

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA  
Augusta Division

IN RE:	)	Chapter 13 Case
	)	Number <u>90-12200</u>
PATRICIA JONES MURRAY	)	
	)	
Debtor	)	
_____	)	
	)	
PATRICIA JONES MURRAY	)	FILED
	)	at 9 O'clock & 25 min. A.M.
Plaintiff	)	Date: 7-24-91
	)	
vs.	)	Adversary Proceeding
	)	Number <u>91-1045</u>
ROBERT F. POPE, d/b/a AA AUTO	)	
SALES,	)	
	)	
First Defendant	)	
and	)	
	)	
GREGORY LAMB	)	
	)	
Second Defendant	)	

**ORDER**

Pursuant to notice trial was held on this adversary proceeding July 10, 1991. The second defendant, Gregory Lamb ("defendant Lamb"), has failed to file responsive pleadings and failed to appear at trial. Defendant Lamb is in default. First defendant, Robert F. Pope, d/b/a AA Auto Sales ("defendant Pope") filed responsive pleadings, appeared at trial and through counsel

defended the action. Based upon the evidence presented, I make the following findings of fact and conclusions of law.

**FINDINGS OF FACT**

Defendant Pope is the owner of a used car lot operating under the unregistered trade name of AA Auto Sales. On or about April 14, 1989 the debtor, Patricia Jones Murray ("debtor"), entered into a sales contract (plaintiff's Exhibit No. 1), wherein she purchased from defendant Pope one (1) 1982 two-door Cadillac DeVille automobile, manufacturer's ID No. 1G6AD4743C9233690. The sales contract provided for a total sales price of Five Thousand Three Hundred Forty-Four and 70/100 (\$5,344.70) Dollars broken down as follows:

Cash sales price	\$4,995.00
Documentary fee/sales tax	299.70
Fee (unidentified)	<u>50.00</u>
TOTAL	\$5,344-70

Credited to the total sales price was a Five Hundred and No/100 (\$500.00) Dollars down payment resulting in a balance owing of Four Thousand Eight Hundred Forty-Four and 76/100 (\$4,844.76) Dollars. The contract provided for no finance charge but the debtor was required to make payments of Fifty and No/100 (\$50.00) Dollars each month beginning April 28, 1989 for ninety-six (96) months, with a

final installment due of Forty-Four and 70/100 (\$44.70) Dollars.

The debtor in fact made bi-weekly payments of One Hundred and No/100 (\$100.00) Dollars. The contract provided "the title of ownership of the above described vehicle does not pass to me [debtor] until the final payment is made." The contract failed to define default and did not contain any grant of a security interest in any property. Subsequent to executing the contract and delivering of the automobile to the debtor, defendant Pope transferred title to the automobile to the debtor. On the certificate of title (defendants' Exhibit No. 1), defendant Pope, through AA Auto Sales, claimed a first lien security interest in the automobile. There is no evidence that the debtor ever granted defendant Pope or any other entity a security interest in the automobile.

On December 12, 1991 the debtor filed for relief under Chapter 13 of Title 11 United States Code. In the debtor's petition AA Auto Sales was duly listed as a creditor and the debtor's plan provided for any claim of AA Auto Sales. At approximately 3:00 a.m. on December 19, 1990, the debtor received a telephone call at her residence. The caller stated that he was acting on behalf of AA Auto Sales and demanded that the debtor immediately surrender her automobile. The debtor informed the caller that she had filed a

bankruptcy petition and offered to provide him with a copy of her petition. The debtor called the police and the caller made no further effort to take possession of the automobile at that time.

The next day, December 20, 1990, at approximately 1:00

p.m., Bobby Boysworth appeared at the debtor's place of business with a wrecker and informed the debtor that he was under orders from defendant Lamb to take possession of the automobile. The debtor again informed Mr. Boysworth that she had filed a Chapter 13 bankruptcy petition and that he was not to take her automobile. The police were again summoned and Ms. Jeanne Harrison, bankruptcy counsel for the debtor, was telephoned. Ms. Harrison informed Mr. Boysworth that she was counsel representing the debtor in the bankruptcy case, that the case had been filed and that AA Auto Sales was a listed creditor. Ms. Harrison demanded that Mr. Boysworth leave the debtor and her property alone. At the insistence of Mr. Boysworth, Ms. Harrison telephoned defendant Lamb at the AA Auto Sales lot and informed him of the bankruptcy filing and that he, AA Auto Sales and Mr. Boysworth were to leave the debtor and the debtor's property alone. Additionally, at approximately 2:00 p.m. on that date, Ms. Harrison caused to be delivered to Mr. Lamb at the AA Auto Sales lot a copy of the debtor's bankruptcy petition.

In spite of the efforts of Ms. Harrison and at the

insistence of defendant Lamb, Mr. Boysworth took the automobile over the objection of the debtor. Mr. Boysworth's action in taking possession of the automobile resulted in damage to the automobile in the amount of One Thousand Sixty-Nine and 05/100 (\$1,069.05) Dollars (plaintiff's Exhibit No. 2). Following removal of the automobile from the debtor's possession, the debtor was forced to

rent a automobile at a cost of Eighty-Eight and No/100 (\$88.00) Dollars. Two days after Mr. Boysworth took the automobile, defendant Pope advised the debtor that she could pick up her automobile at the AA Auto Sales lot.

At all times relevant to this case defendant Lamb acted on behalf of defendant Pope. Defendant Pope claimed a security interest in the debtor's automobile. Mr. Boysworth acted under the direction of defendant Lamb. During the seizure of the debtor's automobile, defendant Lamb was at defendant Pope's place of business and from that location directed the seizure. In all conversations relative to the automobile, defendant Lamb referred to the automobile as "my car."

#### CONCLUSIONS OF LAW

Although defendant Pope testified to the contrary, defendant Lamb and Mr. Boysworth acted as agents for defendant Pope.

An agency relationship exists whenever one authorizes another to act for him. Smith v. Merck, 57 S.E.2d 326, 332 (Ga. Sup. Ct. 1950); Shirley v. Couch, 339 S.E.2d 648, 649 (Ga. App. 1986). Agency may arise expressly, or by implication, and may be established by circumstantial evidence, an apparent relationship, or the parties' conduct. Shirley, 339 S.E.2d 648; Newell v. Brown, 369 S.E.2d 499, 503 (Ga. App. 1988); Butler v. Moore, 188 S.E.2d 142, 144 (Ga. App. 1972). In this case, circumstantial evidence, an apparent business

relationship, and the parties' conduct establish that an agency relationship existed between defendants Pope and Lamb, and between defendants and Mr. Boysworth. When Mr. Boysworth appeared at the debtor's place of business on December 20, 1990 to take the debtor's car, he stated he was acting on behalf of defendant Lamb and AA Auto Sales, defendant Pope's business. At the request of Mr. Boysworth, debtor's attorney, Ms. Harrison, telephoned defendant Lamb. Ms. Harrison reached defendant Lamb at the AA Auto Sales lot. During that conversation, defendant Lamb insisted he was acting on behalf of defendant Pope in authorizing Mr. Boysworth to take the debtor's automobile. Additionally, when defendant Lamb received personal service of a copy of debtor's bankruptcy petition, he was working at the AA Auto Sales lot, apparently as either an employee or business partner of defendant Pope. Defendant Lamb maintained

throughout his dealings with the debtor's attorney that he acted on behalf of defendant Pope. Likewise, Mr. Boysworth held himself out at all times as acting on behalf of defendant Lamb and AA Auto Sales. All indications were that defendants Pope and Lamb acted either as employer and employee, or as business partners, and that Mr. Boysworth conducted the repossession at their direction. Accordingly, I find defendant Lamb and Mr. Boysworth acted as defendant Pope's agents in seizing the debtor's car.

A principal is responsible for the acts of his agent. "The principal may be held liable for the tortious acts of his agent

committed within the scope of his business, although without his command or assent." Intern. Broth. of Elec. Workers v. Briscoe, 239 S.E.2d 38, 45-46 (Ga. App. 1977). See also Piedmont Cotton Mills, Inc. v. General Warehouse No. 2, 149 S.E.2d 72, 76 (Ga. App. 1966); Whisenhunt v. Allen Parker Company, 168 S.E.2d 827, 831 (Ga. App. 1969). Therefore, defendant Lamb is individually liable, even though he is in default, for his and Mr. Boysworth's tortious acts in connection with the seizure of debtor's car. Defendant Pope is individually liable for defendant Lamb's and Mr. Boysworth's tortious acts in connection with the seizure of debtor's car.

Only a secured party may conduct self-help repossession of collateral in which it has a security interest upon the debtor's

default. Official Code of Georgia Annotated (O.C.G.A.) §11-9-503. O.C.G.A. §40-3-2 subsections (13), (14) and (15) provide for the creation of an enforceable security interest in a vehicle. Subsection (13) provides, "'Security agreement' means a written agreement which reserves or creates a security interest." O.C.G.A. §40-3-2(13) (emphasis added). Subsection (14) provides "'Security interest' means an interest in a vehicle reserved or created by agreement which secures the payment or performance of an obligation . . . ." O.C.G.A. §40-3-2(14) (emphasis added). Subsection (15) provides "'Security interest holder' means the holder of an interest in a vehicle reserved or created by agreement and which secures payment or performance of an obligation." O.C.G.A. §40-3-2(15)

(emphasis added). Compare O.C.G.A. §11-9-105(1). Under Georgia law, an agreement granting a security interest in specific collateral is required to create a security interest. See generally ITT Financial Services v. Gibson, 372 S.E.2d 468 (Ga. App. 1988); First National Bank v. Strother Ford, Inc., 374 S.E.2d 203, 204-05 (Ga. App. 1988).

In this case, the sales contract between the debtor and defendant Pope did not grant a security interest in debtor's automobile. Moreover, defendant Pope presented no evidence of a security agreement, or other agreement between him and debtor,

wherein debtor granted defendant Pope a security interest in her automobile. Defendant Pope was not a "secured party" under §11-9-503 with respect to debtor's automobile. Therefore, the Article 9 remedies available to secured parties were not available to defendant Pope.

Nevertheless, defendant Pope proceeded through the acts of his agents, defendant Lamb and Mr. Boysworth, to avail himself of "self-help repossession." Defendant Pope is liable for any wrongful acts committed by his agents in connection with the seizure of debtor's automobile. Whisenhunt v. Allen Parker Company, 168 S.E.2d 827, 831 (Ga. App. 1969). Because defendant Pope was not a secured party entitled to self-help repossession under §11-9-503, the seizure was unlawful. In Georgia, an action in tort for conversion or trover lies against a party who unlawfully repossesses

another's property . See, e.g., Ford Motor Credit Company v. Milline, 224 S.E.2d 437 (Ga. App. 1976); Trust Company of Columbus v. Associated Grocers, 263 S.E.2d 676 (Ga. App. 1979)' Lincoln Discount Corporation of Georgia v. Gibbs, 89 S.E.2d 821 (Ga. App. 1955). "The owner of personalty is entitled to its possession. Any deprivation of such possession is a tort for which an action lies." O.C.G.A. §51-10-1. "Any distinct act of dominion wrongfully asserted over another's property in denial of his right or

inconsistent with it is a conversion." Bromley v. Bromley, 127 S.E.2d 836, 839-40 (Ga. App. 1962). Defendant Pope's unlawful seizure through his agents defendant Lamb and Mr. Boysworth deprived debtor of her possessory rights in the automobile. The repossession of debtor's automobile without legal justification was tortious under state law entitling debtor to damages against defendants Pope and Lamb.

Even had defendant Pope held a valid security interest in debtor's automobile, defendants are liable to plaintiff for breaching the peace in conducting the repossession. A secured party's right to conduct self-help repossession is not unlimited. "In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace . . . ." O.C.G.A. §11-9-503. Although the Uniform Commercial Code does not define "breach of the peace," "most courts find a breach of peace by any creditor who repossesses over the unequivocal oral protest

of the defaulting debtor." Deavers v. Standridge, 242 S.E.2d 331, 333 (Ga. App. 1978) (emphasis in original). See also Whisenhunt, supra. In this case, the debtor's objection to repossession was clear. Debtor informed Mr. Boysworth, defendants' agent conducting the repossession, that she had filed bankruptcy and was lawfully entitled to possession of her car. Additionally, she summoned the police and her bankruptcy attorney, Ms. Jeanne Harrison. Ms.

Harrison spoke with Mr. Boysworth and insisted the car be left alone. Ms. Harrison went so far as to have her courier personally deliver to defendant Lamb a copy of debtor's bankruptcy petition. In spite of the debtor's and her attorney's unequivocal objections, Boysworth proceeded to seize the car. Under these circumstances, the repossession constituted a "breach of the peace" within the purview of O.C.G.A. §11-9-503. See Deavers, supra. Debtor's remedy for defendants' breach of peace in repossession is recovery in tort for damages incurred. Id.

In addition to damages for unlawful repossession, defendants are liable for damages for violating the automatic stay provisions of the Bankruptcy Code. The Code provides for an automatic stay against "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate[.]" 11 U.S.C. §362(a)(3). The stay occurs at the moment the debtor files a petition for bankruptcy. 11 U.S.C. §362(a). This debtor filed her Chapter 13 petition

December 12, 1991. On December 20, 1990, Mr Boysworth, acting as defendants' agent, seized debtor's automobile. Therefore, defendants violated 11 U.S.C. §362.

Section 362(h) states, "An individual injured by any willful violation of a stay provided by this section shall recover

actual damages, including costs and attorney's fees, and, in appropriate circumstances, may recover punitive damages." "Willful," as used in §362(h), does not require a showing of a conscious intent to harm. What is required is a showing that the party knew of the filing of the bankruptcy petition and with that knowledge, acted intentionally or deliberately. In re: Atlantic Business and Community Corp., 901 F.2d 325, 329 (3rd Cir. 1990); In re: Blume, 875 F.2d 224, 227 (9th Cir. 1989); Aponte v. Aungst (In re: Aponte), 82 B.R. 738, 742 (Bankr. E.D. Pa. 1988); In re: Bragg, 56 B.R. 46 (Bankr. M.D. Ala. 1985). Taylor v. U.S., (In re: Taylor) Chapter 13 case No. 89-11583 Adversary Proceeding No. 90-1036 (Bankr. S.D. Ga. Aug. Div., Dalis, J. March 25, 1991); Randall v. Doctors and Merchants Credit Bureau, (In re: Randall) Chapter 7 case No. 89-10845 Adversary Proceeding No. 89-1035 (Bankr. S.D. Ga. Aug. Div., Dalis, J. June 21, 1990); Williams v. H & H Service Store, Inc., (In re: Williams) Chapter 7 case No. 89-20499 Adversary Proceeding No. 89-2021 (Bankr. S.D. Ga. Aug. Div., Davis, J. February 7, 1990). Debtor and her attorney informed Mr. Boysworth of debtor's filing for bankruptcy. Additionally, debtor's

attorney telephoned defendant Lamb and warned him of debtor's bankruptcy. Defendant Lamb defied the warning and authorized the seizure. Mr. Boysworth also disregarded debtor's and her attorney's

warnings and protestations, and seized the automobile. ~Without question, willfulness as contemplated under 362(h) is established.

Section 362(h) mandates an award of actual damages which damages include attorney's fees for a willful violation of the stay. Also, defendants' conversion of debtor's automobile and defendants' breach of the peace in taking debtor's automobile entitles debtor to damages under state law. Ford Motor Credit Company v. Milline, 224 S.E.2d 437 (Ga. App. 1976); Deavers v. Standridge, 242 S.E.2d 331 (Ga. App. 1978). Debtor's actual damages include damage to her car in the amount of One Thousand Sixty-Nine and 05/100 (\$1,069.05) Dollars, which was sustained during the repossession, and rental expense while the debtor was without the car in the amount of Eighty-Eight and No/100 (\$88.00) Dollars. In appropriate cases, damages for emotional distress are recoverable for violations of §362(h). See e.g., Mercer v. D.E.F. Inc., 48 B.R. 562 (Bankr. Minn. 1985); In re: Carrigan, 109 B.R. 167 (Bankr. W.D. N.C. 1989); Wyatt v. Mellon Mortgage Inc.- East, 36 B.R. 783 (Bankr. S.D. Ohio 1984). Likewise, debtor is entitled under state law to actual damages for emotional distress resulting from defendants' illegal seizure of her automobile and defendants' breach of the peace. See Emmons v. Burkett, 348 S.E.2d 323, 326 (Ga. App. 1986), rev'd on other grounds 353 S.E.2d 908 (Ga. Sup. Ct. 1987). Debtor suffered emotional distress from the repeated harassment involved in this

seizure and the embarrassment of having her automobile towed away from her place of business in the presence of her peers. Debtor is entitled to damages in the amount of Three Thousand and No/100 (\$3,000.00) Dollars for her embarrassment and emotional distress resulting from defendants' wrongful conduct. Attorneys' fees of One Thousand Five Hundred and No/100 (\$1,500.00) Dollars are awarded the debtor's attorneys, Ms. Harrison and Mr. Scott Klosinski, to be divided equally at Seven Hundred Fifty and No/100 (\$750.00) Dollars each.

Section 362(h) also authorizes punitive damages for willful stay violations in "appropriate circumstances." 11 U.S.C. §362(h). In order to recover punitive damages, "the defendant must have acted with actual knowledge that he was violating a federally protected right or with reckless disregard of whether he was doing so." In re: Wagner, 74 B.R. 901, 903-04 (Bankr. E.D. Pa. 1987). See also In re: Lile, 103 B.R. 830, 841 (Bankr. S.D. Tex. 1989). "The purpose of punitive damage is to both punish and deter the offending party. It should be gauged by the gravity of the offense and set at a level sufficient to ensure that it will both punish and deter the party." (citations omitted). Mercer supra at 565. Defendants' egregious behavior in this case justifies an award of punitive damages to the debtor. Defendants received ample notice

of debtor's bankruptcy: first, from the debtor on December 19 when someone on behalf of defendants telephoned the debtor in the middle of the night; again, repeatedly on December 20, from the debtor and her attorney, when Mr. Boysworth proceeded to seize debtor's automobile. Debtor and her attorney also informed defendant Lamb of debtor's bankruptcy by telephone. Defendant Lamb authorized the repossession in spite of being personally served with notice of debtor's bankruptcy. Mr. Boysworth and defendant Lamb, individually and as agents of defendant Pope, acted in arrogant defiance of clear notice of the debtor's pending bankruptcy. Their total disregard of the stay warrants punitive damages in the amount of Ten Thousand and No/100 (\$10,000.00) Dollars.

It is therefore ORDERED that judgment be entered in favor of the debtor with damages set according to the provisions of this order.

JOHN S. DALIS  
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia  
this 23rd day of July, 1991.