 477 U.S. 242, 250 (1986). The moving party has the burden of proving there is no genuine issue of material fact, *Anderson*, 477 U.S. at 256, and all inferences should be made in favor of the nonmoving party, *id.* at 249.

STATUTES INVOLVED

The relevant sections of the following statutes are set forth in the Appendix to this brief: Minn. Stat. § 336.9-108 (2006); Minn. Stat. § 336.9-203 (2006); Minn. Stat. § 336.9-609 (2006); Minn. Stat. § 645.22 (2008); Ala. Code 1975 § 7-9A-609 (2010); 13 Pa. Cons. Stat. § 9609 (2010).

STATEMENT OF THE CASE

Minnesota Nightingale Society (Nightingale) is a non-profit organization committed to providing much-needed health care to the poor and underinsured in Duluth, Minnesota. J.A. at 23. Nightingale operates three offices in economically depressed sections of Duluth. J.A. at 21. Nightingale received as a donation a Nimbus 4000 Magnetic Resonance Imaging Machine, which is housed in a wood shed and is placed on a pallet so it may easily be moved among the three clinics. J.A. at 21, 23. Nightingale also owns an X-ray machine that is housed in a similar shed and is also rotated among the clinics. J.A. at 22.

On February 12, 2009, Nightingale entered into a loan agreement for $250,000 with Giant Chicago Bank, Inc. (GCBI). J.A. at 6. GCBI is incorporated in Delaware and operates its principal office in Chicago, Illinois. J.A. at 3. The parties signed a Security Agreement at the same time. J.A. at 10. The parties stipulate that, at the time, they agreed the Nimbus 4000

Magnetic Imaging Machine and shed would serve as collateral. J.A. at 21. At the time of the agreement, the parties did not know the serial number of the machine and decided to write "to be filled in later" for the description of the collateral. *Id.* Though Nightingale never communicated the serial number to GCBI, J.A. at 22, GCBI altered the Security Agreement after the parties signed it on February 12, J.A. at 2. GCBI wrote in the Security Agreement "Nimbus X-Ray Building and Machine" for the description of collateral. J.A. at 14. Nightingale did not receive a copy of the altered Security Agreement until January 2010. J.A. at 3.

On Thanksgiving evening, November 26, 2009, around 9:30 p.m., Nightingale employees working at the Washington Street Clinic heard a woman screaming outside their doors and ran to her rescue. J.A. at 35. They found a young woman lying on the ground moaning. *Id.* Then the lights in the clinic suddenly went out, and one of the nurses, Al Thorne, rushed back into the building, fearing a coffee machine had short-circuited and possibly caused a fire. *Id.* Yet, at that moment, GCBI employees were behind the clinic and had severed an electrical wire connecting the MRI shed to the clinic. J.A. at 36. GCBI had paid the woman $100 to fake a seizure to distract Nightingale employees while GCBI snuck behind the building and loaded the MRI shed onto a flatbed tow truck. J.A. at 30, 36.

After running to the second floor of the clinic, Thorne saw out the window three men loading the MRI building onto the truck. J.A. at 35. He yelled, "Stop, thief," as he believed the clinic was being robbed. J.A. at 35-36. He ran down the stairs and chased the truck, now driving out of the lot, and threw bricks at it. J.A. at 35. Thorne said he was "absolutely outraged," recalling times when medical equipment had been stolen in Iraq, where he served two tours of duty in the U.S. Marine Corps. J.A. at 34-36. Thorne then called 911, still believing the clinic had been robbed. J.A. at 36.

Nightingale filed a complaint on January 22, 2010, against GCBI in the U.S. District Court for the District of Minnesota, alleging trespass, wrongful possession, and conversion. J.A. at 3-5. The Honorable Judge Mark Tyrol granted GCBI's Motion for Judgment as a Matter of Law on September 17, 2010, and dismissed the case with prejudice. J.A. at 40. Judge Tyrol admitted that it was "a very close question" but held that there was insufficient evidence for a jury to conclude that GCBI did not have a secured interest in the MRI machine and shed or that GCBI breached the peace. J.A. at 38, 40. Nightingale then filed a Notice of Appeal on October 6, 2010, to commence the present action. J.A. at 43.

SUMMARY OF THE ARGUMENT

Nightingale respectfully requests that the court reverse the District Court's decision to grant GCBI's Motion for Judgment as a Matter of Law and remand for further proceedings. First, GCBI failed to perfect a security interest in the Nimbus 4000 MRI machine and building when it amended the contract without consulting Nightingale and acquiring its written consent. The security agreement between GCBI and Nightingale does not satisfy the requirements of Minnesota Statutes section 336.9-203 because, even when all the evidence is considered together, there is no signature agreeing to the description of collateral. Second, GCBI changed the written agreement without consulting Nightingale and, in doing so, wrote a description of the collateral that could not be enforced because it is confusing and ambiguous. Nightingale has multiple machines to which the description might be referring. Thus, Nightingale cannot identify the collateral itself, let alone its assignees or potential third parties. GCBI, therefore, failed to perfect a security interest, and the District Court erred in granting GCBI's Motion for Judgment as a Matter of Law on the security interest.

Additionally, GCBI breached the peace while attempting a self-help repossession of the clinic's MRI machine and building. First, GCBI hired a woman to fake a seizure in front of the clinic to divert Nightingale employees' attention away from GCBI's agents, who then snuck behind the building to take the MRI machine and building. This use of deception and trickery alone amounts to a breach of the peace. Second, Nightingale objected to the repossession and revoked consent before GCBI had gained "sufficient dominion" over the MRI building, so GCBI's continued repossession efforts after the objection equaled a breach of the peace. Finally, GCBI severed the electrical wire connecting the MRI building to the clinic, which constitutes unlawful entry and, thus, breach of the peace. Because a reasonable jury could conclude from these facts that GCBI breached the peace, the District Court erred in granting GCBI's Motion for Judgment as a Matter of Law on the breach of peace.

Nightingale, therefore, respectfully requests the court reverse the District Court's ruling on both the security interest and breach of peace and remand for further proceedings.

ARGUMENT

I. The District Court erred in granting the Motion for Judgment as a Matter of Law on the attachment of the security interest because the security agreement was improperly amended without notice or agreement, and the description of the collateral was ambiguous.

The Minnesota statute regarding security interests provides:

> A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral . . . . Except as otherwise provided in subsections (c) through (i), a security interest is enforceable against the debtor and third parties with respect to the collateral only if: (1) value has been given; (2) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and (3) . . . (A) the debtor has authenticated a security agreement that provides a description of the collateral . . . ."

Minn. Stat. § 336.9-203 (2006). The description of the collateral is sufficient if it "reasonably identifies what is described." Minn. Stat. § 336.9-108 (2006).

There is no dispute that, in the security agreement between GCBI and Nightingale, value has been given and Nightingale has rights in the collateral. First, value was given because the security agreement stated the collateral was valued at $250,000. J.A. at 10. Second, Nightingale has rights in the collateral because the MRI machine was donated to it by an anonymous benefactor. J.A. at 20.

The District Court erred in granting GCBI's Motion for Judgment as a Matter of Law because GCBI did not perfect a security interest in the Nimbus 4000 MRI machine and building. The amended agreement cannot be enforced because the GCBI changed the description of the collateral without Nightingale's assent, and the change is too confusing and ambiguous to hold Nightingale or any future third party to that description. Thus, Nightingale respectfully requests the court reverse the District Court's Motion for Judgment as a Matter of Law and remand for proceedings on the remaining questions of fact.

A. GCBI did not perfect a security interest in the Nimbus 4000 MRI machine because the security agreement was improperly amended without a signature.

A security agreement can be created by combining several authenticated documents, *In re Numeric Corp.*, 485 F.2d 1328, 1331 (1st Cir. 1973); however, it is still a contract and will be given its plain and ordinary meaning even if the result is harsh. *Allete, Inc. v. GEC Eng'g, Inc.*, 726 N.W.2d 520, 523 (Minn. Ct. App. 2007). This means that the writing must reflect the intent of the parties and comply with the Statute of Frauds. *Numeric*, 485 F.2d at 1331. A writing must carry the signature of the debtor to satisfy the requirements and the policies behind the statute. *In re Cantu*, 238 B.R. 796 (B.A.P. 8th Cir. 1999). Because other parties may be concerned with the collateral, the statute prevents the enforcement of claims based on oral representations, *Numeric*, 485 F.2d at 1331, even if the intent of the parties appears to create a security interest in the collateral, *Shelton v. Erwin*, 472 F.2d 1118, 1120 (8th Cir. 1973).

A security agreement can be created by merging multiple authenticated documents. *Numeric*, 485 F.2d at 1328, 1331. A formal security agreement is not necessary to perfect a security interest if the parties have an agreement that adequately describes the collateral and demonstrates the parties' assent. *Id.* at 1331. In *Numeric*, the debtor purchased from the creditor machinery and signed a bill of sale describing the machinery. *Id.* at 1329. Subsequently, the debtor board of directors passed a resolution intending to create a security interest and citing the bill of sale as description of collateral. *Id.* The court found that, even though a formal security agreement was never drawn up, the directors' resolution combined with the bill of sale constitute a security agreement. *Id.* at 1332. Yet the court also noted that it cannot rely merely on oral representations to authenticate an agreement of such value (roughly $34,000). *Id.* at 1331.

A security agreement is a contract: the writing will be given its plain and ordinary meaning even if the result is harsh. *Allete*, 726 N.W.2d at 523. In *Allete*, the security agreement claimed an interest in all property located at a facility in Aurora, Minnesota. *Id.* at 521. The property in dispute was never at that property although the creditor believed it was. *Id.* The court enforced the plain meaning of the contract, finding that the property in dispute was never covered by the agreement. *Id.* at 523.

Even though a security agreement can be construed from many documents, it still must have the debtor's signature to be valid. *Cantu*, 238 B.R. at 798. In *Cantu*, the debtor signed a check with a clause incorporating a voucher describing collateral for the loan. *Id.* The court construed the agreement to be created by both the language on the loan check and the language on the security voucher because of the integration clause on the check. *Id.* The court described the integration clause as "critical" and held that the description was validly signed by the debtor.

Id.; *see also Numeric*, 485 F.2d at 1331 (stating that the signature requirement on a description of collateral acts as a Statute of Frauds).

The intent of the parties to create a security agreement is insufficient in itself to create a security interest. *Shelton*, 472 F.2d at 1119. The court in *Shelton* held that, although the placement of a creditor as principal lien holder on a car title clearly showed intent to create a security interest, the parties did not satisfy the formal requirements of the Uniform Commercial Code. *Id.* at 1120. The court pointed out that this seemed harsh, but the requirements of the statute were plain and should not be construed to benefit parties who do not comply with them. *Id.* at 1120.

The documents between GCBI and Nightingale considered together do not create a security agreement. Unlike the scattered, informal documents in *Numeric*, 485 F.2d at 1329, Nightingale and GCBI created formal security agreements. J.A. at 10. The two security agreements have signatures and a description of the collateral, J.A. at 10-14; however, GCBI added the description after the signing, J.A. at 3. This description was added without Nightingale's consent and so should not be considered as evidence of the bargain between them. Without the description, the security agreement fails to satisfy Minnesota Statutes section 336.9-203(b)(3)(A), which requires a description of the collateral.

The plain and ordinary meaning of the security agreement does not perfect a security interest in the Nimbus 4000 MRI machine. The description GCBI amended reads, "Nimbus X-Ray Building and Machine." J.A. at 14. There is no such building or machine in Nightingale's possession; rather, there is a Nimbus 4000 MRI machine and an X-ray machine. J.A. at 21-22. Just as the agreement in *Allete* was interpreted by its plain meaning, even if the result was harsh, 726 N.W.2d at 523, the agreement between Nightingale and GCBI must be interpreted according

to its plain meaning. Because the signature on the amended security agreement should not be considered evidence of the agreement between the parties, the description that was left, "to be filled in later," should be controlling. J.A. at 10. Thus, there was no written description of collateral.

The security agreement between Nightingale and GCBI does not have an adequate signature when all documents are considered together. Unlike the agreement in *Cantu*, which contained an integration clause explicitly binding the language between documents, 238 B.R. at 798, the agreements between Nightingale and GCBI contained no such integration clause, *see* J.A. at 10-17. There is no signature with the description of the collateral because the description was added later without Nightingale's knowledge, J.A. at 3, and there is no language to suggest Nightingale agreed to the new description. Because Minnesota Statutes section 336.9-203 requires a signature to serve the Statute of Frauds, *see Numeric*, 485 F.2d at 1331, the agreement between Nightingale and GCBI lacks a valid signature and fails to perfect a valid security interest.

GCBI cannot depend on oral representations to authenticate the agreement. *Numeric*, 485 F.2d at 1331. Whereas the agreement in *Numeric* was for $34,000 and the court required it to be in writing and signed, *id*. at 1329, 1331, the agreement between Nightingale and GCBI was for a much larger sum, $250,000, J.A. at 6, so it too must be in writing and signed. The court in *Numeric* pointed to the importance of the Statute of Frauds as a purpose of the security agreement. 485 F.2d at 1331. Therefore, despite stipulations of the agreement between GCBI and Nightingale, the written evidence and only the written evidence may be used to authenticate the agreement.

The intent of Nightingale and GCBI to create a security interest has no bearing on whether the collateral actually is a security interest. Just as the parties in *Shelton* may have intended to attach a car as collateral, 472 F.2d at 1119, Nightingale and GCBI may have intended to create a security interest in the Nimbus 4000 MRI machine, J.A. at 21. However, as the court in *Shelton* held, 472 F.2d at 1120, that intent does not bind the parties because they did not satisfy the requirements of Minnesota Statutes section 336.9-203. That is, GCBI amended the description without obtaining Nightingale's subsequent signature. J.A. at 3. Therefore, the parties' intent alone cannot create a valid security interest.

Construing the contract against GCBI means GCBI is not rewarded for changing a contract without the written consent of the other party. Oral representations cannot save GCBI because the policy behind security agreements is to serve as a Statute of Frauds, and relying on oral evidence undermines that policy. *See Numeric*, 485 F.2d at 1331. Parties to a written contract should be encouraged to make sure the writing is accurate evidence of the agreement. *See Cantu*, 238 B.R. at 797. The security agreement between GCBI and Nightingale does not satisfy the requirements of Minnesota Statutes section 336.9-203 because, when all the evidence is considered together, there is no signature indicating Nightingale's agreement to the description of collateral. Therefore, the District Court erred in granting GCBI's Motion for Judgment as a Matter of Law on the security interest, as GCBI failed to meet its burden of proving there was no genuine issue of material fact. Thus, Nightingale respectfully requests the court reverse the District Court's decision and remand for further proceedings.

B. GCBI did not perfect a security interest in the Nimbus 4000 MRI machine because the description "Nimbus X-Ray Machine and Building" could refer to two different machines and is therefore ambiguous.

A court considers, when assessing the description of collateral as sufficient or not, the likelihood of confusion. *In re Immerfall*, 216 B.R. 269, 273 (Bankr. D. Minn. 1998). The writing of the agreement must be reasonably specific so that the collateral can be identified by the parties or future third parties. *World Wide Tracers, Inc. v. Metro. Prot., Inc.*, 384 N.W.2d 442 (Minn. 1986). Thus, a security agreement is not enforceable where a description of the collateral is misleading or ambiguous. *Id.* at 448. The collateral must be objectively identifiable. *FSL Acquisition Corp. v. Freeland Sys., LLC*, 686 F. Supp. 2d 921 (D. Minn. 2010).

A court considers, when assessing the description of collateral as sufficient or not, the likelihood of confusion. *Immerfall*, 216 B.R. at 269, 273. Because security agreements are used to identify collateral, *id.* at 273, they fail their purpose when they cause confusion. In *Immerfall*, the creditor sought to enforce a security agreement using the descriptions of items on a sales slip. *Id.* at 270. The court held that a sales slip with specific descriptive names such as "microwave," "battery," and "humidifier" along with the corresponding model numbers was sufficient. *Id.* at 273. The court also held, however, that incomprehensible numbers with only a price could cause confusion and would not perfect a security interest. *Id.*

To prevent confusion, the writing of the agreement must be reasonably specific so that the parties or future third parties can identify the collateral. *World Wide Tracers*, 384 N.W.2d at 445. In *World Wide Tracers*, one security agreement described the collateral as "[a]ll of the property listed on Exhibit A," which listed contracts and accounts receivable, and another agreement stated "any property of the debtor acquired after July 15, 1980." *Id.* at 443. The court

found that the term "property" was too ambiguous to include contract rights and accounts receivable and, therefore, unenforceable. *Id.* at 448.

GCBI and Nightingale cannot identify the collateral from the description alone. The description GCBI added to the security agreement states, "Nimbus X-Ray Machine and Building." J.A. at 14. Nightingale owns a Nimbus 4000 MRI machine and an X-ray machine, both of which are housed in similar buildings. J.A. at 21-22. While the court in *Immerfall* found that names of items (microwave, battery, humidifier) along with model numbers was sufficient description of collateral, 216 B.R. at 269, 273, the best description available to this court confuses two pieces of equipment owned by Nightingale, J.A. at 21-22. A repossessor needs to be able to identify the collateral, as do potential third parties, *Immerfall*, 216 B.R. at 273, but the description here does not provide an objective observer with enough information to be certain of the collateral.

GCBI's amended description can be interpreted in different ways and is therefore ambiguous. Just as the term "property" had multiple meanings within the security agreement in *World Wide Tracers*, 384 N.W.2d at 448, the description amended by GCBI could refer either to the Nimbus MRI machine or to the X-ray machine. Thus, the description is ambiguous and unenforceable. Therefore, GCBI did not perfect a security interest because the description of the collateral in the security agreement was ambiguous.

GCBI failed to perfect a security interest in the Nimbus 4000 MRI machine and building when it amended the contract without consulting Nightingale and acquiring its written consent. Moreover, the description GCBI wrote is ambiguous and confusing. Therefore, the District Court erred in granting GCBI's Motion for Judgment as a Matter of Law on the security interest, and

Nightingale respectfully requests the court reverse the decision of the District Court and remand for determinations of fact.

II. The District Court erred in granting the Motion for Judgment as a Matter of Law on the breach of peace because GCBI used deception, continued repossession after Nightingale revoked consent, and severed a wire connecting the MRI shed to the clinic.

Minnesota's version of the Uniform Commercial Code (UCC) provides: "(a) . . . After default, a secured party: (1) may take possession of the collateral . . . . (b) . . . A secured party may proceed under subsection (a): (1) pursuant to judicial process; or (2) without judicial process, if it proceeds without breach of the peace." Minn. Stat. § 336.9-609 (2006).

A secured party breaches the peace when the repossession takes place on the debtor's property, occurs after the debtor has revoked consent, is likely to provoke violence among third parties, entails breaking and entering private premises, and involves deception. *See Clarin v. Minnesota Repossessors, Inc.*, 198 F.3d 661, 664 (8th Cir. 1999); *Laurel Coal Co. v. Walter E. Heller & Co., Inc.*, 539 F. Supp. 1006, 1007 (W.D. Pa. 1982); *Ford Motor Credit Co. v. Byrd*, 351 So. 2d 557 (Ala. 1977); *Thompson v. First State Bank of Fertile*, 709 N.W.2d 307, 311 (Minn. Ct. App. 2006); *Bloomquist v. First Nat'l Bank of Elk River*, 378 N.W.2d 81, 84 (Minn. Ct. App. 1985).

The Minnesota statute regarding uniformity of laws states: "Laws uniform with those of other states shall be interpreted and construed to effect their general purpose to make uniform the laws of those states which enact them." Minn. Stat. § 645.22 (2008). Minnesota courts, therefore, have turned to other states' interpretations of the breach-of-the-peace statute to guide their own decisions. *See, e.g.*, *Bloomquist*, 378 N.W.2d at 84.

The District Court erred in granting GCBI's Motion for Judgment as a Matter of Law because Nightingale provided sufficient evidence for a reasonable jury to conclude that GCBI

breached the peace. First, GCBI hired a woman to create a diversion while GCBI's agents snuck behind the building to repossess the MRI machine; this use of trickery amounts to breach of the peace. Second, Nightingale objected to the repossession before GCBI had gained "sufficient dominion" over the MRI building, and by continuing to repossess the building after Nightingale had revoked consent, GCBI breached the peace. Finally, GCBI breached the peace when it severed the electrical wire that connected the MRI building to the clinic. GCBI failed to meet its burden of proving there was no genuine issue of material fact, and the District Court erred in granting GCBI's Motion for Judgment as a Matter of Law. Nightingale, therefore, respectfully requests the court reverse and remand for further proceedings.

A. GCBI breached the peace because it used deception, in the form of a feigned medical emergency meant to distract Nightingale employees.

Using deception to repossess collateral and inciting violence among third parties are factors the court uses to find the secured party breached the peace. *Clarin*, 198 F.3d at 664. Violence or threat of violence need not occur for an action to amount to breach of the peace. *Bloomquist*, 378 N.W.2d at 86. When a secured party creates the potential for a surprise confrontation, it unreasonably risks provoking a violent response and constitutes breach of the peace. *Saice v. MidAmerica Bank*, No. Civ. 98-2396(DSD/JMM), 1999 WL 33911356 (D. Minn. Sept. 30, 1999) (order granting in part and denying in part motion for summary judgment). Likewise, repossessing collateral through fraud, stealth, or trickery without consent of the owner constitutes breach of the peace. *Byrd*, 351 So. 2d at 560.

Using stealth to take possession of collateral when the owners are nearby and could respond quickly creates an unreasonable risk of provoking violence. *Saice*, 1999 WL 33911356 at *3. In *Saice*, a family was unloading a few items from a U-Haul at night. *Id.* at *1. It was cold and snowy, so one of the debtors sat in the car with the heat running and her two-month-old in

the backseat. *Id.* The debtor briefly left the car to speak with the others in the U-Haul. *Id.* At that moment, the repossessor got into the still-running car, with the child still in the backseat, and drove off. *Id.* The debtors called 911, and the police soon returned the two-month-old to her parents. *Id.* Because the repossessor was fully aware that the people in the U-Haul were the likely owners of the car, that they were standing roughly sixty feet away, that someone was likely to return to the car at any moment, and that the car was packed with personal items, the court found that the repossessor took an unreasonable risk in provoking violence. *Id.* at *3. It seems the repossessor did not realize the child was in the car, and the court found that the repossessor's knowledge that the car was packed with personal belongings and that the debtors were nearby was sufficient for a jury to find breach of the peace. *Id.*

The use of stealth and trickery alone amounts to breach of the peace. *Byrd*, 351 So. 2d at 560. In *Byrd*, the repossessor went to the debtor's home to discuss payments on an automobile. *Id.* at 558. The two disagreed on whether the debtor was in default, so the repossessor asked the debtor to drive to the car dealership so they could sort it out. *Id.* at 558-59. The debtor parked his car in front of the business and went inside to review his records. *Id.* at 559. While he was inside, his car was moved from its parking spot to a locked storage area behind the building. *Id.* Interpreting Alabama's version of the UCC, which is identical to Minnesota's, the court concluded that the repossessor lured the debtor to the business, through stealth and trickery, so that the secured party could repossess the car without the debtor's knowledge and consent. *Id.* The court found that this amounted to breach of the peace. *Id.* The court noted the need to discourage extrajudicial acts by citizens when those acts are likely to result in violence. *Id.*; *see also Clarin*, 198 F.3d at 664. Public policy favors resolving disputes in court, and the self-help

remedy should be limited, particularly when those seeking the remedy resort to trickery and subterfuge. *Byrd*, 351 So. 2d at 559.

GCBI unnecessarily risked provoking violence when the bank's agents used deception and trickery to take possession of the MRI building and machine, which is one factor a court considers when determining breach of the peace. *Clarin*, 198 F.3d at 664. GCBI paid a woman $100 to fake a seizure in front of the clinic to distract clinic employees while GCBI's agents snuck behind the building to take the MRI machine. J.A. at 30. Like the debtors in *Saice*, who were nearby and were likely to react quickly and violently to their car apparently being "stolen," 1999 WL 33911356 at *3, Nightingale employees were just inside the building and could respond quickly, J.A. at 35. GCBI employees must have known this because they created a diversion to draw Nightingale employees' attention away from the repossession. J.A. at 35. Not only were GCBI's deceitful tactics likely to provoke a violent response, as in *Saice*, 1999 WL 33911356 at *3, but GCBI's actions did in fact provoke a violent response, J.A. at 35. One Nightingale employee, thinking the clinic was being robbed, ran after the bank's agents, throwing bricks at their truck. J.A. at 35.

GCBI's deceitful tactics go against the public policy purpose of Minnesota's breach-of-the-peace statute. Society is best served when disputes are resolved through the judicial process, and self-help remedy is reserved only for those circumstances where it maybe done peaceably. *See Clarin*, 198 F.3d at 664; *Byrd*, 351 So. 2d at 559. By resorting to deceptive practices that were likely to provoke violence, GCBI took actions that were contrary to the statute's public policy.

By deceiving Nightingale employees into thinking a woman was having a medical emergency outside its doors, J.A. at 30, GCBI used trickery to gain possession of the MRI

machine, which amounts to breach of the peace, *Byrd*, 351 So. 2d at 560. Therefore, there was sufficient evidence for a reasonable jury to conclude that GCBI breached the peace, and GCBI did not meet its burden in proving there was no genuine issue of material fact. Consequently, the District Court erred in granting the Motion for Judgment as a Matter of Law. Nightingale thus respectfully requests the court reverse the District Court's ruling and remand for further proceedings.

B. GCBI breached the peace because it continued to repossess the MRI building and machine after a Nightingale employee yelled, "Stop, thief."

Before a repossessor has gained "sufficient dominion" over the collateral and is in control of it, the debtor may object to the repossession and revoke consent. *Thompson*, 709 N.W.2d at 311. If a debtor objects before the repossession is complete, then the debtor has successfully revoked the secured party's right to enter the debtor's property. *James v. Ford Motor Credit Co.*, 842 F. Supp. 1202, 1208-09 (D. Minn. 1994). If a secured party then enters the debtor's property without consent, the secured party has breached the peace. *Id.* at 1208. If there is a question about whether the debtor objected before repossession was complete, this is a question of fact for the jury. *See Johnson v. Credit Acceptance Corp.*, 165 F. Supp. 2d 923, 930 (D. Minn. 2001).

When a repossessor has attached a vehicle that serves as collateral to a tow truck and lifted the back wheels off the ground, repossession is complete. *Thompson*, 709 N.W.2d at 311. In *Thomson*, the repossessor drove his tow truck down an alley behind the debtor's house and backed up to the vehicle he intended to repossess. *Id.* at 309. He then hooked the car to the tow truck, lifted the rear wheels off the ground, and then, noticing personal items in the car, went to the house to notify the debtor of the repossession. *Id.* The debtor objected to the repossession at that point, *id.*, but the court found that the repossession was complete once the wheels were off

the ground, *id.* at 311. Any objections after that could not legitimately depose the repossessor of his right to repossession. *Id.*

When a debtor objects before or during repossession, the debtor has revoked any implied consent previously granted, and the repossessor thereafter cannot enter the debtor's property without consent. *James*, 842 F. Supp. at 1208. To do so would be a breach of the peace. *Id.* In *James*, a repossessor removed the debtor's car from a parking lot. *Id.* at 1205. An hour later and several miles away, the debtor saw the repossessor driving her car, so she entered the car, and she and the repossessor engaged in a struggle. *Id.* The court held that, because the debtor protested the repossession only after the repossessor had control of the car, the debtor's objections were to no avail. *Id.* at 1209.

A Nightingale employee objected to the repossession when he yelled, "Stop, thief," J.A. at 35, thereby revoking GCBI's right to enter Nightingale's property. From a second-story window, the Nightingale employee witnessed three men pulling the MRI building onto a tow truck, *id.*, which means they had not yet completed repossession. The employee opened the window and yelled, "Stop, thief." *Id.* It is likely GCBI's agents heard him because he shouted out a window facing the back lot, where the bank's agents were, *id.*, and the woman who faked the seizure was in front of the clinic, and even she heard him yell, "Stop, thief," J.A. at 30. Therefore, unlike the repossessor in *James*, who had complete control of the car and was miles away before the debtor objected, 842 F. Supp. at 1205, GCBI's agents were in the process of repossessing the MRI building when the Nightingale employee objected, J.A. at 35. His objections effectively revoked GCBI's right to remain on Nightingale property. *See James*, 842 F. Supp. at 1208.

By continuing to repossess the MRI building on private property after the employee's objection, GCBI breached the peace. *See id.* Whereas the court in *Thompson* held that wheels lifted off the ground signaled complete repossession, 709 N.W.2d at 311, the MRI machine was housed in a shed, J.A. at 35, and what moment constitutes complete repossession of a shed is a new question for the court. If there is a question about whether the objection came before repossession was complete, then this question goes to the jury, *see Johnson*, 165 F. Supp. 2d at 930, and the District Court erred in granting GCBI's Motion for Judgment as a Matter of Law. Nightingale, therefore, requests that the court reverse the District Court's ruling and remand for further proceedings.

C. GCBI breached the peace because it severed the electrical wire that fastened the MRI building to the clinic.

Breaking and entering while attempting self-help repossession amounts to breach of the peace. *Bloomquist*, 378 N.W.2d at 86. Likewise, breaking a lock or fastener securing property when attempting self-help repossession constitutes breach of the peace. *Laurel*, 539 F. Supp. at 1007.

Forcefully entering private property by breaking a lock or fastener, even if it is not an enclosed building, constitutes breach of the peace. *Laurel*, 539 F. Supp. at 1007. In *Bloomquist*, the secured party gained access to the debtor's business through a broken windowpane at night, when the business was closed, in an attempt to repossess the debtor's tools and equipment. 378 N.W.2d at 83. The court held that breaking and entering constitutes breach of the peace. *Id.* at 86. Similarly, in *Laurel*, the secured party broke a chain on a fence to enter the debtor's commercial property to gain access to a bulldozer. 539 F. Supp. at 1007. Interpreting Pennsylvania's version of the UCC, which is identical to Minnesota's, the court held that the secured party unlawfully entered the premises, which constituted a breach of the peace. *Id.* The

court held that "the actual breaking of a lock or fastener securing property, even commercial property, constitutes a 'breach of the peace.'" *Id.*

By entering private property and severing the electrical wire that fastened the MRI building to the clinic, J.A. at 36, GCBI breached the peace. Like the repossessors in *Laurel*, who did not enter an enclosed building but rather broke a chain to gain access to a bulldozer on the premises, 539 F. Supp. at 1007, GCBI's agents did not enter the clinic but did enter the back lot—Nightingale's private property, J.A. at 35-36. There they severed the electrical wire connecting the MRI shed to the building, J.A. at 36, which constitutes breach of the peace.

In conclusion, GCBI breached the peace by using deception, continuing repossession efforts after Nightingale objected, and severing a wire connecting the MRI machine to the clinic. The District Court erred in granting GCBI's Motion for Judgment as a Matter of Law on the breach of peace, as GCBI did not meet its burden in proving there was no genuine issue of material fact. Nightingale, therefore, respectfully requests the court reverse and remand for further proceedings.

CONCLUSION

Because the District Court erred in finding that GCBI had a valid security interest in the MRI machine and building and did not breach the peace, Nightingale respectfully requests that the court reverse the decision of the District Court and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that on this date, the twenty-ninth of March, 2011, a copy of the foregoing Brief for the Appellant was served upon James Lyman, Appellee's attorney, at 1087 Bradley Boulevard, Suite 100, Duluth, Minnesota 55801.

DATED: March 29, 2011_____ 1133972_____
Attorney for the Appellant

DATED: March 29, 2011_____ 1134002_____
Attorney for the Appellant

APPENDIX: STATUTES INVOLVED

Minn. Stat. § 336.9-108 (2006):
Sufficiency of description

(a) Sufficiency of description. Except as otherwise provided in subsections (c), (d), and (e), a description of personal or real property is sufficient, whether or not it is specific, if it reasonably identifies what is described.

(b) Examples of reasonable identification. Except as otherwise provided in subsection (d), a description of collateral reasonably identifies the collateral if it identifies the collateral by:

(1) specific listing;

(2) category;

(3) except as otherwise provided in subsection (e), a type of collateral defined in the Uniform Commercial Code;

(4) quantity;

(5) computational or allocational formula or procedure; or

(6) except as otherwise provided in subsection (c), any other method, if the identity of the collateral is objectively determinable.

(c) Supergeneric description not sufficient. A description of collateral as "all the debtor's assets" or "all the debtor's personal property" or using words of similar import does not reasonably identify the collateral.

(d) Investment property. Except as otherwise provided in subsection (e), a description of a security entitlement, securities account, or commodity account is sufficient if it describes:

(1) the collateral by those terms or as investment property; or

(2) the underlying financial asset or commodity contract.

(e) When description by type insufficient. A description only by type of collateral defined in the Uniform Commercial Code is an insufficient description of:

(1) a commercial tort claim; or

(2) in a consumer transaction, consumer goods, a security entitlement, a securities account, or a commodity account.

Minn. Stat. § 336.9-203 (2006):
Attachment and enforceability of security interest; proceeds; supporting obligations; formal requisites

(a) Attachment. A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.

(b) Enforceability. Except as otherwise provided in subsections (c) through (i), a security interest is enforceable against the debtor and third parties with respect to the collateral only if:

(1) value has been given;

(2) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and

(3) one of the following conditions is met:

(A) the debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned;

(B) the collateral is not a certificated security and is in the possession of the secured party under section 336.9-313 pursuant to the debtor's security agreement;

(C) the collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under section 336.8-301 pursuant to the debtor's security agreement; or

(D) the collateral is deposit accounts, electronic chattel paper, investment property, letter of credit rights, or electronic documents, and the secured party has control under section 336.7-106, 336.9-104, 336.9-105, 336.9-106, or 336.9-107 pursuant to the debtor's security agreement.

(c) Other UCC provisions. Subsection (b) is subject to section 336.4-210 on the security interest of a collecting bank, section 336.5-118 on the security interest of a letter of credit issuer or nominated person, section 336.9-110 on a security interest arising under article 2 or 2A, and section 336.9-206 on security interests in investment property.

(d) When person becomes bound by another person's security agreement. A person becomes bound as debtor by a security agreement entered into by another person if, by operation of law other than this article or by contract:

(1) the security agreement becomes effective to create a security interest in the person's property; or

(2) the person becomes generally obligated for the obligations of the other person, including the obligation secured under the security agreement, and acquires or succeeds to all or substantially all of the assets of the other person.

(e) Effect of new debtor becoming bound. If a new debtor becomes bound as debtor by a security agreement entered into by another person:

(1) the agreement satisfies subsection (b)(3) with respect to existing or after-acquired property of the new debtor to the extent the property is described in the agreement; and

(2) another agreement is not necessary to make a security interest in the property enforceable.

(f) Proceeds and supporting obligations. The attachment of a security interest in collateral gives the secured party the rights to proceeds provided by section 336.9-315 and is also attachment of a security interest in a supporting obligation for the collateral.

(g) Lien securing right to payment. The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien. The attachment of a security interest in the mortgage or lien on real property does not create an interest in real property.

(h) Security entitlement carried in securities account. The attachment of a security interest in a securities account is also attachment of a security interest in the security entitlements carried in the securities account.

(i) Commodity contracts carried in commodity account. The attachment of a security interest in a commodity account is also attachment of a security interest in the commodity contracts carried in the commodity account.

Minn. Stat. § 336.9-609 (2006):
Secured party's right to take possession after default

(a) Possession; rendering equipment unusable; disposition on debtor's premises. After default, a secured party:
    (1) may take possession of the collateral; and
    (2) without removal, may render equipment unusable and dispose of collateral on a debtor's premises under section 336.9-610.

(b) Judicial and nonjudicial process. A secured party may proceed under subsection (a):
    (1) pursuant to judicial process; or
    (2) without judicial process, if it proceeds without breach of the peace.

(c) Assembly of collateral. If so agreed, and in any event after default, a secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties.

Minn. Stat. § 645.22 (2008):
Uniform laws

Laws uniform with those of other states shall be interpreted and construed to effect their general purpose to make uniform the laws of those states which enact them.

OTHER STATES' UCC BREACH-OF-PEACE STATUTES

Ala. Code 1975 § 7-9A-609 (2010):
Secured party's right to take possession after default
(a) *Possession; rendering equipment unusable; disposition on debtor's premises.* After default, a secured party:

(1) may take possession of the collateral; and

(2) without removal, may render equipment unusable and dispose of collateral on a debtor's premises under Section 7-9A-610.

(b) *Judicial and nonjudicial process.* A secured party may proceed under subsection (a):

(1) pursuant to judicial process; or

(2) without judicial process, if it proceeds without breach of the peace.

(c) *Assembly of collateral.* If so agreed, and in any event after default, a secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties.

13 Pa. Cons. Stat. § 9609 (2010):
Secured party's right to take possession after default
(a) POSSESSION; RENDERING EQUIPMENT UNUSABLE; DISPOSITION ON DEBTOR'S PREMISES. After default, a secured party:

(1) may take possession of the collateral; and

(2) without removal, may render equipment unusable and dispose of collateral on a debtor's premises under section 9610 (relating to disposition of collateral after default).

(b) JUDICIAL AND NONJUDICIAL PROCESS. A secured party may proceed under subsection (a):

(1) pursuant to judicial process; or

(2) without judicial process if it proceeds without breach of the peace.

(c) ASSEMBLY OF COLLATERAL. If so agreed, and in any event after default, a secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties.