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SC Court of Appeals

Case No. 2015-1472

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

On appeal from the Court Common Pleas

Dorchester County

Carmen T. Mullen, Circuit Court Judge

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LAWRENCE R. POTTS, CANDACE MARIE POTTS, and LANETTE ZIMMERMAN

Appellants

v.

EDWARD E. YAGER,

Respondent

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# REPLY BRIEF OF APPELLANTS

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## Summary of Argument

In response to Plaintiffs' argument, Defendant has raised two obviously incorrect positions and left completely unaddressed the bulk of Plaintiffs' brief.

First, Defendant contends that it may use distraint without any involvement of judicial authorities. (Resp. Initial Brief at 3.) Unlike the lease in the single case cited by Defendant, the lease here contained no term authorizing self-help by Defendant. Defendant's only option was to pursue his statutory remedies, which he did not.

Second, Defendant contends that Plaintiffs waived any right to collect damages for damage to "Plaintiffs' property." (Resp. Initial Brief at 3-4.) Defendant has misrepresented the term of the lease agreement. Far from being an anticipatory waiver of all intentional conduct by Defendant, the term waives liability *only* to Plaintiffs' *vehicle*, not all of the property it contained. Moreover, even then the waiver at paragraph 6 covers *only* damage that occurs "while it is parked on owners [sic] property." (R. 145.) Plaintiffs' claim is for both the trailer itself and the more than $100,000 in personal property it contained. And, the damage to the trailer did not happen on Defendant's property at all; it happened at a remote car crushing business.

## Argument

### I. The trial court erred in ruling for Defendant based on a lack of testimony about the exact value of the Potts' losses when the undisputed testimony proved that the Potts suffered at least *some* injury.

#### A. Defendant did not have the right to self-help either at law or by private agreement between the parties.

When a landlord is owed back rent, he or she may pursue distraint by following the provisions of the South Carolina Code. The South Carolina Code contains specific protections for the tenant, none of which was followed by Defendant. For example, notice of the action must be served on a defendant with a known location personally by a constable or sheriff. S.C. Code Ann. § 27-39-210 (2007). Defendant, however, did not even start a judicial action, much less serve notice. Moreover, a tenant's property cannot be declared abandoned before notice is either delivered or at least posted on the subject premises, S.C. Code Ann. § 27-39-210 (2007), neither of which happened here. Additional notice has to be given before the actual sale which must be by public auction and not private sale, S.C. Code Ann. § 27-39-320 (2007); Defendant violated that safeguard by selling Plaintiffs' property at a private sale. Lastly, many types of personal property are simply not subject to distraint at all. S.C. Code Ann. § 27-39-230 (2007). Here, without any notice to the Potts of his plans, Defendant seized their personal property, including items that were statutorily off-limits, and sold it off in a private sale at a fraction of what it was worth even as mere scrap.

Defendant has responded by asserting a unilateral right to self-help, citing *Pinckney v. Pettijohn Builders, Inc.*, 289 S.C. 405, 346 S.E.2d 533 (Ct. App. 1986). In that case, the tenants rented a storage unit from Pettijohn Builders but stopped making rent payments while waiting to resolve a claim for water damage to their belongings. *Id.* at 406, 346 S.E.2d at 534. The landlord sold their property at a public sale, and the plaintiffs sued for conversion.

On appeal, this Court did not—as Defendant has suggested—rule that a landlord enjoys the unfettered right to self-help without compliance with the South Carolina Code. To the contrary, this Court ruled for the storage facility's owner *only* because "the actions of [landlord] Pettijohn were clearly authorized under provisions of the lease." *Id.* at 406, 346 S.E.2d at 534. In that case, the lease specifically stated:

> If any rent shall be due and unpaid . . . then it shall be lawful for the lessor to re-enter the said premises and to remove all persons and property therefrom. Lessor agrees to give Lessee ten (10) days written notice of Lessor's intent to re-enter the leased premises. Said notice shall be given by regular U.S. Mail at Lessee's address below written. Any and all property so removed may be retained as payment for any and all sums due from Lessee to Lessor, or may be sold at private sale or public sale . . . .

*Id.* at 406, 346 S.E.2d at 533-34.

In contrast, the lease between the parties in this case did not include any reference to self-help whatsoever. Even though Defendant has represented to this Court that "Defendant's actions were supported by the plain agreement of the

parties," there is not a single word anywhere in the lease giving Defendant any right to seize and sell Plaintiffs' property. No such term can even be implied since, as Defendant has mentioned, the lease is comprehensive and may not be varied except by written agreement by both parties. (Resp. Initial Brief at 3.)

Because Defendant violated several provisions of the South Carolina Code concerning distraint and because nothing in the lease gave Defendant any other right to self-help, the Court should disregard Defendant's argument.

### B. Plaintiffs very clearly did not waive all rights to proceed against Defendant for the intentional loss of their property.

As an initial factual matter, Defendant falsely states that "the contract *specifically* absolves Defendant of any liability for harm that comes to Plaintiffs' property" and cites paragraph 6 of the lease. (Resp. Initial Brief at 3-4 (emphasis added).) Paragraph 6 of the lease states, in its entirety, "The renter shall assume all liability for all or any damages *to his vehicle* that occur *while it is parked on owners [sic] property.*" (R. 145 (emphasis added).)

Assuming that the plain language of the contract governs, the release does not even apply to this case. "Since such provisions tend to induce a want of care, they are not favored by the law and will be strictly construed against the party relying thereon." *Pride v. S. Bell Tel. & Tel. Co.*, 244 S.C. 615, 619, 138 S.E.2d 155, 157 (1964).

The term here does not excuse damage to *all* of Plaintiffs' property. And, to the extent that it concerns damage of Plaintiffs' trailer, it applies *only* to damage that happens while Defendant has the trailer on his land. Plaintiffs are seeking damages not just for the destruction of their trailer but also to their lifetime of personal property. (R. 68-74, 87-91, 121-25, 128-31, 154-61.) Additionally, the damage to Plaintiffs' trailer did not occur on Defendant's property at all but at a remote car crushing business. (R. 82-83.)

If, however, Defendant attempts to argue the waiver should be rewritten by the Court to cover every possible claim, that argument must also fail. In *Murray v. Texas Co.*, 172 S.C. 399, 174 S.E. 231 (1934), our Supreme Court addressed whether a provision relieved a defendant from liability for its own negligence. The Court noted that the waiver was broad, but resolving all doubt in favor of the plaintiff, the Court found the parties did not intend for the contract to relieve the defendant from all liability for its own negligence since it could have plainly said so. *Id.* at 402–03, 174 S.E. at 232. This Court has explained that broad anticipatory waivers of liability for a party's own conduct violate public policy and are unenforceable. *Fisher v. Stevens*, 355 S.C. 290, 297, 584 S.E.2d 149, 153 (Ct. App. 2003).

## Conclusion

For all these reasons and those submitted in Plaintiffs' principal brief, the Court should reverse the decision of the trial court and remand for a new trial.

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